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CHANCERY

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THE RIGHT HONOURABLE SIR RICHARD HENN COLLINS,
MASTER OF THE ROLLS

THE HONOURABLE MR. JUSTICE WRIGHT

SIR R. B. FINLAY, K.C.,
ATTORNEY-GENERAL

THE ENGLISH REPORTS

VOLUME XXI

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CHANCERY

I

CONTAINING

CARY; CHOYCE CASES IN CHANCERY; TOTHILL; DICKENS;
REPORTS IN CHANCERY, VOLUMES 1 TO 3; NELSON; AND
EQUITY CASES ABRIDGED, VOLUME 1

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PREFATORY NOTE

THE paging, adopted in this reprint, of Cary and Tothill is that of the 1650 and 1649 editions respectively. Tothill being virtually little else than a rough index, never intended to be published, it has not been thought necessary to include the cases therein, in the Table of Cases. In dealing with Equity Cases Abridged no notes are appended to those cases which are also reported elsewhere. The notes will be found in these other reports to which references are given.

Mr. Max. A. Robertson, Barrister at Law, is responsible for the notes in the present volume.

LIST OF LORD CHANCELLORS, LORD KEEPERS, LORDS COMMISSIONERS OF THE GREAT SEAL, AND MASTERS OF THE ROLLS DURING THE PERIOD COVERED BY THE PRESENT VOLUME.

LORD CHANCELLORS, LORD KEEPERS, AND LORDS COMMISSIONERS OF THE GREAT SEAL.

- 1556. NICHOLAS HEATH, Archbishop of York, Lord Chancellor.
- 1558. Sir NICHOLAS BACON, Lord Keeper.
- 1579. Sir THOMAS BROMLEY, Lord Chancellor.
- 1587. Sir CHRISTOPHER HATTON, Lord Chancellor.
- 1592. Sir JOHN PUCKERING, Lord Keeper.
- 1596. Sir THOMAS EGERTON, Lord Keeper (1603), created LORD ELLESMERE, Lord Chancellor.
- 1617. Sir FRANCIS BACON, Lord Keeper, afterwards LORD VERULAM, Lord Chancellor.
- 1621. LORD MANDEVILLE,
DUKE OF RICHMOND,
VISCOUNT PEMBROKE,
Sir JULIUS CAESAR, M. R. } Lords Commissioners.
- 1621. JOHN WILLIAMS, Bishop of Lincoln, Lord Keeper.
- 1625. Sir THOMAS COVENTRY, Lord Keeper.
- 1639. Sir JOHN FINCH, Lord Keeper.
- 1640. Sir EDWARD LYTTELTON, Lord Keeper.
- 1645. Sir RICHARD LANE, Lord Keeper.
- 1653. Sir EDWARD HERBERT, Lord Keeper.
- 1657. Sir EDWARD HYDE, afterwards LORD CLARENDON, Lord Chancellor.
- 1667. Sir ORLANDO BRIDGMAN, Lord Keeper.
- 1672. EARL OF SHAFTESBURY, Lord Chancellor.
- 1673. Sir HENEAGE FINCH, afterwards LORD NOTTINGHAM, Lord Chancellor.
- 1682. Sir FRANCIS NORTH, afterwards EARL OF GUILFORD, Lord Keeper.
- 1685. Sir GEORGE JEFFREYS, Lord Chancellor.
- 1688. Sir JOHN MAYNARD,
ANTHONY KECK,
Serjeant RAWLINSON, } Lords Commissioners.
- 1690. Sir JOHN TREVOR,
Sir WILLIAM RAWLINSON,
Sir GEORGE HUTCHINS, } Lords Commissioners.
- 1693. Sir JOHN SOMER, Lord Keeper, afterwards LORD SOMERS, Lord Chancellor.
- 1700. Sir JOHN HOLT, Chief Justice of the King's Bench,
Sir GEORGE TREBY, Chief Justice of the Court of Common Pleas,
Sir EDWARD WARD, Chief Baron of the Exchequer,
Sir JOHN TREVOR, Master of the Rolls, } Lords Commissioners.
- 1700. Sir NATHAN WRIGHT, Lord Keeper.
- 1705. LORD COWPER, Lord Chancellor.

1711	LORD HARCOURT, Lord Chancellor.
1714	EARL COMBER, Lord Chancellor.
1718	LORD PARKER, afterwards EARL OF MACCLESFIELD, Lord Chancellor.
1725	SIR JOSEPH JEKYLL, M. R.,
	SIR ROBERT RAYMOND, { Lords Commissioners.
	SIR JEFFREY GIBBERT, {
1729	LORD KING, Lord Chancellor.
1733	LORD TALBOT, Lord Chancellor.
1736	LORD HARDWICKE, afterwards EARL HARDWICKE, Lord Chancellor.

MASTERS OF THE ROLLS.

1557.	SIR WILLIAM CORDELL.
1581.	SIR GILBERT GERRARD.
1594.	SIR THOMAS EGERTON.
1603.	LORD KINLOSS.
1611.	SIR EDWARD PHILLIPS.
1614.	SIR JULIUS CAESAR.
1636.	SIR DUDLEY DIGGES.
1639.	SIR CHARLES CAESAR.
1643.	SIR JOHN COLEPEPER, afterwards LORD COLEPEPER.
1660.	SIR HARBOTTLE GRIMSTONE.
1685.	SIR JOHN CHURCHILL.
1685.	SIR JOHN TREVOR.
1689.	SIR HENRY POWLE.
1693.	SIR JOHN TREVOR.
1717.	SIR JOSEPH JEKYLL.
1727.	THE HON. JOHN VARNY.
1741.	WILLIAM FORTESCUE.

REPORTS or CAUSES in CHANCERY.

Collected by Sir George Cary, out of the Labours of Mr. William Lambert [1557–1602].

Payment after the day upon bonds holpen.—If a man be bound in a penalty to pay money at a day and place, by obligation, and intending to pay the same, is robbed by the way; or hath intreated by word some other respite at the hands of the obligee, or cometh short of the place by any misfortune; and so failing of the payment, doth nevertheless provide and tender the money in short time after: in these, and many such like cases, the Chancery will compel the obligee to take his principal, with some reasonable consideration of his damages (*quantum expedit*), for if this was not, men would do that by covenant which they do now by bond.

Condition to undo estates in lands.—The like favour is extendable against them that will take advantage upon any strict condition, for undoing the estate of another in lands, upon a small or trifling default.

ANONYMOUS.

Giving day to one, it shall help the other.—So if two be jointly and severally bound to pay money, and the obligee will give longer day (or other favour) to the one, and then will sue the other for the debt, he which is sued shall sue in Chancery (9 E. 4. 41 [1469]).

[2] ANONYMOUS.

Payment without acquittance.—A man payeth debt upon a single obligation without taking acquittance, therefore this will not discharge him at the common law, but he shall be relieved therein in Chancery (*quare* 22 E. 4. 6 [1482]) by the party's oath, but not by witness.

ANONYMOUS.

Lessee's damages in waste, moderated by the death of the lessor.—If a man fell trees upon the lands of a lessee for life, and the lessee recovereth damages amounting to the treble value that he ought to answer to his lessor in waste, and the lessor dieth before any recovery in waste, now the lessee shall not be suffered to take those damages himself, being so discharged of them, but shall be restrained in Chancery (Doctor and Student, 33, 34, and 40).

[Mews' Dig. tit. Landlord and Tenant, M. Covenants, 3. To repair, *g.* Damages, N. Other Rights and Liabilities of Landlord and Tenant, 5. Wrongful Acts and Nuisances, *b.* Liability of Tenant, *i.* To Landlord.]

ANONYMOUS.

The greater part of the debt paid, and the rest offered, relieved in Chancery.—If the obligee have received the most part of the money, payable upon the obligation at the peremptory time and place, and will nevertheless extend the whole forfeiture immediately, refusing soon after the default to accept of the residue rendered unto him, the obligor may find aid in Chancery.

ANONYMOUS.

Purchaser of parcel of land not subject to the whole rent-charge.—If a man grant a rent-charge out of all his lands, and afterwards selleth his lands by parcels to divers

C. I.—1

persons, and the grantee of the rent will from time to time levy the whole rent upon one of the purchasers only, he shall be eased in the Chancery by a contribution from the rest of the purchasers; and the grantee shall be restrained by order to charge the same upon him only.

[Mews' Dig. tit. Rent-Charge. 3. Recovery of Arrears.]

ANONYMOUS.

Suing in a wrong county—A man recovered at the common law a debt in one county, where the obligation was made in another county, against the stat. 6 R. 2. c. 2. The defendant sued, and suggested in Chancery, [3] that by this means he was put from divers pleas, of which he might have taken advantage, if the obligation had been sued in the very county, and he had aid there; for the Chancellor said, that he sued to hide the truth, and against conscience also, which cannot be so well found in any place, as in the very county where a thing is done (9 E. 4. 2, and 9 E. 4. 15 [1469]). A man shall not be prejudiced by formality or misleading, &c.

ANONYMOUS.

Copyholders—Touching copyholders, Mr. Fitzherbert in his *Natura Brevium*, folio 12, noteth well, that toasmuch as he cannot have any writ of false judgment, nor other remedy at common law against his lord, therefore he shall have aid in Chancery; and therefore if the lord will put out his copyholder that payeth his customs and services, or will not admit him to whose use a surrender is made, or will not hold his Court for the benefit of his copyholder, or will exact fines arbitrary, where they be customary and certain, the copyholder shall have a subpoena to restrain or compel him as the case shall require (Dyer, 264 and 124; Fitz. Subpoena, 21).

[Mews' Dig. tit. Copyhold, A. Manor, 2. Validity of Customs.]

ANONYMOUS.

Not to examine any judgment given at the common law.—First, this Court forbearth directly to examine any judgment given at the common law, to which end the statutes 27 E. 3. c. 12, 39 E. 3. c. 14, 4 H. 4. c. 23, and 16 R. 2. c. 5 were made; and it seemeth that the common law used some power to restrain such examinations of judgments before all these statutes, for 13 E. 3 [1339] upon a recovery had upon a *quare impedit*, the defendant sued for help in the Chancery; and they sent a prohibition, and upon that an attachment against him (Fitzherbert, Prohibition, 21). [4] The like hath been done upon suits in the Courts of Requests. But yet 9 E. 4. c. 65, one recovered debt upon an obligation in one county, whereas the obligation was made in another county, and he complained in Chancery, because he had lost some advantages, which he might have taken if the trial had been in the other county, which thing in effect was made a law by the statute 6 R. 2. c. (Dyer, 201, and 301). And in the case of Paramore (Ann. 3, and 13 Eliz. [1561, 1571]), a fine supposed to be levied by an infant, was examined in Chancery, after it had been allowed by examination of the Justices of the Common Pleas; but whether these and such other may seem rather to examine the manner, then the very matter and substance of the thing adjudged, it is worthy of consideration.

SIR JOHN WINDHAM'S CASE.

Attornment—Sir W. Cordall, Master of the Rolls, denied to compel one to attorn here that was at liberty by the common law, in the case of Sir John Windham.

[Mews' Dig. tit. Landlord and Tenant, L. Attornment.]

PHILIPS v. SANDFORD.

Attornment denied but in some cases.—Chancellor Bromely likewise denied such compulsion generally, but where the party quarrelled with the particular tenant's estate, or entereth into some part of the lands in demise, or hath covenanted for recompense for non-attornment, there he utterly denieth to inforce the attornment (Pasche, 21 Eliz. [1579], in case of Philips and Doctor Sandford).

[Mews' Dig. tit. Landlord and Tenant, L. Attornment.]

ANONYMOUS.

Fines, recoveries, &c.—Such assurances as be used for the common repose of men's estates, the Chancery will not draw in question : for a fine with proclamation ought, after the five years, to be a bar in conscience as it is in law, so shall it be of a common recovery for docking the intail (Doctor and Student, 33, 155).

[Mews' Dig. tit. Fines and Recoveries, 1. General Principles.]

ANONYMOUS.

Mulier and bastard.—So likewise it seemeth, that the continued [5] possession of the bastard eigne shall prevail in conscience against the right of the mulier puisne. Albeit a feme covert may be thought to join with her husband for fear in a fine of her lands, yet after the five years it shall not be recalled, for the general inconveniences that may ensue to that highest assurance (Doctor and Student, 154).

[Mews' Dig. tit. Fines and Recoveries, 3. Operation, *e.* Tenant in Tail—Disentailing Deed, i. Generally ; tit. Husband and Wife, IV. Wife's Property, B. Property, other than Separate, 4. Real Estate, *b.* Contracts and Specific Performance.]

ANONYMOUS.

Warranty.—And if remedy in Chancery should be extended to a collateral warranty, the same Saint Germaine saith that then all writings shall be examined.

DUPLEGE'S CASE.

Extent laws.—If the extender undervalue the lands as there is no remedy at the common law (15 Hen. 7 [1500] Duplege's case), because the debtor may help himself by payment of the debt ; so in conscience there ought to be no relief, unless it were done by *covin*. *Idem*.

[Mews' Dig. tit. Fraud and Misrepresentation, IV. Practice, 2. Jurisdiction.]

ANONYMOUS.

Nudum pactum—*Wager of law.*—Upon *nudum pactum* there ought to be no more help in Chancery than there is at the common law, neither against him that hath waged his law in debt, though peradventure falsely. *Idem*.

[Mews' Dig. tit. Contract, C. The Matter of Contracts, *a.* Sufficiency, ii. *Nuda pacta*.]

ANONYMOUS.

No seisin of a rent seek.—Where a man made title to a rent seek of which there was no seisin, nor for which he had any action at the common law, and prayed help here, it was denied upon conference had by the Lord Keeper with the Judges (Mich. 1596).

ANONYMOUS.

Possessio sororis in copyhold.—A copyholder dieth, leaving two daughters by divers venters, both which do enter and take the profits, without doing fealties, or paying fine, and without any admittance by the Court, and the eldest dieth without issue : this only possession sufficeth to order the copyhold to the collateral heir of the eldest, and not for the sister of the half blood (12 Eliz. [1570–71] ; Dyer, 291).

[Mews' Dig. tit. Copyhold, E. Tenure and Incidents, 2. Descent of Copyhold.]

[6] ANONYMOUS.

Copyhold—*Possession of the mother for the heir collateral.*—A copyholder in fee hath issue a daughter and a son by two venters ; the lord committeth the custody of the land and of the son to the mother, who taketh the profits, and the son dieth before any admittance ; this copyhold was ordered also for the heir collateral against the sister of the half blood, because the mother's possession serveth for the son (Anno 12 Eliz. [1570–71] ; *Ibid*).

ANONYMOUS.

Copyhold devise.—The lord devised a copyhold to C for life, and after passed the freehold of the soil thereof by livery of seisin thereof to B for life, reserving a rent ;

and then by fine levied, doth grant the said land to the said C (*comme ceo que il ad de son done, &c.*), and C accepted the said rent of B, and thereupon it was questioned, whether or no the copyhold of C were gone in conscience (28 H. 8 [1536-37]; Dyer, 30).

LITTON'S CASE.

Copyhold forfeited for cutting of trees during minority.—A copyholder within age is admitted, and the lord committeth the custody to the mother of the infant, whose under tenant cutteth down timber trees, which being presented, the lord seizeth the land for the forfeiture (during still the nonage) and keepeth it till he dieth, and it descendeth to the heir, who and his father had kept it forty years, and for that the copyholder moved suit in the Chancery twenty-nine years since, which was now revived, and the forfeiture was taken during his minority, he was restored to his possession till the lord should recover it for the forfeiture by the common law, in the case of Mr. Litton (Mich. 41 & 42 Eliz. [1599]. Justice Clench, and the Masters).

[Mews' Dig. tit. Copyhold, F. Lord of Manor (Rights of), 7. Forfeiture : tit. Infant, C. Property, 1. In General : tit. Waste and Timber, F. Copyholds.]

THWAITES' MANOR, IN RE.

Tenant right fines for alienation of the tenant, but not of the lord.—Tenure by tenant right as it is usual towards the borders of Scotland, shall not pay any uncer-[7]-tain fine or income at the change of the lord by alienation, but by death, which is the act of God ; for otherwise the lord might weary the tenant by frequent alienations ; but it may be fine uncertain upon the alienation of the tenant as well upon death as descent, for that it is the act of the tenant, and in his power (Sir Thomas Egerton, Mich. 1599, case *Mannor de Thwaites et les Justices accord*) ; the same holdeth in copyholders, for the custom must be reasonable.

[Mews' Dig. tit. Copyhold, F. Lord of Manor (Rights of), 6. Fines.]

ANONYMOUS.

Payment of creditors out of a copyhold forfeited by mortgage.—A copyholder in fee surrendereth to the use of one, and to his heirs, upon condition of redemption, writeth down his debts, and willet part of his copyhold to be sold for payment of his debts after his death : one of the creditors payeth the money at the day to the mortgagee, who nevertheless enrolleth the surrender afterward ; this other creditor complaineth against him, and the heir in chancery, and had a decree that the copyhold should be sold for the payment of debts, and the remainder of it (if any were) should descend to the heir (41 Eliz. [1597-98]). For although the devise of the copyhold be void, yet to take it from the surrenderee (who held it only for money to be paid) and to pay him and the other creditors therewith, hath good warrant in equity, and the heir hath no wrong, for that it was gone from him by the surrender lawfully.

[Mews' Dig. tit. Copyhold, G. Copyholders (Rights of), 1. b. Construction.]

ANONYMOUS.

Lease parol.—*Termino Trinitatis*, 40 Eliz. [1597-98], the Lord Keeper, Sir Thomas Egerton, pronounced openly, that he, for avoiding perjuries and other abuses, would not give help to a lease claimed by parol only.

[Mews' Dig. tit. Landlord and Tenant, D. Agreements for Leases, 4. Specific Performance, c. Part Performance, i. Generally.]

[8] CUTTING v. —.

Marriage portion recovered at common law, and reversed in the Exchequer, holpen in Chancery.—One Cutting brought an action upon assumpsit for one hundred pounds against the executors of a testator that promised the money in marriage with his daughter, and recovered at the common law ; which judgment was reversed in the Exchequer Chamber, but Cutting sought help in Chancery, where it was proved that the executors had assets for funerals, debts, and legacies, with a good overplus to satisfy the complainant ; and therefore after hearing and report thereof by Dr. Stanhope and Mr. Lambert, it was decreed for the complainant ; but the executor

exhibited his bill for remedy ; upon which Justice Owen thought he was not to be heard till he had satisfied the decree ; and then also but only upon new matter ; not thus resting, the executor exhibits a second bill, which was referred to Master Lambert, but he excused himself, that he was not to judge in his own cause, and recommended it to the censure of the Lord Keeper, who ordered the executor to perform the first decree (Mich. 40 Eliz. [1598]).

ANONYMOUS.

Perpetuities. Lease for one thousand years.—Trinity. 41 Eliz. [1599], the Lord Egerton pronounced openly, that he would give none aid in Chancery for the maintenance of any perpetuities, nor of any lease for hundreds or thousands of years, made of lands holden *in capite* ; because the latter be grounded upon fraud, and the former be fights against God.

[Mews' Dig. tit. Perpetuity, 1. The Rule against, *a. Generally.*]

ANONYMOUS.

Statute lands bought with money lent, priority sans covin.—A was bound in a statute to B, and one C lendeth one hundred pounds to A with which A bought lands, and assured the same to C for his hundred pounds. A faileth in payment. B extended that land. C was denied help in Chancery, although the land was bought with his money ; for B hath priority of right in law without covin (Crompton. 63 *a*).

[Mews' Dig. tit. Crown. F. Extent. Execution by, 2. Extent in Chief, *a. What may be taken under.*]

[I] ANONYMOUS.

Bailment sans consideration countermanded.—A delivereth twenty pounds to B to the use of C, a woman, to be delivered her the day of her marriage. Before her marriage, A countermandeth it, and calleth home the money. C shall not be aided in Chancery, because there is no consideration why she should have it (Dyer. 49).

[Mews' Dig. tit. Contract. C. The Matter of Contracts, 1. Consideration, *a. Sufficiency, ii. Nuda pacta.*]

ANONYMOUS.

Void limitation de lease, in vol. Cook, lib. 8. 95.—A termor devised his term and whole lease to B. Proviso, that if B die, living C, then the term shall wholly remain to C. B selleth the term, and dieth, living C, and, by the opinion of the Justices, C shall have no remedy (Dyer, 74).

[Mews' Dig. tit. Landlord and Tenant. M. Covenants. 5. Not to assign or underlet, *c. Breach of.*]

ANONYMOUS.

Ravishment de garde.—The Vice-Countess Montague claimed the wardship of the body of the heir of a tenant of her's, which was esloined from her ; she suspecting some of the heir's friends, exhibited her bill in Chancery ; and it seemed they should not answer to charge themselves criminally ; especially in this case, where so great a punishment as abjuration may follow, &c.

CROMER v. PENISTON.

Survivor in joint-tenancy de lease.—Cromer and Peniston married two sisters jointly possessed of a lease for years ; the wife of Cromer died ; Peniston claimed the whole by survivor ; Cromer exhibited a bill, suggesting that Peniston had in her lifetime severed the jointure by some act secretly : The Lord Keeper over-ruled, that the defendant should not answer (Mich. 39 and 40 Eliz. [1597]).

[10] ANONYMOUS.

Feoffees to use.—As concerning confidence secretly knit to estates, it hath manifold considerations ; first, if my feoffee, upon confidence, do infeoff another *bona fide* that knoweth not of the confidence, I am without remedy (Fitzherbert. Subp. 12). But if the second feoffee have notice of the use, he shall be compelled here to perform it (5 Edw. 4. 7 [1465–66]).

ANONYMOUS.

If my feoffor die, I have no remedy against his heir.—*The feoffee shall do acts for the feoffor's good.*—So if my feoffee die, and the land descend to his heir, I have no remedy against him (8 Edw. 4. 6 [1468-69]). All the Justices :—And this confidence extendeth not only to the taking of the profits, but also that the feoffees shall do acts for the good of the feoffor ; and if the feoffor require him to make an estate to any other, he ought to do it ; but thereof he ought to have request in writing, for he is not to do it upon a bare message, or upon desire by word only (37 Hen. 6. 35, 36 [1458-59]). And if the feoffor will have him make an estate to I for life, the remainder in fee to B, though I will take estate, yet B shall compel him to make estate to him in the life of I (*Ibid.* 36 Finch). So if the feoffee be disseised, the feoffor shall compel him to sue an assize (2 Edw. 4. 7 [1462-63]).

ANONYMOUS.

They may grant offices, but not annuities.—*Fees to counsel.*—Nevertheless those feoffees might grant necessary offices, as stewardships, bailiwicks, &c., though they may not grant annuities to learned men to defend the land (8 Hen. 7. 12 [1492-93]). They may also, as it seemeth, give fees to counsel, and shall have allowance thereof, so far as they are from being maintainors.

ANONYMOUS.

Money given to buy lands.—If I give money to one to purchase lands therewith to him and his heirs, and to permit me to take the profits thereof during my life, [11] and he withholdeth the profits, he shall be compelled by subpoena (Crompton, fol. 48 b).

ANONYMOUS.

The feoffee shall retain the land to his own use, surattainder de felony.—If (*cestui que use*) be attainted of felony, the lord shall not be aided by subpoena to have his escheat ; and if the heir be barred by the corruption of his blood, then the feoffee, as it seemeth, shall retain the land to his own use (5 Edw. 4. 7 [1465-66]). Feoffments of use, Brooke, 34.

[Mews' Dig. tit. Criminal Law, B. Offences Generally, I. Felony, 1, Rights of the Crown.]

ANONYMOUS.

Intent specified in a feoffment to use.—When the use is to the feoffee and his heirs, without any other intent, there (*cestui que use*) may declare his will thereof, and may vary at his pleasure ; but if it be to any intent certain, as to take back an estate tail, or with remainders to others, then he cannot change it for the interest that is in others (5 Edw. 4. 8, a [1465-66]).

ANONYMOUS.

Uses of gavelkind at the common law (26 Hen. 8 [1530-31] ; Dyer, 6).—Whether the use of gavelkind lands should ensue the nature of the land, and so of Borough English, or shall be at the common law, because the custom do extend to lands, and not to uses or rents, as is said against Fitzherbert.

ANONYMOUS.

Cestui que use, de tearme de ans.—Although (*cestui que use*) of a term for years be not within the statute of Uses, rather therefore he shall have remedy in Chancery (Crompton, 64).

ANONYMOUS.

Jurament, delatum ex parte.—Where the complainant will rest upon the oath of the defendant, and be contented to be judged thereby, there the oath of bewraying is hardly granted.

ANONYMOUS.

Equitas sequitur legem.—Conscience never resisteth the law, nor addeth to it, but only where the law is directly in itself against the law of God, or the law of Reason ; for in other things, *Equitas sequitur legem* (Saint Germaine, fol. 85. 155).

[12] ANONYMOUS.

Things left to the conscience of the party.—Sometimes equity helpeth a man to that for the which there is no law of man provided (folio 85, *ibid.*). Sometimes equity follows the meaning of the parties in their contract (86, *ibid.*), where a common inconvenience will follow, if the common law be broken, there the Chancery shall not help. (155). For albeit the party cannot with a good conscience take the advantage of sundry things to which he comes, yet the Court of Conscience is not thereby bound to help the other, but must leave some things to the conscience of the party himself.

[Mews' Dig. tit. Maxims.]

OUSLOWE *v.* OUSLOWE; NORRIS *v.* LESTER; CUTTING *v.* HUCKFORD.

Help in Chancery against executors.—It is reported, 8 Edw. 4. 6 [1468–69], and 22 Edw. 4. 6 [1482–83], Year Book, that the Lord Chancellor and Judges were of opinion, that a subpoena lieth not against the heir of a feoffee in trust; but our time affordeth that help against executors very commonly, as between Ouslowe *v.* Ouslowe, Lord Norris *v.* Lester, Cutting *v.* Huckford, &c.).

ANONYMOUS.

Surety.—At the common law, if a man were surety for another's debt, he was chargeable if the debtor failed in payment; but Magna Charta, c. 8, ordereth that the pledge shall not be distrained, if the principal debtor be sufficient to pay; this grew troublesome to the creditor, and therefore it fell in use that the pledge should be bound as principal, and so by common law he is chargeable, notwithstanding the sufficiency of the principal; nevertheless it is now usual in Chancery to help this surety against whatsoever default of the principal, if so be he will offer the principal debt and damages: but in my opinion he ought to find here [13] no other relief than the principal debtor should find, because he is not only a principal by his own bond, but also was the cause for which the money was lent, seeing that without him the principal had not been credited. And experience bewrayeth, that this favour to sureties breedeth contempt of bonds: *Nihil est autem* (saith Cicero) *quod vehementius remp. continet quam fides, quæ nulla esse poterit si non erit necessaria solutio rerum creditarum, fraudandi vero spe sublata, solvendi necessitas consequitur.*

But the case of the purchaser (*bona fide*) of land subject to a statute or recognizance, is better than of such a surety; and so is the case also of the heir of the recognizer or obligor; for though the land be charged in their hand with the debt, yet equity ought to relieve them touching any penalty, unless they be found in Mora, &c.

[Mews' Dig. tit. Principal and Surety, A. Nature of Contract, 8. Extent of Liability.]

GREENE AND COTTERELL'S CASE; WOODFORD *v.* MULTON.

Fraud upon fraud.—If a debtor will, collude with some of his friends in fraud of his creditors, and the friend break trust with him, this Court will not punish the breach; yet Greene and Cotterell's case to the contrary (*fraus non est fallere fallentem*). But two doctors and I took order in such a case between Woodford and Multon, Mich. 42 & 43 Eliz. [1601] by our report, that the goods so conveyed in fraud should be transferred to the benefit of the creditors.

[Mews' Dig. tit. Fraud and Misrepresentation, IV. Practice, 7. Relief, Mode, and Terms of; tit. Maxims.]

[14] ANONYMOUS.

Feoffee punishable for making estate at the wife's request during the coverture.—A man was enfeoffed to the use of a woman sole, which taketh an husband; they both for money sell to B. the land, which payeth it to the wife; and she and her husband do pray the feoffee to make estate to B. Afterwards her husband dieth: now by the Chancellor and all the Justices, she shall have aid against the first feoffee by subpoena, to satisfy her for the land; and if the second feoffee were comasant, a subpoena shall be against him for the land; for all that the wife did during the coverture (as they said) shall be taken to be done for fear of the husband (7 Edw. 4. 14 [1467–68]: Subpœna, Fitzherbert, 6).

ANONYMOUS.

No relief against his own deed.—If A sell land to B for twenty pounds, with confidence, that it shall be to the use of A, yet A shall have no remedy here, because the bargain hath a consideration in itself (Dyer, 169, per Harper); and such a consideration in an indenture of bargain and sale seemeth not to be examinable, except fraud be objected, because it is an estoppel.

ANONYMOUS.

Release of joint feoffee.—Lands be mortgaged to A and B, where A only payeth the money, and the intention was that B should take nothing; now B shall be compelled to release to A (27 Eliz. [1584–85]).

ANONYMOUS.

Subpoena against one appointed by will to sell.—A willeth that B shall sell his land to C; now C shall have a subpoena against B to compel him to sell the testator's land unto him (15 Hen. 7. 12 [1499–1500]).

[Mews' Dig. tit. Will. IX. Construction, k. 8. Options and Rights of Choice or Pre-emption.]

ANONYMOUS.

To discharge himself of a bond is permitted in equity.—Pyers was bound in a statute to Hawes and Joan, for the behoof of Joan, and Hawes released to Pyers, whereupon she brought a subpoena against them both; but Pyers was discharged, although he knew the confidence, because it is permitted, in such a case, a man should help himself to be charged of his bond; and the subpoena stood against Hawes, because he had deceived Joan (11 Edw. 4. 8 [1471–72] *a. tamen quære*); for it is no conscience to be a partaker in fraud; therefore if my feoffee in use had made a feoffment unto one that knew of the use, the subpoena did lie against [15] them both (5 Edw. 4. 7 [1465–66]). And the case precedent liked not the reporter.

ANONYMOUS.

Forced to sue an obligation.—If an obligation be made to B to the use of C, now B shall be compelled here to sue upon that obligation (2 Edw. 4. 2 [1462–63]).

ANONYMOUS.

Executor shall not release a bond without his co-partner.—If one executor will release a debt without the consent of his co-partner, whereby the will cannot be performed, the releasor and the releasee shall be ordered therefore in Chancery (4 Hen. 7. 4 [1488–89]). By the Chancellor, against the opinion of Fineux.

ANONYMOUS.

Executor shall not answer without his co-partners.—If a subpoena be brought against three executors, and one of them appeareth, he shall not be compelled to answer, till they be driven to appear also, for they are but one (8 Edw. 4. 5 [1468–69]). By the Chancellor.

ANONYMOUS.

Co-partners to join in plea or presentment.—So if two co-partners or joint-tenants, join in a *quare impedit*, and the one will plead covinously, he shall be compelled here to join with the other in plea or presentment.

ANONYMOUS.

One deed by which two claim severally.—And so if lands be severally given by one deed to two men; he which hath the deed shall be compelled here to shew it for defence of the other's title (9 Edw. 4. 41 [1469–70]).

[Mews' Dig. tit. Discovery, A. Documents, B. Production, 1. Possession or Power, *a. Joint Possession.*]

ANONYMOUS.

Where remedy at common law, no help here.—A made a deed of feoffment to his own use to B, but gave no livery of seisin. A dieth; C his heir bringeth a subpoena against B; but by Morton, Master of the Rolls, C was denied help here, because B had nothing

in the land; and if he abate, there is remedy at the common law against him (18 Edw. 4. 13 [1478-79]).

ANONYMOUS.

Goods of felons granted, which are difficult to prove.—Where certainty wanteth, the common law faileth, but yet help is to be found in Chancery for it; for if the Queen grant to me the goods of A that is attainted of felony, and I know not [16] the certainty of them, yet shall I compel any man to whose possession any of them be come to make inventory of them here (36 Hen. 6. 26 [1457-58]); Cur.).

[Mews' Dig. tit. Criminal Law, B. Offences Generally, I. Felony, 1. Rights of the Crown.]

ANONYMOUS.

Bringing evidence into Court.—It is most usual in Chancery to demand evidence concerning the complainant's lands, to which he maketh title, which are not in chests, bags, or boxes, and whereof he knoweth not the date, &c.

ANONYMOUS.

Justifying detaining of evidences. And in that case the defendant made title to the lands, and justified the detaining of the evidences, for maintenance of his right, whereupon it was ordered, that the complainant should bring an action for the land at the common law, to which the defendant should plead in chief; and that he for whom the verdict should pass, should also have his possession stalled here (28 Eliz. [1585-86]).

ANONYMOUS.

Tenants of the land uncertain.—If a man have cause to demand land by action, and knoweth not the tenant of the land, by reason of the making of secret estates, it hath been lately used to draw them in by oath, to confess the tenant; but it is now doubted.

CAPELL v. MYM.

Tenants in common to know the certainty.—A tenant in common of a manor, for long time occupied wholly by the other tenant in common, which knoweth not the quantity of the manor, by reason the other hath also sold lands intermingled, had the sight of the Court rolls and writings of his companion, concerning only the quantity of the manor, but not concerning the sold lands, nor his title to the manor, and the other was ordered also to shew the like on his part (Capell and Mym, 1599).

ANONYMOUS.

Supply of true meaning in feoffments.—The Chancery also giveth help for perfecting of things well meant, and upon good considera [17]-tion. As if in a feoffment of lands for money the word "heirs" be omitted in the deed. Audeley, Chancellor (9 H. 8 [1517-18]), said that he would supply it.

ANONYMOUS.

To bring in an obligation to be cancelled.—A man bought debts due upon obligations, and gave his own obligation for the money to be paid for them; and because he had not (*quod pro quo*) but only things in action, and the seller would not use action upon them for the benefit of the vendee; It was ordered here by the assent of the Judges thereto called, that the vendor should bring in the obligation to be cancelled (37 H. 6. 14 [1458-59]).

ANONYMOUS.

Money paid upon obligation single, or single statute, not compelled here to cancel it.—But if a man pay money upon an obligation or a statute that is single, the obligee, or conusee shall not be called hither to cancel it, though the other had no acquittance upon the payment made. 22 Edw. 4. b. [1482-83] *les Justices*, and Doctor and Student, 23, who said, that a man shall have no aid here to supply his folly: As if he pay a debt upon a single obligation or statute without taking acquittance. But Robert Stillington (*Episcopus Bathoniensis*) said, that *deus est procurator futurus*. I think if money be paid upon a redemption of a mortgage by indenture without taking an acquittance, the mortgagee shall bring in the indenture to be cancelled here.

ANONYMOUS.

Lands sold in two counties, and livery made only in one.—So if a man sell lands in two counties for money, and maketh livery in the one only, he shall be compelled in conscience to perfect the assurance by another livery (Doctor and Student, 37), for the contract faileth in a circumstance or ceremony.

ANONYMOUS.

Lessor to have the woods, leaving sufficient boots. A lease is made of a house and woods, wherein it is covenanted, that the lessee shall have [18] houseboot and fireboot. By this it is implied and meant that he shall not have any of the woods to any other purpose, but that they belong to the lessor; and it is usual to help him in the Chancery, to them leaving sufficient for these boots.

ANONYMOUS.

Messuage cum pertin. carries the land used with it. A messuage was demised (*cum pertinentiis*) only but for that sundry lands had been occupied therewith for the same rent, and by the same words: the Lord Chancellor Bromley, by advice of the Judges, ordered those lands should now pass also; yet in law they do not pass, as some Justices hold.

ANONYMOUS.

Manor demised, except the Court Baron.—The Lord North demised a manor (excepting the Court Baron) and perquisites, &c., the exception was found void in law; and the tenant Lady Daeres would not make suit to the Court kept by the Lord North. But the Lord Keeper Puckering, assisted with some Judges, decreed her to make suit, for that it was plainly so intended.

[Mews' Dig. tit. Copyhold, B. Courts.]

ANONYMOUS.

Fraud or covin in goods. A man made a gift of his goods of intent to defraud his creditors, and yet continued the possession of them, and took sanctuary and died there: now his executors having the goods were charged towards the creditors (16 Edw. 4. 9 [1476-77]).

[Mews' Dig. tit. Fraud and Misrepresentation, II. Fraudulent Conveyances;

A. As against Creditors, 3. Consideration, a. General Principles.]

ANONYMOUS.

Grand lease forfeited by covin.—So if a lessee for years demiseth parcel of the term to another, and covinously forfeiteth his whole lease for any condition broken, and taketh the land back in lease again, his lessee shall find help in Chancery (Crompton, 64, 65). And Stillington, the Chancellor (8 E. 4. 4 [1468-69]), was of opinion that, *pro lasione fidei* or breach of promise, a man was at liberty to sue either in the spiritual court (*Canonica injuria*) or else in [19] the Chancery, for the damage accrued by the breach.

[Mews' Dig. tit. Landlord and Tenant, M. Covenants, 5. Not to assign or underlet, c. Breach of.]

ANONYMOUS.

Connusee. A man had lands of ancient demesne in extent for debt, and they were recovered from him by the sufferance of the vouchee, whereby he was ousted; in this case he shall be helpen here. Morton, Chancellor; per Assent, Bryan, and Hussey, Justices (7 H. 7. 11 [1491-92]).

ANONYMOUS.

To avoid future perjury—Payment for the principal by the surety.—If one that is bound with another for the debt of the other payeth it at the day for fear of arrest; now if he sue his counter-bond which he hath to save him harmless (*non est damnificatus*) is a good plea at the common law against it; but yet the Chancery will give order for his repayment. (Mich. 31. 32 Eliz. [1589]). And whereas such a surety paid the debt, and sued the principal upon his obligation to save him harmless; the prin-

cipal brought a subpoena, and alleging that he having delivered goods into the hand of the surety to save him harmless, prayed an injunction to stay his suit ; but because the surety made another title to the goods, the Court would not stay the suit for him (16 E. 4. 9 [1476-77]).

[Mews' Dig. tit. Principal and Surety, C. Rights of Surety, 2. Recoupment.]

DIXIES v. HILARY.

Deeds brought into the Court.—Where deeds and muniments do concern as well the defence of the tenant for life, his title who also possesseth the deeds, as the right of another in reversion or remainder, it is usual to have them brought into this Court for the avoiding all perils, and the indifferent custody of them (Dixies and Hilary, 40 Eliz. [1597-98]).

[Mews' Dig. tit. Mortgage, K. Payment off, Reconveyance and Deeds, 3. Deeds, a. Right to ; tit. Practice, A. In the High Court of Justice, X. Intermediate proceedings, g. Custody, Preservation, Sale and Inspection of Property.]

ANONYMOUS.

Waste holpen in Chancery.—A lease is made for life, the remainder for life, the remainder over in fee ; first lessee maketh waste ; and because he in the fee hath no remedy by the common law, and [20] waste is a wrong prohibited, he shall be holpen in Chancery (Crompton, 48. 6).

ANONYMOUS.

Mulier and bastard join in suing their livery.—And not every bar or estoppel in law ought also to bind in Chancery : For if a legitimate daughter, and her sister a bastard, do join in suing of their livery, this ought not to bar in conscience, howsoever it may estop in law (Doctor and Student, 34).

ANONYMOUS.

Action of the case seeketh damages, subpoena rem ipsam.—It is usual in a bill of Chancery to object, that the case hath proper help at the common law, and (21 H. 7. 41 [1505-6]) where one assumed for ten pounds to lands to another, it was said he might have action upon his case ; and not to sue in Chancery to compel him to make the estate : but these helps be divers, and not the same ; for by the one he seeketh the land ; and by the other he demandeth damages only. And therefore I see not, but that the petition in Parliament might have prevailed, if it had stood upon that point only ; and at this day, it is taken for a good cause of dismissal in most causes, to say that he hath remedy at the common law : and where an action upon the case for a nusans and damages only are to be recovered, the party may have help here to remove or restore the thing itself, *quod est idem*.

ANONYMOUS.

Fines fraudulent.—A leased lands for twenty-one years, and let other lands at will to B that had lands in the same town, who makes a lease for life to C of his own lands and of A's, and then by fine all is conveyed to B, he pays the rent to A, still the five years pass ; by the opinion of all the Judges delivered to the Lord Keeper, this fine shall not bar A *quia apparet per le payment del rent and cest case fit subscribe* (per Popham & Andersan, 12th Feb. 1601, 40 Eliz.).

[Mews' Dig. tit. Fines and Recoveries, 2. Agreements to levy or suffer, g. Fraud.]

[21] ANONYMOUS.

Executors how upon trust.—*Nata que executor non pait estre* a trust, unless he have an especial gift in the will, and that may then be in trust, otherwise the general trust of an executor is to pay debts and legacies ; and of the surplusage to account to the ordinary in *pios usus* (44 Eliz. 8th June, 1602).

ANONYMOUS.

No relief against a voluntary act.—A woman sole takes consideration for making a lease for twenty-one years, and then marries ; and she and her husband made the

promised lease at the twenty one years end, the lessee surrenders and takes a new lease for twenty one years more; the husband dies, the wife ousts the lessee, who sues in Chancery to have the first lease continued rest for the first twenty-one years, and not remedied here, the surrender being voluntary (44 Eliz. [1602]).

[Mews' Dig. tit. Husband and Wife, IV. Wife's Property, B. Property, other than Separate, 4. Real Estate, b. Contracts and Specific Performance.]

ANONYMOUS.

Joint tenants, one taking the profits.—Two joint tenants, the one takes the whole profits, no remedy for the other, except it were done by agreement, or promise of account (8th June 1602, 44 Eliz.).

CASE OF KINGSTON-UPON-THAMES.

Defendant examined as a witness.—A defendant, not being a principal defendant, might be read as a witness, if he were examined on the plaintiff's party in another suit, between other persons, in case of Kingston-upon-Thames (10th June, 1602, 44 Eliz.).

ANONYMOUS.

General customs reduced to certainty by agreement in a manor.—A custom of descent in a manor, and many other things were in controversy between the lord and tenants, and between the tenants themselves. And in the 10th Eliz. [1568] a general agreement made by deed indented, and a bill in Chancery for establishing the same, but no record to be found but the deed inrolled, though all the tenants of the said manor shall be stopped in the Chancery to speak against this (*Car. est qua le Itapes del realme*) notwithstanding pretence was made (Philips being of counsel with [22] the defendants), that agreement cannot alter a custom in law, that some were infants, some feme coverts at the time that the lord was but tenant in tail, of which opinion was Mr. Cook, Attorney General, and Justice Gawdy (10th June 1602, 44 Eliz.).

ANONYMOUS.

Statute acknowledged in my name by a stranger.—If a statute be acknowledged in my name by a stranger, I shall have an action of deceit against him, but I shall not avoid the statute or recognizance; but if it be acknowledged by one of the same name with me, I shall avoid it by plea (23d June 1602, 44 Eliz.).

ANONYMOUS.

Power to make leases.—The opinion of the Courts is, that uses may be raised by covenant for jointures, but power to make leases in that sort cannot pass, but it may be done by fine, or transmutation of possession, if the covenant be that the owner will stand seised to those uses (27th June 1602, 45 Eliz.).

ANONYMOUS.

Copyhold tailed surrender.—Whether copyholders may be entailed, and held, that they may not by the statute *de donis conditionalibus*, but by the common law *denante*: and that surrenders, or plaints in nature of fines and recoveries may bar these estate tails, as well in the Court Baron, as at the common law, if the custom have been such, which is the rule in these cases (3d Feb. 1602, 45 Eliz.).

[Mews' Dig. tit. Copyhold, E. Tenure and Incidents, 5. Mode of barring Entails.]

ANONYMOUS.

Abating a bill.—Administrators in nature of a guardian to an infant being executor, exhibits on his behalf a bill in Chancery; the infant (depending the suit) comes of full age; this abates not the bill, by the opinion of the Lord Chancellor Egerton (7th Feb. 1602, 45 Eliz.).

[Mews' Dig. tit. Practice, II. Parties to Actions, &c., g. Change of Parties, 3. In the case of Infants, b. On attaining Twenty-one.]

ANONYMOUS.

Leases devised to his wife, on confidence to come to his son, not relieved.—Dector Ford by his will devised certain lands to his wife in these words (*non per viam fidei commissæ*), for which his son might sue her, but [23] hoping if his son grew thrifty, that at her death she would leave the remnant of these leases to him; she married Greysil; but before marriage Greysil wrote unto her, that she should have the disposing of those leases at her death; after the marriage Greysil sells the leases; Ford brings his suit in Chancery, and had no help by the opinion of the Court (31st May, 1 Jacob. 1603).

[Mews' Dig. tit. Will. IX. Construction. *k.* Bequests and Devises, 6. Trusts, *b.* Precatory Trusts.]

CLENCH *v.* TOMLEY, 1603.

Possession bound by decree, and the party prohibited to sue at common law.—Inter Tomley and Clench, it appeared by testimony of ancient witnesses speaking of sixty years before, and account books and other writings, that Francis Vaughan, from whom Tomley claimed, was *mulier*; and Anthony, from whom Clench claimeth, was a bastard; and the possession had gone with Tomley fifty years. In this case the Lord Egerton not only decreed the possession with Tomley, but ordered also that Clench should not have any trial at the common law for his right till he had shewed better matter in the Chancery, being a thing so long past; it rested not properly in notice *de pais*, but to be discerned by books and deeds, of which the Court was better able to judge than a jury of ploughmen, notwithstanding that exceptions were alleged against those ancient writings; and that for the copyhold land, the verdict went with Clench upon evidence given three days before Serjeant Williams that Anthony was *mulier* (31st May, 1 Jacob. 1603).

[Mews' Dig. tit. Injunction, B. In what Cases granted, 8.]

ANONYMOUS.

Grantee distrains one who prayeth relief, ordered he sue the rest and the grantee, the one to contribute, and the other to accept of equality.—Sir Edmund Morgan married the widow of Fortescue, had his wife's lands distrained alone by the grantee of a rent-charge from her former husband, and therefore sued the grantee in Chancery to take a rateable part of the rent, according to the lands he held subject to the [24] distress; and notwithstanding the Lord Chief-Justice Popham's report, who thought this reasonable, the Lord Chancellor Egerton will give him on this bill no relief, but ordered that he should exhibit his bill against the rest of the tenants and grantee both, the one to shew cause why they should not contribute, the other why he should not accept of the rent equally; otherwise it was no reason to take away the benefit of distress from the grantee, which the law gave him (7th June, Jacobi, 1603).

[Mews' Dig. tit. Rent-Charge, 3. Recovery of Arrears.]

ANONYMOUS.

Contents of a manor as it was sixty years past.—A in *forma pauperis* had a decree against C for the manor of B that the contents of the manor were doubtful. C shewing ancient deeds, that proved divers parcels of the lands claimed by force of the decree by A to be of another manor, which notwithstanding, the Lord Chancellor Egerton ordered that it should be put to jury, and they to find as the contents of the manor had gone by usual reputation sixty years last, and not to have it paired, and defalked by such ancient deeds.

[Mews' Dig. tit. Copyhold, A. Manor, 1. What is.]

ANONYMOUS.

Executrix husband ordered to pay debts.—A married a feme executrix subject to a *devastavit*; if A have not sufficient to satisfy, himself shall be imprisoned for the debt.

ANONYMOUS.

Plaintant mistaking his title in his bill.—A plaintiff in Chancery for a lease upon a bill, that affirmed the lease to end at our Lady-day, An. 1604, had the same decreed

for him : many years after coming to the lease itself, he finds, that it is not to end till our Lady, Anno 1605. And then moves in Chancery, that he may not be forced to leave the land, till that time as the decree appointed him (*qui constitutus est cancellarius*, 24th July, *ad Coronam Regis*) for the first he must perform the decree : and then exhibit a new bill upon the special matter, otherwise it [25] were perilous to blow away decrees upon motions (Hil. 1 Jacobi [1604]. Cosset com. Crowther, fol. 122).

ANONYMOUS.

Leases conveyed in trust to pay debts. Henry Earl of Derby conveyed certain lands in trust to Doughty his servant for the payment of his debts, upon mediation of an end of controversies between the daughters of Ferdinand, eldest son of Henry, and William his younger son, now Earl. Articles were set down, that William should discharge all his father's debts ; whereupon Doughty conveyed the leases to William, the creditors sue Doughty in Chancery ; and ordered to pursue their remedy against Earl William (Hil. 1 Jacobi [1604]).

HEARLE v. BOTELERS.

Heir of purchaser charged with payment of money behind for the land.—Hearle plaintiff in Chancery against Botelers mother and son, whose husband had bought tilled lands of Hearle's brother, to which the plaintiff was inheritable ; and some of the money due upon a bond unpaid, and the bond lost. And the opinion of the Lord Chancellor was, to charge the son and them other, in regard of the land in their possession, with the payment thereof (Hil. 1 Jac. [1604]).

MYNN v. COBB.

Proceedings in a cause where there is no full proof.—*Nota in le case* Mynn and Cobb, the trust was not so fully proved as the Lord Chancellor would make a full decree thereupon, so as it should be a precedent for other causes, and yet so far forth proved, as it satisfied him as a private man ; and therefore in this case he thought fit to write his letters to the defendant to conform himself to reason ; and affirmed, that if he should find the defendant obstinate, then would he rule this cause specially against the defendant, *sans la tires consequence* (Hil. 1 Jac. [1604]).

MANWOOD'S CASE.

Copy good by devise without mention of surrender.—*Nota in le case* of Manwood, that there behoveth not a full surrender to be expressed in the copy, but the devise is chiefly to be regarded if the surrender be perfect in the roll of the lord, though there be no mention at all of a surrender, good enough (Hil. 1 Jacobi [1604]).

[Mews' Dig. tit. Will. IX. Construction, *k.* Bequests and Devises, 2. What Interest passes, i. Copyholds.]

[26] SWAYNE v. ROGERS.

Turning of watercourses from mills holpen.—*Inter* Swayne and Rogers, the case was in effect an assize of nuisans, for Rogers disturning the trenches and plucking up of stakes of Swayne's mill leet : and making a bank, or dam beneath, that made the water reflow so as the wheels could not go ; and exception taken that the Court should not hold plea thereof (*sed contrarium ad indicatur*) many causes of the same manner ended here ; and this specially for Rogers a great man in the country, Swayne a professor of the law, who sought hereby to avoid multiplicity of suits, per Warburton, justice ; but upon a second hearing at the Rolls, referred to a commission of sewers (Hil. 1 Jacobi [1604]).

[Mews' Dig. tit. Sewers and Drains, 2. Commissioners, Powers and Jurisdiction of ; tit. Water, C. Streams, Non-Navigable Rivers and Watercourses, 4. Infringement of Rights, *a.* Diversion and Abstraction of Water.]

ANONYMOUS.

Waste forbidden in Chancery, where not punishable at law.—*Nota per* Egerton, Chancellor, where tenant for life, the remainder for life, though there lie no action of waste in Chancery, yet he shall be prohibited to do waste by the Chancellor, for wrong to the inhabitants, and hurt to the commonwealth (Hil. 1 Jacobi [1604]).

BLOOMER'S CASE.

Archbishop's certificate against Bloomer, for not paying a maid's portion.—Bloomer having married the widow of Nanfan, who had forfeited a recognizance to the Archbishop of Canterbury, for not paying of her daughter's portion, entreated the Bishop of Canterbury to take a new recognizance, and discharge the former. Bloomer, after finding that his wife's lands was entailed, used means to have her by fine or recovery to put it into fee, that so it might be subject to the recognizance, and hoped to get it from his wife also. One Bridges, his wife's kinsman, withstood this; now dieth the woman, the portion unpaid; Bloomer is sued for it in Chancery, and the opinion of the Court against him: the Bishop of Canterbury had certified against him; and because his counsel was not [27] ready that day, the Chancellor declared, he must take the Archbishop's certificate, not as a testimony, but as a judicial proceeding: and therefore willed Bloomer to satisfy the Archbishop, or else he must decree against him (Hil. 1 Jac. [1604]).

ANONYMOUS.

Witnesses ad informand. conscientiam.—*Nota*, that witnesses *ad informand. conscientiam*, shall never be appointed to be taken but upon hearing (*ubi Juxta dubitat*), but yet witnesses examined after publication not fit to be published, may be fit to be *ad informandum conscientiam*, if it shall be thought meet upon the hearing (Hil. 1 Jac. [1604]).

HILL'S CASE.

Five pounds costs given in a demurrer, and the counsellor prohibited to deal any more in Chancery.—Daniel Hill having put in for his client a long insufficient demurrer to a bill exhibited against his client, in which supposed demurrer were many matters of fact, and other things frivolous and vain, the Lord Chancellor Egerton awarded five pounds costs against the party: and ordered, that neither bill, answer, demurrer, nor any other plea, should from henceforth be received under the hand of the said Hill (27th April, 1 Jac. [1603]).

[Mews' Dig. tit. Banister, 6. Misconduct of Counsel.]

ANONYMOUS.

Fines of copyholds, how ordered in Chancery.—In the case of tenant right, between Musgrave and some of his tenants on the borders, the Lord Chancellor pronounced, that neither in tenant right, nor in other copyholds, would he make any order for all the tenants in generality, but for special men in special cases, nor for any longer time than the present, except it were by agreement between the lord and the tenants, which then he would decree, if it appeared reasonable (8th June, 1 Jac. [1603]).

[Mews' Dig. tit. Copyhold, G. Copyholders (Rights of), 1. g. Enforcing.]

ANONYMOUS.

Lease parol.—Item, that he neither would help leases parol in Chancery: and that it was good for the commonwealth, if no lease parol were allowed by the law, nor promises to be proved by [28] witnesses, considering the plenty of witnesses nowadays, which were *testes diabolices, qui magis fame quam fama morantur* (8th June, 1 Jac. [1603]).

ANONYMOUS.

Proceeding on the statute for charitable uses.—Lands given *ad divina Celebranda* by feoffment, till an estate should be made by the feoffees of them, for founding a chauntry, and this in the 20th of Hen. 6, and held no superstitious use, nor by the Lord Chancellor, if it had been absolutely given *ad divina Celebranda*, and for saying of Obites, for most part of the Churches of England are so founded, if it be granted to a Priest: *contra*, if it be granted to a particular Priest, *ad divina Celebranda*, and saying Obites, &c. The case was, that those lands were after given to found a Chapel of Ease by the feoffees, and then new come in upon the first grant, would have had it a concealment, and got a patent thereof, and commissioners upon the statute 39 Eliz. took it from the patentee. And note, that the commissioners make the decree: the Lord Chancellor hearth the exceptions against the said decree, and decreed the possession according to the commissioners' decree, leaving the patentee to exhibit his bill against the parishioners, and to show what cause he could for reversing thereof (18th June, 1 Jac. [1603]).

LITTLETON'S CASE.

Lands intended to be given to a school, after otherwise disposed by will.—George Littleton, of the Inner Temple, lent money upon bonds taken in other men's names, and had not any in his own name; among the rest he purchased five marks per annum in two other men's names, with this trust, that he might enjoy it during his life, and after it should be to the erecting of a school in the town where the said George was born and buried, as the feoffees declared in their answer; [29] and in his lifetime, after the purchase, he repealed his intent of converting the same to the use of the school to divers others; but by his will he gave certain acres of land to I C and I H, and then devised all the rest of his lands to his brother's son, who sues *Cum que trust* for converting unto him the five marks of land, which Justice Warburton presently decreed for him, saying, his will was his declaration. But in his words there was but a meaning only expressed (*one contradicente*), for if I C make a feoffment to the use over according to articles annexed, he cannot alter the same by a later will: *contra*, if it be to the use of his will (19th June, 1 Jac. [1603]).

CUTTING'S CASE.

Cutting, clerk of the outlawries, bought lands of Bedwell, whereof he was seised as tenant by courtesy, promising the heir should assure at full age, and by mortgage assured other lands for performance thereof. Cutting, before full age, dieth without issue, his heir not known, for some claimeth as heir on the father's side, some as heir on the mother's side, others as assignees by devise; and another as executor sued a statute for performance of covenants; Bedwell, being willing to assure, brought all into the Chancery, that he might incur no prejudice till he should know to whom he should assure; and ordered that he should assure to two of the six Clerks, they to re-assure to the heir when he should be found (10th October, 1 Jac. [1603]).

[Mews' Dig. tit. Trust and Trustee, II. Vesting Orders, Conveyances, and Transfers. 2. Conveyances and Transfers, *b.* Under Trustee Acts prior to 1850, *c.* Conveyances under 7 Anne, c. 19.]

PIGOT'S CASE.

No help in Chancery touching power to make leases.—*Nota*, that the Lord Chancellor Egerton, in the case of Pigot, that if a power be reserved to make leases by a covenant without transmutation of possession, the Chancery shall not help, because the first is void in law, if upon transmuta-[30]-tion of possession, and the power be not precisely followed, that doubtful, and rather most strong against help; for then the estate works, and the power gone; and upon wills no help: *causa patet antea*, fol. 1, and difference *inter* will and testament; testament requires executors; will of lands (11th October, 1 Jac. [1603]).

[Mews' Dig. tit. Powers, XX. Power of Leasing, *e.* Reversionary Leases.]

MERICK *v.* —.

Decree against infants.—Young purchased lands in the name of one Mason, to the use of him and his heirs, dying without declaring any settled determination of this trust or confidence: Dethicke, a kinsman, procures Mason to convey the lands to him, and he conveys it over to infants; Merick, a nearer kinsman, sues in Chancery, as next heir; if the benefit of the trust appear to appertain to Merick, notwithstanding the conveyance to infants being decreed for them, they shall hold by the decree during the minority. And a proviso for the infants to assure at full age, per Cook, attorney *veniendo de Westm.* and there appearing no certain disposing thereof, it was ordered that Mason should repay the money he had for making the conveyance to Dethicke, and Merick to have the lands ordered for him (11th October, 1 Jac. [1603]).

ANONYMOUS.

Amending of answers.—Those who are curious to have the defendants to amend their answers, ordered first by the Lord Chancellor to put in sureties in Court, for proof of the contents of their bills, according to the statute, 15 Hen. 6. or *Juramentum Calumniæ*, were better perchance (13th November, 1 Jac. [1603]).

ANONYMOUS.

Misdemeanor in commissioners, how to be reformed.—Commission to examine witnesses, went out to Sir Alexander Brett and Others, who made certificate against Sir Alexander, of partial proceedings: Philipps, Serjeant, moved at the Rolls for [31] a commission to others to examine in whom the misdemeanor was, in Sir Alexander, or in the certifiers, *et fuit negatum*, for such collateral certificates are not required of the commissioners, but let them certify the matters committed to their charge; and if there be misdemeanor, let the party wronged thereby make affidavit thereof, and then take out his attachment (13th November, 1 Jac. [1603]).

[Mews' Dig. tit. Evidence, VII. Examination of Witnesses under Commission or Mandamus, 5. The Commissioners, *d. Misconduct.*]

ANONYMOUS.

Deeds, how to be proved.—A release was offered to be disposed, that it had been seen by some at the bar, it being affirmed that by casual means it was lost; but the Lord Chancellor said, the oath should be, that he saw it sealed and delivered, and not that he saw it after it was a deed: for in Munson, the Justice, his case, a deed was brought into the Chancery, and a *vidimus* upon it, being but a counterfeit copy; and after the fraud discovered, and the true deed produced; therefore none allowance to be given of a deed, without producing the deed, or proving the execution thereof; and here appeareth what want we have of notaries and their deputies (16th November, 1 Jac. [1603]).

ANONYMOUS.

Leases of corporations, wherein their names are mistaken by themselves.—The Dean and Chapter of Bristol made sundry leases, misreciting the name of their Corporation, and an intricate case of sundry such leases made of one thing to divers men; wherein the Lord Chancellor said, that it was fit to help such leases in Chancery, being for reasonable time, and upon good consideration; *contra*, of long leases, without consideration of fine or good rent; and that Judges might have done well at the first to have expounded the law so, with averment, that they were the same parties, [32] and so was the old law till now of late, especially where the mistaking arose on their part, who had the keeping of the evidences, the which the leases could not see, but must take a lease by the college clerk, in a writ where you may have anew, no harm to abate it for a misnomer; and yet in that case sometimes in old times an averment of *comer per lieu nosme et l'auter*, where they were sued by others, and not named so by themselves (23d November, 1 Jac. [1603]).

[Mews' Dig. tit. Corporation, A. I. Corporate Name and Description, B. X. Contracts By and With, *d. Leases by*; tit. Landlord and Tenant, E. Leases, 12. Rectification (see *Slocombe v.* —, Ch. Ca. Ch. 108; *Croydon Hospital v. Farley*, 1816, 2 Marsh. 174).]

DEVON (EARL) *v.* HAULE.

Leases to be holpen in Chancery against patentees.—Haule had a duchy lease gotten upon untrue surmises; and the King bestowed the land upon the Earl of Devon, for his service done in Ireland. This lease the Earl sought to avoid by the law; Haule prays to have the matter examined in Chancery, and to have the suit stayed by injunction; which was denied, for that the lease was granted by fraud, and the fee-simple to the Earl in possession, and not in reversion; *et nota*, that the Lord Chancellor said, that where lands are granted in reversion, if the grantee will avoid the lease for a rent paid, but not at the day, in that case he will relieve; but not where the lease is granted upon a false suggestion, for that were to relieve fraud in the Chancery: it was further objected, that this grant was made to the Earl, upon consideration of service done; and the Lord Chancellor said, that the service done to the realm was as valuable, as if the Earl had given five hundred pounds for the land, but the Earl offered to give the lessee one thousand pounds recompense in honour (23d Jan. 1 Jac. [1604]).

[Mews' Dig. tit. Landlord and Tenant, E. Leases, 10. Setting aside.]

ANONYMOUS.

Chancellor calling the Judges into the Exchequer Chamber, upon remainders of a lease.—In a case moved by Mr. Chamberlaine, where the Lord Chancellor had referred the matter to be tried at the common law, touching remain-[33]ders upon a lease, whether good in law or no, and the Judges had given Judgment upon the case, in another point, in the King's Bench, so as the Lord Chancellor remained still uncertain of that point, called the Judges into the Exchequer Chamber (1 Jac. [1603]).

GARNESTON v. BRADWELL.

Costs against the defendant and clerk that made process before a bill in Court.—Forasmuch as the plaintiff hath served process upon the defendant to appear in this Court, Return, 15 Mich. and exhibited no sufficient bill against him, and further for mere examination, sued out a writ of attachment against the defendant, before the return of the subpoena; it is ordered that the plaintiff shall pay unto the defendant ten shillings costs; and also that Hugh Tildesley, who made the process against the defendant without a sufficient bill, shall pay unto the defendant other ten shillings for his costs; William Garneston, plaintiff; Thomas Bradwell, defendant (Anno 5 Hen. 6 Philip & Mary, fol. 11 [? 5 & 6 Philip & Mary, 1558]).

GRAVENOR v. BREARTON.

Publication of witnesses in perpetuum rei memoriam a year past.—Forasmuch as a commission to examine witnesses in *perpetuum rei memoriam*, issued out of this Court, and the witnesses examined by virtue thereof, have remained in Court by the space of a year, it is ordered, that publication shall be granted; Richard Gravenor and John Gravenor, plaintiffs; Bryan Brearton, defendant (Anno 5 & 6 Philip & Mary, fol. 12 [1558]).

[Mews' Dig. tit. Evidence, VIII. Perpetuation of Testimony, 4. Publication and User of Depositions.]

ANONYMOUS.

Consil.—Episcop. Cicestriens. publication of witnesses in *perpetuum rei memoriam* (Anno 5 & 6 Philip & Mary, fol. 30 [1558]).

WILLINGTON v. AGAR.

Consil.—Willington, plaintiff; Agar, defendant; publication of witnesses remaining since 33 Hen. 8, fol. 42 [1541-42]; Anno 5 & 6 Philip & Mary [1558]).

[34] GEOFFRY v. GEOFFRY.

An injunction is granted against the defendants, to deliver to the plaintiff certain plate contained in their petition, or else to appear and shew cause in *curr. anim. proc.* (Anno 5 & 6 Philip & Mary, fol. 13 [1558]). David Geoffry and John Geoffry, plaintiffs, and Thomas Davis, defendant.

LINCOLN v. BEVORE.

The manner of entering decrees in times past.—A decree is made for the plaintiff, as by the record thereof, signed with the Lord Chancellor's hand, plainly appeareth; and the said record is delivered to John Millicent, attorney for the plaintiff, to be inrolled; the Dean and Chapter of Lincoln, plaintiff; Bevore and Alice, defendants (Anno 5 & 6 Philip & Mary, fol. 15 [1558]).

GLANFFELL v. STRICKLEY.

Dismissions, and the manner of entering them.—Glanffell, plaintiff; Strickley, defendant; a decree is made for the defendant for dismissal of the cause, as by the record thereof, signed with the Lord Chancellor's hand; and the same put to the inrollment (Anno 5 & 6 Philip & Mary, fol. 22 [1558]).

HATCHAM v. WINCHCOMBE.

Oath made for serving a subpoena before witnesses examined in perpetual memory.—James Jervis hath made oath for the delivery of a subpoena to the defendant, whereby

he hath knowledge that witnesses are to be examined in perpetual memory : so that he may, if he will, examine the same witnesses in this Court : therefore the examiners in this Court may proceed to the examination of the said witnesses accordingly : Hatcham, plaintiff ; Winchcombe, defendant (5 & 6 Philip & Mary, fol. 19 [1558]). [Mews' Dig. tit. Evidence, VIII. Perpetuation of Testimony. 3. Taking Evidence.]

PORTER v. BAKER.

Commission to examine in perpetual memory.—Porter, plaintiff ; Baker, defendant : the examiner may proceed to examination of witnesses in perpetual memory ; if the plaintiff have served a subpoena upon the defendant, to give him no-[35]tice to examine likewise (Anno 5 & 6 Philip & Mary, fol. 32 [1558]).

[Mews' Dig. tit. Evidence, VIII. Perpetuation of Testimony. 3. Taking Evidence.]

BAGSHAW v. —.

Forasmuch as the plaintiff hath taken oath in this Court, that there are sundry witnesses contained in the schedule exhibited in this Court, which he desireth to have examined in perpetual memory, so impotent and sick, that they are not able to travel up to be examined in Court, without danger of their lives : therefore a commission is awarded to Sir Humfrey Bradburn, Knt., to examine the same witnesses in perpetual memory : Bagshaw, plaintiff ; —, defendant (Anno 5 & 6 Philip & Mary, fol. 22 [1558]).

[Mews' Dig. tit. Evidence, VIII. Perpetuation of Testimony. 3. Taking Evidence.]

ROBINS v. FOSTER.

Consil.—Robins, plaintiff ; Foster, defendant : a commission is granted to examine witnesses in the country, being impotent, in perpetual memory (Anno 5 & 6 Philip & Mary, fol. 26 [1558]).

[Mews' Dig. tit. Evidence, VIII. Perpetuation of Testimony. 3. Taking Evidence.]

ROW v. GUYBONE.

Costs for a witness served to testify before the Mayor of London.—The plaintiff is adjudged to pay to the defendant costs three pounds, for that he was served to appear before the Lord Mayor of London, to testify in the matter depending before the said Lord Mayor, between the plaintiff, and one John Gresham, and others, without any precept directed from the Lord Mayor unto the said defendant to appear : Row and Alice, plaintiffs ; Thomas Guybone, defendant (Anno 5 & 6 Philip & Mary, fol. 24 [1558]).

MANLYE v. SIMCOTE.

Publication of witnesses to be used at a Court Baron.—John Manlye hath taken oath, the deposition of witnesses examined on the behalf of the plaintiff, and remaining in this Court, are to be given in evidence at a Court Baron, holden at Potton, in the county of Bedford, on Monday next : therefore publication is granted : William Manlye, clerk, plaintiff ; Thomas Simcote, defendant (Anno 5 & 6 Philip & Mary, fol. 24 [1558]).

[36] AYLAND v. BACON.

Injunction to stay proceedings in judgment or execution.—An injunction is awarded against the defendant, to stay his proceedings in the Sheriff's Court, of London, or elsewhere, upon debt of one hundred pounds, not to proceed to trial, judgment, or to execution, if judgment be given : John Ayland, plaintiff ; Francis Bacon, defendant (Anno 5 & 6 Philip & Mary, fol. 29 [1558]).

HASTINGS v. JUGGES.

Feme sole takes out a subpoena, and then marrieth and serveth it ; she and her husband pay costs.—Forasmuch as the plaintiff served process upon the defendant, by the name of Margaret Hastings, and at that instant was married to William Brown : and also for want of a bill : therefore the said William Brown and Margaret are adjudged to pay to the defendant twenty shillings costs : Margaret Hastings, plaintiff ; Nicholas Jugges, defendant (Anno 5 & 6 Philip & Mary, fol. 30 [1558]).

THOMAS v. HOELL.

Commission to take the defendants answer upon a languidus, returned.—Forasmuch as the Sheriff of Denbigh hath returned a *languidus* in prison, therefore a commission is awarded to Richard Griffiths and Others, to take the answer of the defendant : John ap Thomas, plaintiff ; Englarard Hoell, widow, defendant (Anno 5 & 6 Philip & Mary, fol. 33 [1558]).

HAWKES v. CHAMPION.

Injunction to put the defendant in such possession as he had at the time of the bill exhibited.—Forasmuch as the defendant was in possession of the lands at the time of the bill exhibited, and the plaintiff hath since entered ; therefore an injunction is granted to the defendant against the plaintiff, to avoid the possession : William Hawkes, and Jennit his wife, plaintiffs ; John Champion and Others, defendants (Anno 5 & 6 Philip & Mary, fol. 35 [1558]).

[Mews' Dig. tit. Injunction, B. In what Cases granted, 8. To quiet Possession.]

MANNERING v. SMALLWOOD.

Jurisdiction of Wales rejected.—It is ordered, the plaintiff shall, between this and Friday next, bring into this Court a certificate from the officers of the Queen's house, or otherwise ; whereby this Court may credibly understand, that his attendance in Court is neces[sar]y, and that he cannot conveniently be absent ; or if he cannot so do, then the matter is remitted to the determination of the commissioners in the marches of Wales : Philip Mannering, plaintiff ; Henry Smallwood and Alice, defendants (Anno 1 Eliz. fol. 51 [1558–59]).

Consil.—Mannering, plaintiff ; Smallwood and Alice, defendants ; for want of a certificate, that the plaintiff's attendance in Court is necessary, the cause is dismissed into the marches of Wales (Anno 1 Eliz. fol. 62 [1558–59]).

PULVERTOST v. PULVERTOST.

Injunction to stay suit of execution of land, which he agreed not to do.—The plaintiff's husband was bound in a statute of one hundred and sixty pounds to pay one hundred and sixty pounds ; and after by indenture the defendant did grant unto the plaintiff's husband, that if he failed in the payment of the said one hundred and sixty pounds, the same should be levied of certain lands, then the said plaintiff's husband's lands, called Stirbeck, and some other lands specially named, lying in Hawthorn, in the county of Lincoln ; the husband died, and the defendant sued execution as well of other lands in the occupation of the plaintiff's late husband, as of the said lands mentioned in the indenture. And Sir Nicholas Bacon, Lord Keeper of the Great Seal of England, granted an injunction against the defendant immediately to remove from the possession of all the other lands, except of those only contained in the indenture ; and that he should quietly suffer the plaintiff to enjoy the same : Margaret Pulvertost, widow, plaintiff ; and Gilbert Pulvertost, defendant (Anno 1 Eliz. fol. 51 [1558–59]).

CHRISTOPHERUS v. CHOMELY.

Injunction with a clause (si ita sit).—An injunction was granted to the plaintiff, upon the surmises of his bill, with this clause (*si ita sit*) that the plaintiff be in possession by good [38] conveyance in law as he allegeth. *Nota*, it was then usual to grant instructions upon surmises, with a proviso (*si ita sit*) Fodringham Christopherus, plaintiff ; Richard Chomely, defendant (Anno 1 Eliz. fol. 67 [1558–59]).

[Mews' Dig. tit. Injunction, C. Practice relating to, 8. Form.]

LANGLEY v. MARK.

A guardian admitted the defendant infant.—Forasmuch as the defendant is under age, and by inspection not above the age of fifteen years ; therefore George Wyatt is by this Court named, and appointed guardian to the defendant : Hugh Langley, plaintiff, and Philip Mark, defendant (Anno 1 Eliz. fol. 73 [1558–59]).

BOLES v. WALLEY.

A commission to put the plaintiff in possession, injunction being dissolved or disobeyed.—A commission is awarded to the Sheriff of Nottingham and Derby, to put the plaintiff in possession of certain lands, for which he formerly had an injunction against the defendants, which they have disobeyed: William Boles, plaintiff; Richard Walley and Alice, defendants (Anno 1 Eliz. fol. 84 [1558–59]).

RICHE v. FOARD.

The defendant enjoined in open Court not to proceed in his action.—The defendant is enjoined in open Court, upon pain of £200, not to proceed any further in an action upon the case, by him commenced in the King's Bench against the plaintiff, nor that he procure the jury to be sworn in the issue, but only to record their appearance until to-morrow; at which time further order shall be taken by the Court; George Riche, plaintiff; Edmond Foard, defendant (Anno 1 Eliz. fol. 88 [1558–59]).

ROVE v. WEST.

Attachment against the defendant, and a subpoena against one supposed to beat the server.—Upon information the defendant disobeyed a writ of subpoena brought to be served against her, and that they which should have served the said writ, were beaten and wounded; therefore an attachment was granted against the defendant, and a subpoena against Edmond Pirton; returned immediate: William Rove and Rose his wife, plaintiffs; Agnes West, widow, defendant (Anno 1 Eliz. fol. 90 and 97 [1558–59]).
[Mews' Dig. tit. Contempt of Court, 4. Interference with Officer of Court.]

[39] PYKE v. GRAUNT.

The plaintiff was in execution at the suit of the king, and being no just cause, therefore he was delivered by supersedeas.—Where the said Edward Pyke hath of long time been, and yet is in execution upon a statute, at the suit of the late King Edward the Sixth; forasmuch as upon the examination of the matter before the Lord Keeper of the Great Seal of England in open Court, it manifestly appeareth, that there was not just cause why the said Pyke should remain in execution, as Gilbert Gerrard, and Rosewell, esquire, the Queen's Majesty's attorney and solicitor general, being present, did confess and agree: it is therefore now ordered, that a writ of supersedeas be directed to the Warden of the Fleet, in whose custody the said Pyke now is, commanding him by the same, forthwith upon the receipt thereof, to deliver out of prison the body of the said plaintiff; provided always before his deliverance he be bound to Her Majesty by recognizance in one hundred pounds, not only to make his further appearance to answer Her Highness any thing hereafter shall happen to be laid to his charge concerning the said execution; but also to stand to, and obey all such order and determination as the said Lord Keeper of the Great Seal and this Court shall hereafter take in the matter in variance between him and the said Graunt: Edward Pyke, plaintiff, Robert Graunt, defendant (Anno 1 Eliz. fol. 166 [1558–59]).

SPICER v. PAKINE.

The husband and wife, defendants, he only appears and demurs, attachment against both.—Pakine the husband only appeared, and put in a demurrer in both their names, without oath of impotency, or otherwise, for non-appearance of Joan his wife: whereupon an attachment is awarded against the defendants: Thomas Spicer and Catherine his wife, plaintiffs; John Pakine and Joan his wife, defendants (Anno 1 Eliz. fol. 170 [1558–59]).

[40] HODGE v. SMITH.

A demurrer put in, and the defendant appeared not in person, a subpoena to make direct answer.—Thomas Hodge, plaintiff; W. Smith, defendant: the defendant demurred by his counsel not appearing in person, therefore a subpoena was awarded against him to make a direct answer (Anno 1 Eliz. fol. 230 [1558–59]).

SEDGEWICK v. REDMAN.

Attorney at law enjoined not to proceed or call for judgment.—John Jackson, attorney for the defendant, at the common law is in open Court enjoined, that neither he, nor any other by his means, do further proceed in an action of trespass commenced against the plaintiff, and depending at the common law, nor call for judgment, until further order shall be therein taken by the Lord Keeper of the Great Seal of England, and High Court of Chancery: John Sedgewick and Alice, plaintiffs: William Redman, defendant (Anno 1 Eliz. fol. 212 [1558–59]). [See S. C. *post*, Cary, 44.]

KNOT v. JACKSON.

An injunction granted for not appearing, and to stay proceedings at the common law.—The plaintiff served the defendant with a subpoena to appear in Chancery, whereof he made oath: and because the defendant did not appear, an injunction was awarded against the defendant, his counsellors and attorneys, upon pain of two hundred pounds, not to proceed in judgment in an action of debt of forty pounds in the Common Pleas against the defendant (Anno 1 Eliz. fol. 213 [1558–59]). Thomas Knot, plaintiff; Thomas Jackson, defendant.

WADE v. GWYE.

A commission to examine witnesses upon oath of impotency.—David Eyre was served with a subpoena *ad testificandum* for the plaintiff in a cause depending in this Court, and Thomas Eyre made oath, that the said David Eyre was, at the serving of the said subpoena upon him, and yet is, so sick, that he is not able to travel hither to testify: therefore a commission is granted to such commissioners as the plaintiff will nominate to examine him: John Wade, plaintiff; Gwyne and Alice, defendant (Anno 1 Eliz. fol. 240 [1558–59]).

[Mews' Dig. tit. Evidence, VII. Examination of Witnesses under Commission or Mandamus, 4. When Witness within Jurisdiction, a. Examination of *De bene esse*, ii. In what Cases.]

[41] RICHERS v. STILMAN.

A defendant appearing gratis, an attachment being out, was committed.—An attachment was awarded against the defendant for his not appearance upon oath, he was served with a subpoena, who now appeared gratis, and would have excused himself that he had no notice of the subpoena; but he that served the subpoena deposed, he did hang the same upon the defendant's door, and within half an hour after, saw him abroad with a writ in his hand, which he supposed to be the subpoena: therefore he is committed to the prison of the Fleet: Bernard Richers, plaintiff; Thomas Stilman, defendant (Anno 1 Eliz. fol. 249 [1558–59]).

GEORGE v. BOLINGTON.

The defendant served with a subpoena the day of the return.—The defendant was served with a subpoena the day of the return; and for his not appearance an attachment was awarded against him, and upon oath that he was served six score miles off, so as he could by no possibility appear, therefore a commission is awarded to take their answers in the country, paying the plaintiff six shillings and eight pence for his costs: Henry George, plaintiff; and Henry Bolington and Joane Deane, defendants (Fol. 255).

HOBBY v. KEMP.

An injunction to discharge an execution, for that the defendant being served did not appear.—An injunction is granted to discharge an execution by *elegit* taken by the defendant out of this Court, for that he being served with a subpoena did not appear: William Hobby, plaintiff; Francis Kemp, defendant (Anno 1 Eliz. 274 [1558–59]).

HUMBLE v. MALBE.

A witness served to testify, pressed for a soldier, attachment is stayed.—The plaintiff served one Rolfe with a subpoena *ad testificandum*, and after he was served, before he could be examined, Rolfe was pressed for a soldier: upon oath made hereof, attachment

was stayed : Richard Humble and Anne his wife, plaintiffs ; William Malbe, defendant (Anno [? Primo] Eliz. fol. 3 [? 1558-59]).

[Mews' Dig. tit. Evidence, V. Attendance of Witnesses, 8. Remedy for Non-Attendance, *a. Attachment.*]

[42] ASCHUGHE v. SKELTON.

Injunction (si ita sit) to stay judgment and execution.—The plaintiff sets forth by his bill, that where there was a suit depending in the Duchy Court, between the defendant and Christopher Aschughe, his brother, for certain lands ; it was agreed, and the plaintiff was bound to the defendant in one hundred pounds, that the said Christopher should become bound by obligation in the sum of one hundred pounds, the 10th day of June following, and should then also make unto him a release ; and the defendant was also bound by obligation in fifty pounds, to pay the said Christopher a sum of money the 9th of June in the parish church of Dale. And because both the days of performance of the conditions of the said several obligations were so near together, therefore it was agreed, that when the defendant paid his money, the said Christopher should make his bond and release ; and sheweth that the ninth day of June, the defendant came not himself, but sent his servant to pay the money ; and Christopher was there ready to make the bond and release to the defendant, and offered to deliver the same to the defendant's servants, but they refused to accept thereof ; and afterward the said Christopher offered the same to the defendant, but he likewise refused to receive the same, and yet puts the plaintiff's bond of one hundred pounds in suit in the King's bench ; hereupon an injunction is granted with a clause (*si ita sit*) to stay all further prosecution of any action in any the Queen's Courts at the common law, or elsewhere, upon the bond of one hundred pounds against the plaintiff ; and also the taking of any *nisi prius*, or judgment, or execution upon judgment, if judgment be already given upon the same bond, until the defendant have made a perfect [43] answer, and the Court take other order : Aschughe, plaintiff ; Skelton, defendant (Anno 2 Eliz. fol. 9 & 12 [1559-60]).

BARENTINE v. HARBERT.

A commission to the examiner of the Court to examine witnesses.—A commission is awarded to Thomas Ward, one of the examiners of this Court of Chancery, for the examining of witnesses in perpetual memory, in which commission the defendants may examine, if they think good : Barentine, plaintiff ; Harbert and Alice, defendants (Anno 2 Eliz. fol. 46 [1559]).

[Mews' Dig. tit. Evidence, VIII. Perpetuation of Testimony, 3. Taking Evidence.]

MAYOR AND ALDERMEN OF LONDON v. DORMER.

A subpoena to appear before the Mayor and Aldermen of London, for an orphan's portion.—The defendant was bound by recognizance to the Chamberlain of London, for payment of divers sums of money for orphans portions ; and departed out of this city, and dwelt in Oxfordshire, leaving no estate behind him in the city ; so as the process of the city cannot take hold ; therefore a subpoena is granted against him upon pain of one hundred pounds, to appear before the Mayor and Aldermen, and to stand to their order : Mayor and Aldermen of London, plaintiffs ; John Dormer, defendant (Anno 2 Eliz. fol. 5 [1559-60]). Afterwards fol. 67, ordered, if he do not appear, an attachment is granted.

BROWN v. SMITH.

An order for bringing evidences into Court.—Sir Humphrey Brown, Knt., one of the Judges of the Common Pleas, is plaintiff against the defendant ; and an order is made for bringing in and delivering into the Court of certain evidences : Sir Humphrey Brown, Knt., plaintiff ; Thomas Smith, defendant (Anno 2 Eliz. fol. 53 [1559-60]).

ANONYMOUS.

Decrees and dismissions entered at large.—*Nota*, that dismissions were entered at large (Anno 2 Eliz. [1559-60], fol. 55 and fol. 56). A decree was entered at large in the register's book ; which be the first I find entered at large in that kind, and so after divers others.

DUTTON v. ALERSEY.

A writ of privilege granted to a soldier.—The defendant appeared upon a subpoena, [44] and answered the plaintiff's bill, and after attended upon the Lord Keeper, for a matter in controversy between him and one Ellin Wryne; and in the meantime being arrested in London, at the suit of one Anthony Brisket, contrary to the order and privilege of this Court; it is therefore ordered, That a subpoena of privilege be granted to the Mayor and Sheriffs of London, for the discharge of the said arrest: Richard Dutton, plaintiff; William Alersey, defendant (Anno 2 Eliz. fol. 58 [1559-60]).

STRADLING v. PEMBROKE (EARL OF).

The Sheriff amerced £5 for return non est inventus, upon an attachment having been in presence of the party.—Forasmuch as Thomas Harbert, Sheriff of Monmouthshire, hath returned *non est inventus*, upon an attachment awarded against Roger Williams, who is a Justice of Peace, and as is informed, was at the last Quarter Sessions holden for the same county; therefore the Sheriff is amerced five pounds: Sir Thomas Stradling, Knt., plaintiff; William Earl of Pembroke, defendant (Anno 2 Eliz. fol. 84 [1559-60]).

[Cf. Arnold v. Roberts, 1577, Ch. Cas. 115.]

SEGEWICK v. REDMAN.

The attorney ordered to stay proceedings, the defendant proceedeth; injunction to bring in the money levied, and to answer the contempt.—The defendant's attorney at law was enjoined to stay his proceedings at law against the plaintiff in an action of trespass. And notwithstanding this, the defendant himself proceeded and got judgment, and took out a *levari facias* against the plaintiff; and an injunction was granted against the defendant himself, to stay the execution of the same writ of *levari facias*; or if he had executed it, and levied the damage and costs, that then he should bring all the money thereupon received into the Court of Chancery *in Crastina Ascensionis Domini*, to be disposed of as the Court shall think fit; and yet, notwithstanding himself should be then present in Court to answer the contempt: John Segewick, plaintiff; William Redman, defendant (Anno 2 Eliz. fol. 92 [1559-60]). [See S. C. ante, Cary, 40.]

[45] DOWCHE v. PERROT.

Injunction for the defendant's possession.—The defendant was in possession at the time of the bill exhibited, and the plaintiff entered upon him after the bill, therefore an injunction for the defendant against the plaintiff: William Dowche, plaintiff; John Perrot, defendant (Anno 2 Eliz. fol. 99 [1559-60]).

[Mews' Dig. tit. Injunction, B. In what Cases granted, 8. To quiet Possession.]

STANEBRIDGE v. HALES.

Injunction to stay all proceedings at common law.—An injunction was granted against the defendant upon pain of one hundred pounds, that he should not prosecute an action of debt of five pounds, or any writ of *nisi prius*, jury, judgment, or execution of judgment, if judgment be given, before the Justices of either Bench, until special licence be given by this Court: Thomas Stanebridge, plaintiff; Thomas Hales, defendant (Anno 1 Eliz. fol. 103 [1558-59]). [See S. C. Cary, 48, 49.]

FYFIELD v. VIMORE.

The defendant examined upon interrogatories, and if the matter appeared not for the plaintiff, then he to pay costs, and the cause dismissed.—Forasmuch as it is informed, the trial of the truth of the matter resteth altogether in the declaration of the defendant; it is therefore ordered that the defendant shall be examined upon interrogatories to be ministered by the plaintiff, upon whose examination if the matter fall not out for the plaintiff, then the plaintiff to pay the defendant costs, and the cause to be dismissed: John Fyfield, plaintiff; John Vimore and Alice, defendants (Anno 2 Eliz. fol. 122 [1559-60]).

[Mews' Dig. tit. Evidence, V. Attendance of Witnesses, 6. Expenses and Conduct Money, a. Tender and Payment.]

FINCHAM v. BLACKWOOD.

Defendant dismissed with costs, the plaintiff not appearing at the hearing.—The plaintiff at the day appointed for hearing appeared not, therefore the defendant is dismissed with costs: Richard Fincham, plaintiff; William Blackwood, defendant (Anno 2 Eliz. fol. 125 [1559–60]).

COLVERWELL v. BONGEY.

Decreed that the defendant shall acknowledge satisfaction of a judgment.—The defendant, notwithstanding an injunction delivered unto him, got a judgment upon an action of debt in the Common Pleas: and decreed upon the hearing of the cause that the defendant shall within fourteen days next after the decree, resort to the record in the Common Pleas, whereupon the said judgment is [46] entered, and there to confess of record a full satisfaction of the said judgment. *Nota*, the action of debt in the Common Pleas was, for not delivering to the defendant a statute, which, by the depositions of witnesses, appeared to be delivered, and by the clerk of the staples certificate, the record was discharged: Nicholas Colverwell, plaintiff; Ralph Bongeay, defendant (Anno 2 Eliz. fol. 126 [1559–60]).

FIELDING v. WREN.

A decree for a fold-course, or common of pasture.—It is decreed, the plaintiff, his heirs and assigns, and his or their farmers of the said farm or tenement, called Stubbles, shall from henceforth hold and enjoy, as appendant to the same farm or tenement, called Stubbles, all the same fold-course, or common of pasture, for the full number of three hundred sheep within the said fields of Wentforth alias Wentford: Basill Fielding and Alice, plaintiffs; Thomas Wren, defendant (Anno 2 Eliz. fol. 137 and 155 [1559–60]).

[Mews' Dig. tit. Common, I. Rights, 1. Common of Pasture, a. Appendant and Appurtenant.]

ALNETE v. BETTAM.

Two defendants contend for a tenement; the tenant paying his rent into the Chancery, is discharged.—The plaintiff exhibited his bill, thereby shewing that there is question and controversy between two defendants, for the reversion of the manor of Aldwell, which he holdeth for years by lease, made thereof to him by one Anthony Marmyon, and that he doth not know to which of them the rent and reversion is due, and therefore desireth, that upon payment of his rent into this Court, according to the covenants and articles of his lease, he may be discharged, and saved harmless from molestation, suit, and trouble for the same rents by the defendants, or either of them; wherefore it is ordered, an injunction be awarded against the defendants, not to molest the plaintiff for his said rent during the said contention, so as the plaintiff pay his rent into [47] this Court: John Alnete, plaintiff; Christopher Bettam and Edmond Marmyon, defendants (Anno 2 Eliz. fol. 141 [1559–60]).

PEACOCK v. COLLENS.

Setting down depositions in a wrong sense suppressed, and the witnesses examined again.—Upon hearing of the matter, three witnesses examined by commission did in open Court depose, that the commissioners have set down their depositions otherwise than they did depose: therefore it is ordered those depositions shall be void, and the same witnesses shall be examined again: John Peacock, plaintiff, Edward Collens, defendant (Anno 2 Eliz. fol. 146 [1559–60]).

[Mews' Dig. tit. Evidence, VII. Examination of Witnesses under Commission or Mandamus, 14. Depositions, d. Suppressal of, iii. Other Grounds.]

SAPCOTE v. NEWPORT.

Injunction for the plaintiff's possession as at the time of the bill, and three years before.—For that the Court was credibly informed, the plaintiff was in peaceable possession at the time of the bill exhibited, and three years before, an injunction is awarded: John Sapcote, plaintiff, William Newport, defendant (Anno 2 Eliz. fol. 173 [1559–60]).

[Mews' Dig. tit. Injunction, B. In what Cases granted, 8. To quiet Possession.]

BURTET v. REDMAN.

An award made by justices of assizes ordered to be performed.—The suit was concerning the custom of tenant right for lands in Dent, in the county of York; and for that both parties confessed, that Justice Dallison, and Serjeant Rastall, Justices of assizes in that county, had made an award in the cause between the parties, therefore it was decreed that both parties should perform it; and an injunction is granted to either party against the other for that purpose; and where an injunction was the last term granted against the defendant for stay of execution upon a judgment in the Common Pleas; it is ordered the said injunction shall stand in force, and the defendant shall obey the same, and the defendant shall answer the plaintiff's bill: William Burtet and Alice, plaintiffs: William Redman, defendant (Anno 2 Eliz. fol. 174 [1559-60]).

[Mews' Dig. tit. Injunction, C. Practice relating to, 6. Continuing.]

STANBRIDGE v. HALES.

Injunction to stay suits if the plaintiff bring £223 into Court; execution to stay for the rest.—It is ordered, the injunction formerly granted [48] against the defendant, for stay of his action in the King's Bench be dissolved, and the defendant to be at liberty to take judgment upon his action of debt of five hundred pounds. Provided if the plaintiff do bring into Court on Monday next, two hundred and twenty-three pounds, then execution for the rest is to be suspended until this Court take other order: Thomas Stanbridge, plaintiff: Thomas Hales, defendant (Anno 2 Eliz. fol. 176 [1559-60]).

[Mews' Dig. tit. Appeal, III. To Court of Appeal, 9. c. On what Terms. See S. C. Cary, 45, 49.]

BAGNOLD v. GREEN.

Witnesses examined by commission before answer, in regard they were old.—The plaintiff exhibited his bill in this Court, and before the defendant answered, had a commission to examine his witnesses, upon pretence the witnesses were old and in danger to die: Sir Radnus Bagnold Miles, plaintiff: Green, defendant (Anno 2 Eliz. fol. 178 [1559-60]).

[Mews' Dig. tit. Evidence, VII. Examination of Witnesses under Commission or Mandamus, 4. When within the Jurisdiction, iv. At what Stage. S. C. Dick. 2.]

KIDNERE v. HARRISON.

The plaintiff after bill, answer, and replication, distraineth, for which an injunction is granted.—The defendant first exhibited her bill in this Court, for land conveyed to her in jointure, and evidences of the same land, and after did molest the same plaintiff by distresses, after answer and replication put into this Court, therefore an injunction is granted: Richard Kidnere, plaintiff: Agnes Harrison, defendant (Anno 2 Eliz. fol. 173 [1559-60]).

[Mews' Dig. tit. Distress, A. For Rent and Charges on Land, 15. Injunction restraining Distress.]

HILTON v. LAWSON.

Certiorari to remove the suit from the Chancery of Durham into this Court.—The plaintiff setteth forth, that his father and he are jointly seised for life of the lordship of Barrington, in the county Palatine of Durham; and that the defendant sues his father for those lands before the Chancellor of Durham, and for that it was informed that the plaintiff dwelleth in Ratcliffe, in the county of Middlesex, and that the plaintiff's father is an old diseased man, and not able to follow his suit; therefore a *certiorari* is granted; directed to the Chancellor of Durham, to certify into this Court the whole matter depending before him: William Hilton and Alice, plaintiffs: Robert Lawson and [49] William Lawson, defendants (Anno 2 Eliz. fol. 200 [1559-60]).

NORTH v. KELEWICH.

Injunction to stay judgment upon certificate of the justices of assizes.—The plaintiff being son and heir to his father, who died intestate, entered into the house whereof his father died seised in fee, and possessed himself of certain small parcels of goods, to the value of five shillings of his father's goods who died intestate; and the defendant

having an obligation of four hundred pounds made by the father unto him for performing the covenants of an indenture, sued the son as executor to his father (who died intestate) and upon the testimony of some witnesses, that the plaintiff had sold or given away the said small parcels of goods, a verdict passed for the defendant for the whole four hundred pounds, which appeared by certificate of the justices of assizes; and thereupon an injunction was granted to stay judgment, and all other actions to be commenced by the defendant against the plaintiff upon the same obligation, until the matter be heard, or otherwise determined by the Court: Edward North, plaintiff; George Kelewich, defendant (Anno 2 Eliz. fol. 237 [1559-60]).

HALES v. STANEBRIDGE.

Injunction dissolved if cause be not shewed.—It is ordered, if the defendant shew not cause on Friday next, then the injunction before granted for the defendant against the plaintiff, to stay his execution in the King's Bench, shall be dissolved, or else the money for which the plaintiff lieth in execution at the defendant's suit shall remain in his hands, in part of payment of such money as is due unto him by the defendant; and afterwards upon Friday, because the Lord Keeper did not sit in Court to hear such cause as was offered, further day was given, and afterwards the plaintiff was left at liberty to call [50] for execution upon the judgment, because the defendant shewed no cause: Thomas Hales, plaintiff; Thomas Stanebridge, defendant (Anno 2 Eliz. fol. 244 [1559-60]). [See S. C. Cary, 45, 48.]

BILL v. BODY.

Injunction to stay the defendant's suit at law, because he began in Chancery.—The defendant exhibited his bill into the Chancery, for certain lands, and afterwards sued the plaintiff in the Common Pleas for the same lands, before the matter was determined in the Chancery; therefore an injunction was awarded against the said Body, to stay his proceedings in the Common Pleas: Robert Bill and Thomas Gifford, plaintiffs; John Body, defendant (Anno 2 Eliz. fol. 263 [1559-60]). [S. C. Dick. 1.]

ROSSE v. LASSELS.

The plaintiff being in execution upon a statute, was delivered upon recognizance.—The Under-Sheriff of Middlesex, brought into this Court the body of the plaintiff, by commandment of the Lord Keeper, in execution upon a writ of extent of three hundred pounds, together with the said writ, at the suit of Sir Edmond Maliverer, Knt., and by order of Court he was taken from the Sheriff of Middlesex, and delivered in execution to the warden of the Fleet, for the three hundred pounds, and because the defendants shewed no good cause to the contrary upon a day given them; therefore it was ordered, that upon recognizance by the plaintiff, and good sureties, to stand to the order of the Court, or else to yield his body prisoner to the Fleet in execution, and there to remain until the defendant be satisfied, he, the plaintiff, shall have liberty to go at large; and that the defendant shall not sue for any manner of execution, by force of the said execution: Robert Rosse, plaintiff; Christopher Lassels and Alice, defendants (Anno 3 Eliz. fol. 90 [1560-61]).

BROOKE v. APPRICE.

The plaintiff had execution for £300 and ordered to take execution for £100 only.—The plaintiff had judgment in the King's [51] Bench, against the defendant upon a bond of two hundred pounds, and another judgment for three hundred pounds, upon an action of debt of arrearages of account in the King's Bench; and ordered they may proceed with execution upon the bond of £200, and also to take execution of £100, parcel of the £300, provided always, and it is ordered, the plaintiff shall not in anywise proceed, nor take execution of the £200 residue of the £300 recovered upon the account, without special licence of the Court: John Brooke and Catherine his wife, plaintiffs; Thomas Apprice, defendant (Anno 3 Eliz. fol. 233 [1560-61]).

BOULT v. BLUNT.

A de vilaica removenda, for part of a parsonage, and an injunction for the house.—The plaintiff sheweth by his bill, that the parsonage of Thekelye was holden by force, whereby the plaintiff could not be inducted; whereupon a writ of *de vilaica removenda*

was awarded out of this Court, and thereby the plaintiff put in possession by the Sheriff; nevertheless the defendant keepeth the possession of the said house appertaining to the parsonage; and for that the plaintiff is bound to pay his first-fruits to the Queen's Majesty, therefore an injunction is granted against him: Thomas Boulton, clerk, plaintiff; Sir George Blunt, Miles and Alice, defendants (Anno 3 Eliz. fol. 262 [1560-61]).

HARRISON v. CHOMELEY.

Injunction for the corn sowed upon a lease parcel.—The plaintiff made title to the lands by a lease parcel made by the defendant unto him, whereupon he did sow the ground with corn, and the defendant entered upon him; therefore the plaintiff had an injunction for the corn: Thomas Harrison, plaintiff; Richard Chomeley, Miles and Alice, defendants (Anno 3 Eliz. [1560-61]), for three hundred pounds.

LITTON v. COUPER.

Decree for three shillings and fourpence rent service and suit of Court.—It is decreed, the defendant and his heirs [52] shall from time to time yearly pay to the plaintiff and his heirs, lords of the manor of Knebworth, the rent of three shillings and fourpence for the piece of ground called the Hawte, together with the arrearages thereof since the 6th of Edw. 6. And shall from henceforth do suit and service to the Court of the plaintiff and his heirs, owners of the said manor; and the plaintiff and his heirs shall have and receive the fines and amercements presentable in the Court of the manor, for any trespass, or lack of service done by the tenants of the said Hawte: Richard Litton, plaintiff; John Couper, defendant (Anno 6 Eliz. fol. 145 [1563-64]).

FAIREFIELD v. GREENFIELD.

The plaintiff married before answer, and no advantage taken, therefore no bill of revivor.—It is ordered a subpoena be awarded against the defendant to be examined upon interrogatories, whether before his answer he had knowledge that the plaintiff was married, and would take no advantage of the same marriage in his answer, then the matter to proceed without bill of revivor: Christian Fairefield, plaintiff; Robert Greenfield, defendant (Anno 6 Eliz. fol. 150 [1563-64]).

PANNELL v. HODGSON.

Advowson passeth not by livery, within view of the church, without deed, there being incumbent.—The question of the case drawn was, whether the advowson in question did pass by the livery made in the view of the church without deed or not (the church being full of an incumbent) and resolved by the Lord Chief Justice of the King's Bench, and Justice Manwood, to whom the same was referred, that the advowson could not pass by that livery: Pannell, plaintiff; Hodgson, alias Hodson, defendant (Anno 18 & 19 Eliz. [1576]).

[Mews' Dig. tit. Ecclesiastical Law, V. Advowson and Presentation, 1. Advowson.]

WILFORD v. DENNY.

A duces tecum to bring in deeds, but ordered to be delivered to the usher of the Court, not to the plaintiff.—A subpoena *duces tecum* was awarded against the defendant to bring in certain deeds, and to shew cause why the same should not be delivered [53] to the plaintiff; the defendant by his counsel shewed, that the mortgage was upon condition for payment of forty pounds at a day; and before the day the mortgagor sold the same over to the plaintiff, and delivered the estate by livery and seisin, whereby the condition was extinct; and yet the defendant offered to give for the same one hundred pounds. It is ordered that the evidences be delivered to the usher of the Court, but not to the plaintiff, without special order: Wilford, plaintiff; Denny, defendant (Anno 18 & 19 Eliz. [1576]).

[Mews' Dig. tit. Evidence, V. Attendance of Witnesses, 3. Subpoena *duces tecum*, a. Generally.]

STUKLY v. LUTTERELL.

The defendant took a commission, and returned a demurrer, ordered to answer.—The plaintiff exhibited his bill to be relieved for a promise, supposed to be made by

the Lady Lutterell for a lease of certain lands, and for stopping certain ways: the defendant had a commission to take her answer, and demurred, for that the plaintiff may have his remedy by law; which cause seems insufficient, and not to be allowed of: and the rather, for that the defendants having a commission to take their answers in the country did demur: therefore a subpoena is awarded against them to make a better answer: Stukly, plaintiff; the Lady Lutterell and alias, defendants (Anno 18 & 19 Eliz. [1576]).

LEAKE v. MARROW.

Attachment for not performing a decree.—Stephen Smith made oath, that he was present when one John Maddock made these persons hereinafter named privy to a writ of execution, upon a decree made for the plaintiff, viz. John Ward, John Priddock, Henry Pinly, Lawrence Banks, John Kiddermaster, and William Tuttle; and the said Maddocks left the same writ with one Thomas Smith, from whom the defendant confesseth the receipt of the said writ, [54] which said parties have not performed the said decree; therefore an attachment is awarded against them: Leake, plaintiff; Marrow, defendant (Anno 18 & 19 Eliz. [1576]).

BURGH v. WENTWORTH.

The defendants, executors to their father, being guardian in socage to the plaintiff, are ordered to answer for profits taken by him.—The bill is against the defendants as executors to their father, who in his lifetime being guardian in socage to the plaintiff, in right of the plaintiff's mother, whom he married, for and concerning profits by him taken of the lands of the plaintiff during his minority, for fines of leases, wood-sales, and wilful decay of houses, and doth aver assets sufficient to be come to their hands; the defendants demur, because not privy, nor chargeable by law, but ordered to answer: Burgh, plaintiff; Wentworth, defendant (Anno 18 & 19 Eliz. [1576]).

[Mews' Dig. tit. Executor and Administrator, XIII. Proceedings by or against, *b.* 2. Account; tit. Infant, H. Guardian, 4. Duties and Powers, *c.* Accounts; tit. Trust and Trustee, C. The Trustee, 11. Liabilities of Trustees for Breaches of Trusts, iii. Deceased Trustees.]

BARLOW v. BAKER.

Subpœna delivered to the defendant's wife in his house, sufficient.—Thomas Stapleton made oath, that he delivered a subpoena to the defendant's wife, being in the defendant's house, who hath not appeared: therefore an attachment is awarded: Barlow, plaintiff; Baker, defendant (Anno 18 & 19 Eliz. [1576]).

[Mews' Dig. tit. Husband and Wife, XI. Actions by and against Husband and Wife, 2. Procedure, Pleadings, and Practice, *c.* Other points of Practice.]

BLACKWALL v. LOW.

A year's value allowed upon surrender of copyhold land.—It is decreed by assent, that the defendant being lord of the manor of Alderswasley, shall have for a fine of a copyholder upon a surrender, one whole year's value, as the same is reasonable worth, according to the usual rates of lands in that country: Blackwall and Alice, tenants of the Manor of Alderswasly, plaintiffs; Low, defendant (Anno 18 & 19 Eliz. [1576]).

YOUNG v. BURRELL.

The plaintiff sueth for tokens he delivered to the defendant, as a suitor in marriage, and obtaineth them.—The defendant confesseth by her answer, the having of a tablet or pomander in gold, demanded by the plaintiff; and as to the twenty pounds likewise demanded by the plaintiff, by him left with the said defendant as a token, at such time as he was a suitor for marriage to the defendant, [55] she confesseth the same was left with her against her will, and she delivered the same over unto one Sydole her brother, who was a dealer with her on the plaintiff's behalf, to the end he should deliver the same over to the plaintiff. It is ordered, the tablet be forthwith delivered by the defendant to the plaintiff, which was done presently in Court; and as to the twenty pounds the plaintiff shall call in the said Sydole by process: Young, plaintiff; Burrell and Elizabeth *uxor ejus*, defendants (Anno 18 & 19 Eliz. [1576]).

HOLDEN v. CLERK.

A bill against a copy of Court roll indirectly entered, the defendants demur, but ordered to answer.—The plaintiff by his bill sheweth, that the copy of the Court roll whereby the defendants pretend title, was indirectly entered by the steward's clerk of the manor; the defendants demur, for that the plaintiffs shall not be received by surmise to object against, or impeach the said Court rolls; and allegeth further, the copy was found by the homage to be true, which causes seem to this Court very insufficient: It is therefore ordered, if cause be not shewed before Wednesday for maintenance of the demurrer, then a subpoena is awarded against the defendants to make answer: Holden and Holden, plaintiffs; Clerk and Alice, defendants (Anno 18 & 19 Eliz. [1576]).

HEINES v. WINDSOR (DEAN OF).

Variance in a bill of revivor from the first bill dissolved.—The plaintiff hath exhibited his bill of revivor against two, where the first bill was against three; and the personage in question is named by another name than in the former bill: therefore ordered, if cause be not shewed by a day, the defendant shall be discharged: Heines, plaintiff; William Day, Dean of Windsor, and Hatchines, defendants (Anno 18 & 19 Eliz. [1576]).

WHITE v. LOWGHER.

Jurisdiction of Oxford rejected, one of the defendants being not resident there.—William Lowgher appeared and answered, but [56] Robert Lowgher claimed the privilege of the university of Oxford; but because the said Doctor Lowgher was joined with William Lowgher in the bill, who was not subject to the same jurisdiction: therefore ordered process to be awarded against him, to shew other cause why he should not answer: White, plaintiff; Robert Lowgher, Doctor of Divinity, and William Lowgher, defendant (Anno 18 & 19 Eliz. [1576]).

[Mews' Dig. tit. University, 5. Other Matters.]

JONES v. JONES.

Prosecuting contempt after a general pardon, to pay costs.—The defendant is adjudged to pay to the plaintiffs forty shillings costs, for suing out process of contempt against him, being discharged by Her Majesty's general pardon: Jones and Parris, plaintiffs; Jones, defendant (Anno 18 & 19 Eliz. [1576]). There is more precedents of the like case.

JEAMES v. MORGAN.

Subpoena hanged on the door of a house where the defendant resorted.—Walter James made oath, that he hanged a subpoena on the door of one Stacy Barry, widow; and that the defendant used to resort thither, as he heard reported before that time, who hath not appeared; therefore an attachment was awarded: James, plaintiff; Morgan, defendant (Anno 18 & 19 Eliz. [1576]).

WALFORD v. WALFORD.

Witnesses examined by fraud suppressed, and the practisers to be proceeded against by bill.—The plaintiff exhibited his bill against the defendant, by practice of purpose to examine witnesses, and did examine witnesses accordingly, whereas the cause chiefly concerned one Thomas Staunton, and William Bayles; and therefore ordered, that the depositions should be suppressed, and that the said Staunton and Bayles shall exhibit a bill into this Court, against all such as they think to be parties to the fraudulent abusing of this Court: Walford, plaintiff; Walford, defendant (Anno 19 Eliz. [1576-77]).

[Mews' Dig. tit. Evidence, VII. Examination of Witnesses under Commission or Mandamus, 14. Depositions, *d.* Suppressal of, iii. Other Grounds; tit. Fraud and Misrepresentation, I. What amounts to, 4. Concealment, *a.* Of Facts.]

HAMETHESON v. TOUNSTALL.

Jurisdiction of Lancaster allowed.—It is informed, that the parties dwell in the county palatine of Lancaster, and the matter of the bill is for a supposed trespass,

in entering [57] upon the defendant's lands, and consuming the grass and hay upon the same, which this Court doth not use to hold plea of: therefore ordered, if it be true, then the cause is dismissed, and the plaintiff to take his remedy in the county palatine of Lancaster: Hametheson, plaintiff; Tounstall, Covell, Rigmaden, and Baldwin, defendants (Anno 19 Eliz. [1576-77]).

BARKER v. BARKER.

Suit to have the defendant perform an award.—The plaintiff's suit is to have an award made (by Master Tilbey, and Mr. Chambers, arbitrators indifferently chosen) performed, and both parties were bound each to other for the performance of the award; and one part of the award was, that if any question did grow between the parties, the arbitrators should end it; it is ordered, a subpoena to shew cause: Lancelot Barker, plaintiff; Peter Barker, defendant (Anno 19 Eliz. [1576-77]).

JACKSON v. SMITH.

Two defendants, the one taketh a husband, the plaintiff puts in a bill of revivor against husband and wife, and they discharged with costs.—The plaintiff exhibiteth a bill of complaint against Luce and Maulde, two of the defendants; and after commission Maulde marrieth John Bourne the other defendant, and the plaintiff then exhibited a bill of revivor against the defendants, which needeth not, as it seemeth to this Court; therefore ordered, if there be no cause of revivor, that Bourne and his wife, who are called up by process to answer the same bill, are licensed to depart without answer to the bill of revivor; and the plaintiff to pay him such costs as this Court shall award: Jackson and Uxor, plaintiffs; Luce Smith, John Bourne, and Maulde his wife, defendants (Anno 19 Eliz. [1576-77]).

LUCAS v. ARNOLD.

The plaintiff ordered not to proceed, till he make one a party, whom the defendant prayeth in aid.—The plaintiff by his bill pretends title to certain lands, and freehold lands, which lands the defendant claims to hold by copy of Court roll to him and his heirs, of one Thomas Stedolph [58] Esquire, lord of the manor of Milcklam, in the county of Surrey, whereof the said lands are parcel; and prayed in aid of the said Stedolph: nevertheless the plaintiff served the said Arnold with process to rejoin, without calling the said Stedolph thereunto, which this Court thinks not meet; therefore ordered, the plaintiff shall no further proceed against the defendant, before he have called the said Stedolph in by process: Lucas, plaintiff; Arnold, defendant (Anno 19 Eliz. [1576-77]).

HOLGATE v. GRANTHAM.

Injunction left at the defendant's house, and disobeyed, an attachment.—The said Holgate maketh oath, he left an injunction in the house of the defendant, and that the defendant, Elizabeth White, Thomas Crimore, and Robert Watkins, have disobeyed the same; therefore an attachment is awarded against them: Holgate and Uxor ejus, plaintiffs; Grantham, defendant (Anno 18 Eliz. [1576-77]).

[Mews' Dig. tit. Injunction, C. Practice Relating to, 9. Service.]

BROWN v. DERBY.

A commission of rebellion, the bond made to the commissioners.—The defendant this day made his personal appearance upon a commission of rebellion, for saving his bond made to the commissioners in that behalf: Brown, plaintiff; Derby, defendant (Anno 19 Eliz.).

ANONYMOUS.

The bond made to the Lord Chancellor, &c.—Commonly it is used to take the bonds in the name of the Lord Chancellor, Lord Keeper of the Great Seal of England, the Master of the Rolls, or to any two of the Masters of the Chancery, all which are good and allowable by the practice of the Court of Chancery.

ANONYMOUS.

Witnesses examined after publication, ad informandum conscientiam judicis.—Upon affidavit made by the plaintiff, that since publication granted he had divers

witnesses, setting down their names, come to his knowledge, which formerly he had not knowledge of; therefore ordered, he may examine them before the examiner, *ad informandum conscientiam judicis*.

[59] BRIGHTMAN v. POWTRELL.

Costs for want of a bill, shewing the subpoena, but delivering no note of the day of appearance, and attachment for such serving.—The plaintiff coming to the defendant, shewed him a writ; but did deliver him neither note of the day of his appearance, neither did the same appear unto him by the schedule, label, or any other paper, and the defendant appearing, found no bill: it is ordered, the defendant be allowed good costs, and an attachment against the plaintiff for such serving: Brightman, plaintiff; Powtrell, defendant (Anno 19 Eliz. [1576–77]).

WILLOUGHBY v. BREARTON.

Jurisdiction of Chester allowed.—The plaintiff called the defendant, dwelling in the county palatine of Chester, by process to answer a bill for lands lying in the said county palatine, contrary to a general order lately certified into this Court by Her Majesty's appointment, touching the said county palatine, according to the said general order: Willoughby, plaintiff; Brearton, defendant (Anno 19 Eliz. [1576–77]). [S. C. Cary, 60.]

WOOD v. TIRRELL.

A covenant to repair a house, the defendant would not suffer it, and demurred, but ordered to answer.—The plaintiff's bill is, that he leased a house to the defendant, and did covenant to build and repair it before a day, which being at hand, and shewed that he had prepared timber and workmen to perform the same; but the defendant, as well to have him break his covenant, as to free himself from his covenant to keep it in reparations, did interrupt and threaten the workmen, whereby they durst not proceed to repair, and so the houses are decayed, and the plaintiff hath no remedy to force the defendant to suffer him to repair: the defendant demurred upon the bill, alleging the plaintiff hath sufficient remedy by law, which kind of answer this Court alloweth not; therefore a subpoena is awarded against the defendant to answer: Wood, plaintiff; Tirrell, defendant (Anno 19 Eliz. [1576–77]).

[Mews' Dig. tit. Covenant, VI. Breach, 2. Relief from Forfeiture.]

[60] WILLOUGHBY v. BREARTON.

Jurisdiction of Chester allowed.—Where it appeared by a book heretofore presented to the Queen's Highness, under the hands of Sir James Dyer, Knight, Lord Chief-Justice of the Common Pleas, Mr. Justice Weston, late a Justice of the same Court, Mr. Justice Harpar, late another Justice of the same Court, and Mr. Justice Carus, late a Justice of Her Majesty's Bench, and remaining (by force of Her Majesty's warrant) of record in the Court of Chancery, touching the jurisdiction of the county palatine of Chester; that before the reign of King Henry the third, all pleas of lands and tenements, and all other causes and contracts, and matters residing and growing within the said county palatine of Chester, are pleadable, and ought to be pleaded and heard, and judicially determined within the said county palatine of Chester, and not elsewhere out of the said county palatine; and if any be heard, pleaded, or judicially determined out of the same county, then the same is void, and *coram non jndice*; (except it be in case of error, foreign plea, or foreign voucher,) and also that no inhabitant within the said county palatine, by the laws, liberties, and usages of the same, be called or compelled by any writ or process to appear, or answer any matter or cause out of the said county palatine for any the causes aforesaid (as by the said book among other things more at large appeareth) and where now of late the plaintiff hath exhibited a bill of complaint into this honorable Court, for and concerning certain lands and tenements lying within the said county palatine, and hath taken process against the said defendant in that behalf, who [61] hath thereupon appeared, and by his counsel made request to this Court, that for the causes aforesaid the matter here exhibited against him might be from henceforth dismissed; wherefore forasmuch as William Saylor hath made oath, that the said lands do lie within the said county palatine, and that the said defendant is inhabiting and dwelling within the said county; therefore the said

cause is from henceforth dismissed, and remitted to the Chamberlain of Chester, and other Her Majesty's ministers there, according to the tenor of the same book: Willoughby Miles, plaintiff; Brearton, defendant (Anno 19 Eliz. [1576-77]). [See S. C. ante, Cary, 59.]

BATT v. ROOKES.

A subpoena served to testify in the Guildhall, and not appearing an attachment.—Jearvis Wheatly made oath for the serving of a subpoena upon the defendant, to testify on the behalf of the plaintiff at the Guildhall in London, who hath not thereupon appeared; therefore an attachment is awarded against him: Batt, plaintiff; Rookes, defendant (Anno 19 Eliz. [1576-77]).

[Mews' Dig. tit. Evidence, V. Attendance of Witnesses, 8. Remedy for Non-Attendance, a. Attachment.]

HARRISON v. HAULE.

A bill against Roger Haule, and another Roger Haule was served, he must shew it by plea, and not by motion.—A bill was exhibited by the plaintiff against Roger Haule, supervisor of the last will of Thomas Clifton, and one Roger Haule was served with process, that was no supervisor of the said Clifton's will, and alleged that the said Roger Haule, who was the supervisor, was dead; and ordered the defendant shall put in his allegation upon oath by way of answer, and then desire judgment, whether he shall be compelled to answer the said bill or not; and therein pay his costs for his wrongful vexation, which shall be thereupon allowed to him: Harrison, plaintiff; Haule, defendant (Anno 19 Eliz. [1576-77]).

[Mews' Dig. tit. Practice, A. In High Court of Justice, XVI. Motions and Rules, a. In what Cases.]

PEARCE v. CRAWTHORN.

Costs to witnesses served to testify.—The plaintiffs are adjudged to pay to the defendants twenty shillings costs, coming upon process [62] of subpoena to testify on their behalf; and having no charges tendered unto them, nor any interrogatories put in for them to be examined upon: Pearce and Uxor ejus, plaintiffs; Crawthorn and White, defendants (Anno 19 Eliz. [1576-77]).

BELGRAVE v. HERTFORD (EARL OF).

Costs paid to a witness before he be examined.—Lawrence Hide, gentleman, being called upon by process by the plaintiff to testify, informed this Court, that he was ready to depose, so that he might first have his costs to him allowed, which this Court thought reasonable: Belgrave, plaintiff; Edward Earl of Hertford, and William Drury, defendants (Anno 19 Eliz. [1576-77]).

BERD v. LOVELACE.

A solicitor served with process to testify, ordered not to be examined.—Thomas Hawtry, gentleman, was served with a subpoena to testify his knowledge touching the cause in variance; and made oath that he hath been, and yet is a solicitor in this suit, and hath received several fees of the defendant; which being informed to the Master of the Rolls, it is ordered that the said Thomas Hawtry shall not be compelled to be deposed, touching the same, and that he shall be in no danger of any contempt, touching the not executing of the said process; Berd, plaintiff; Lovelace, defendant (Anno 19 Eliz. [1576-77]).

[Mews' Dig. tit. Evidence, VI. Examination of Witnesses, 8. Privilege, a. Legal Professional Confidence, ii. Solicitors.]

THORNE v. BREND.

A man and wife exhibit their bill, the wife dies, the defendant demurs, for that there is no bill of revivor, ordered to answer.—The plaintiff exhibited his bill, as well in his own, as in his wife's name, concerning a promise made by the defendants to the plaintiff and his wife, to make them a lease of the manor of Appescourt during their lives, the defendants demur, for that the plaintiff ought to have a bill of revivor against them, for that his wife is dead since the bill exhibited; which cause of demurrer this Court alloweth not, for that the promise was made during the coverture, and the

witnesses, setting down their names, come to his knowledge, which formerly he had not knowledge of; therefore ordered, he may examine them before the examinor, *ad informandum conscientiam judicis*.

[59] BRIGHTMAN v. POWTRELL.

Costs for want of a bill, showing the subpoena, but delivering no note of the day of appearance, and attachment for such serving.—The plaintiff coming to the defendant, shewed him a writ; but did deliver him neither note of the day of his appearance, neither did the same appear unto him by the schedule, label, or any other paper, and the defendant appearing, found no bill: it is ordered, the defendant be allowed good costs, and an attachment against the plaintiff for such serving: Brightman, plaintiff; Powtrel, defendant (Anno 19 Eliz. [1576–77]).

WILLOUGHBY v. BREARTON.

Jurisdiction of Chester allowed.—The plaintiff called the defendant, dwelling in the county palatine of Chester, by process to answer a bill for lands lying in the said county palatine, contrary to a general order lately certified into this Court by Her Majesty's appointment, touching the said county palatine, according to the said general order: Willoughby, plaintiff; Brearton, defendant (Anno 19 Eliz. [1576–77]). [S. C. Cary, 60.]

WOOD v. TIRRELL.

A covenant to repair a house, the defendant would not suffer it, and demurred, but ordered to answer.—The plaintiff's bill is, that he leased a house to the defendant, and did covenant to build and repair it before a day, which being at hand, and shewed that he had prepared timber and workmen to perform the same; but the defendant, as well to have him break his covenant, as to free himself from his covenant to keep it in reparations, did interrupt and threaten the workmen, whereby they durst not proceed to repair, and so the houses are decayed, and the plaintiff hath no remedy to force the defendant to suffer him to repair: the defendant demurred upon the bill, alleging the plaintiff hath sufficient remedy by law, which kind of answer this Court alloweth not; therefore a subpoena is awarded against the defendant to answer: Wood, plaintiff; Tirrell, defendant (Anno 19 Eliz. [1576–77]).

[Mews' Dig. tit. Covenant, VI. Breach, 2. Relief from Forfeiture.]

[60] WILLOUGHBY v. BREARTON.

Jurisdiction of Chester allowed.—Where it appeared by a book heretofore presented to the Queen's Highness, under the hands of Sir James Dyer, Knight, Lord Chief-Justice of the Common Pleas, Mr. Justice Weston, late a Justice of the same Court, Mr. Justice Harpar, late another Justice of the same Court, and Mr. Justice Carus, late a Justice of Her Majesty's Bench, and remaining (by force of Her Majesty's warrant) of record in the Court of Chancery, touching the jurisdiction of the county palatine of Chester; that before the reign of King Henry the third, all pleas of lands and tenements, and all other causes and contracts, and matters residing and growing within the said county palatine of Chester, are pleadable, and ought to be pleaded and heard, and judicially determined within the said county palatine of Chester, and not elsewhere out of the said county palatine; and if any be heard, pleaded, or judicially determined out of the same county, then the same is void, and *coram non judice*; (except it be in case of error, foreign plea, or foreign voucher,) and also that no inhabitant within the said county palatine, by the laws, liberties, and usages of the same, be called or compelled by any writ or process to appear, or answer any matter or cause out of the said county palatine for any the causes aforesaid (as by the said book among other things more at large appeareth) and where now of late the plaintiff hath exhibited a bill of complaint into this honorable Court, for and concerning certain lands and tenements lying within the said county palatine, and hath taken process against the said defendant in that behalf, who [61] hath thereupon appeared, and by his counsel made request to this Court, that for the causes aforesaid the matter here exhibited against him might be from henceforth dismissed; wherefore forasmuch as William Sayler hath made oath, that the said lands do lie within the said county palatine, and that the said defendant is inhabiting and dwelling within the said county; therefore the said

cause is from henceforth dismissed, and remitted to the Chamberlain of Chester, and other Her Majesty's ministers there, according to the tenor of the same book : Willoughby Miles, plaintiff ; Brearton, defendant (Anno 19 Eliz. [1576-77]). [See S. C. ante, Cary, 59.]

BATT v. ROOKES.

A subpoena served to testify in the Guildhall, and not appearing an attachment.—Jearvise Wheatly made oath for the serving of a subpoena upon the defendant, to testify on the behalf of the plaintiff at the Guildhall in London, who hath not thereupon appeared ; therefore an attachment is awarded against him : Batt, plaintiff ; Rookes, defendant (Anno 19 Eliz. [1576-77]).

[Mews' Dig. tit. Evidence, V. Attendance of Witnesses, 8. Remedy for Non-Attendance, a. Attachment.]

HARRISON v. HAULE.

A bill against Roger Haule, and another Roger Haule was served, he must shew it by plea, and not by motion.—A bill was exhibited by the plaintiff against Roger Haule, supervisor of the last will of Thomas Clifton, and one Roger Haule was served with process, that was no supervisor of the said Clifton's will, and alleged that the said Roger Haule, who was the supervisor, was dead ; and ordered the defendant shall put in his allegation upon oath by way of answer, and then desire judgment, whether he shall be compelled to answer the said bill or not ; and therein pay his costs for his wrongful vexation, which shall be thereupon allowed to him : Harrison, plaintiff ; Haule, defendant (Anno 19 Eliz. [1576-77]).

[Mews' Dig. tit. Practice, A. In High Court of Justice, XVI. Motions and Rules, a. In what Cases.]

PEARCE v. CRAWTHORN.

Costs to witnesses served to testify.—The plaintiffs are adjudged to pay to the defendants twenty shillings costs, coming upon process [62] of subpoena to testify on their behalf ; and having no charges tendered unto them, nor any interrogatories put in for them to be examined upon : Pearce and *Uxor ejus*, plaintiffs ; Crawthorn and White, defendants (Anno 19 Eliz. [1576-77]).

BELGRAVE v. HERTFORD (EARL OF).

Costs paid to a witness before he be examined.—Lawrence Hide, gentleman, being called upon by process by the plaintiff to testify, informed this Court, that he was ready to depose, so that he might first have his costs to him allowed, which this Court thought reasonable : Belgrave, plaintiff ; Edward Earl of Hertford, and William Drury, defendants (Anno 19 Eliz. [1576-77]).

BERD v. LOVELACE.

A solicitor served with process to testify, ordered not to be examined.—Thomas Hawtry, gentleman, was served with a subpoena to testify his knowledge touching the cause in variance ; and made oath that he hath been, and yet is a solicitor in this suit, and hath received several fees of the defendant ; which being informed to the Master of the Rolls, it is ordered that the said Thomas Hawtry shall not be compelled to be deposed, touching the same, and that he shall be in no danger of any contempt, touching the not executing of the said process ; Berd, plaintiff ; Lovelace, defendant (Anno 19 Eliz. [1576-77]).

[Mews' Dig. tit. Evidence, VI. Examination of Witnesses, 8. Privilege, a. Legal Professional Confidence, ii. Solicitors.]

THORNE v. BREND.

A man and wife exhibit their bill, the wife dies, the defendant demurs, for that there is no bill of revivor, ordered to answer.—The plaintiff exhibited his bill, as well in his own, as in his wife's name, concerning a promise made by the defendants to the plaintiff and his wife, to make them a lease of the manor of Appescourt during their lives, the defendants demur, for that the plaintiff ought to have a bill of revivor against them, for that his wife is dead since the bill exhibited : which cause of demurrer this Court alloweth not, for that the promise was made during the coverture, and the

examiners, to travel to the plaintiff's house in Wiltshire, sixty miles distant [67] from London, and there hath examined witnesses ; it is ordered, that publication be stayed until the matter be examined after publication is granted ; Darrall, plaintiff ; and Stukely, defendant (Anno 19 Eliz. [1576-77]).

ANONYMOUS.

The plaintiff's father seised in fee, with a condition to re-enter, deviseth for life —A duces tecum.—The plaintiff's father did purchase in fee-farm to him and his heirs, the manor of Long-Eason, in the county of Derby, of one Kymwelmarsh, rendering eight pounds rent, with a condition of re-entry for non-payment of the rent, deviseth the land to another for life : A *duces tecum* for the evidences (Anno 19 Eliz. [1576-77]).

DUGDELL v. ORDELL.

The defendant licensed to depart after issue.—Forasmuch as the defendant hath appeared in this Court upon an attachment of privilege, and attended from day to day according to his bond made in that behalf, and hath also pleaded an issue to the plaintiff's declaration ; therefore the defendant is licensed to depart : Dugdell, plaintiff ; Ordell, defendant (Anno 20 Eliz. [1577-78]).

YOUNG v. LEIGH.

Trustee ordered to convey the lands according to the trust.—The defendant by his answer confesseth he was joint-purchaser in trust with the plaintiff's father, to them two, and to the heirs of the plaintiff's father, of the lands in question ; and that he never received any profits thereof ; and that he meant at the plaintiff's full age to convey the lands to the plaintiff and his heirs, according to the trust ; it is ordered and decreed, the defendant shall forthwith upon notice to him given, convey his estate in the lands to the plaintiff, and the heirs of his body begotten, with such remainder over, as in the last will and testament of the plaintiff's father is expressed, at the costs of the plaintiff : Young, plaintiff ; Leigh, defendant (Anno 20 Eliz. [1577-78]).

EAST v. BITTENSON.

Jurisdiction of the Exchequer rejected, for that one of the defendants had no privilege there.—Bittenson, one of the defendants, demurred, for [68] that he was a clerk of the Exchequer, and ought to be privileged there ; and the said Mary demurred without shewing any cause ; forasmuch as it was openly affirmed by the common voice of the officers of the same, that the said Bittenson may be impleaded in this Court, notwithstanding any privilege in the Exchequer ; and for that likewise, if there were any such cause of privilege, yet he could not have the same in this suit by reason another party who ought not to have any such privilege is joined with him ; therefore a subpoena is awarded against the defendants to answer : East and Seudamore, plaintiffs ; Bittenson and Mary Valence, defendants (Anno 20 Eliz. [1577-78]).

PHILIPS v. BENSON.

The defendant in a bill of perjury after answer, ought to be examined upon interrogatories—It is ordered, that in a bill of perjury put in against the defendant, he having put in his answer, should not depart until he be examined upon interrogatories, according to the general order and course in that behalf accustomed ; for it was affirmed by the officers of this Court, that by the order and custom of this Court, he ought to be examined upon interrogatories : Philips, plaintiff ; Benson, defendant (Anno 20 Eliz. [1577-78]).

SYERS v. COTTS.

The plaintiff requires the defendant to appear, shewing no writ, and no bill in Court, hath 20s. costs.—The defendant made oath, the plaintiff came to him on Easter day last in Barrington church, and commanded him in the Queen's name to appear in Chancery, the 17th day after ; which said defendant demanded the process, and the plaintiff answered him, he was to serve another, and therefore would not leave him any note for his appearance, and yet upon his appearance no bill was found in Court ; therefore the plaintiff is adjudged to pay him twenty shillings costs ; Syers, plaintiff ; Cotts, defendant (Anno 20 Eliz. [1577-78]).

[69] CROKER v. HAMBDEN.

Affidavit for serving a subpoena.—Robert Hodgeson made oath, that he left a subpoena to make a better answer upon the door of the lodging of the said defendant, being at the sign of the Maidenhead, without Temple Bar, whereas both by the report of divers of the neighbours thereabouts, as by the recourse of her servants to and fro at the same time, by all presumptions, she the said defendant was then in the said house, and yet she hath not made a better answer; therefore an attachment is awarded against the defendant: Croker, plaintiff; Hambden, defendant (Anno 20 Eliz. [1577-78]).

PARVY v. MORGAN.

The defendant hath no cost, because the subpoena is lost, but attachment is stayed.—The said defendant hath this present term appeared upon a subpoena, at the plaintiff's suit, 15 Pascha, and no bill in Court: and for that the defendant hath lost the said subpoena, he cannot demand his charges for want of the said bill; it is ordered, no process of contempt issue out of this Court against the defendant upon the said subpoena: Blanch Parvy, plaintiff; Morgan, defendant (Anno 20 Eliz. [1577-78]).

GRAY v. GURNEY.

Costs for want of a bill.—The defendant made oath, that one of the plaintiff's servants shewed him a subpoena *tres Pascha* return, but would not deliver him the writ or label; and now upon the defendant's appearance, there is no bill against him in Court; therefore costs: Gray, plaintiff; Gurney, defendant (Anno 20 Eliz. [1577-78]).

ARCHBALD v. BORROLD.

The defendant disclaiming, no witnesses to be examined, touching the death of another.—The defendant by his answer disclaimed of the clerkship of the peace in question, and confessed thereby that he delivered all the records, and titlings of sessions, which he had, to Mr. Trentham, *custos rotulorum* in the county of Stafford; and yet the plaintiff hath replied to the same, to examine the manner of assault, and other [70] matters touching the death of one Ashbrook, and goeth about to examine witnesses thereupon; it is ordered, that if cause be not shewed to the contrary, that no witnesses shall be examined touching the manner of assault or death of Ashbrook, or circumstances thereof: Archbald, plaintiff; Borrold, defendant (Anno 20 Eliz. [1577-78]).

LOVELL v. HOPKINS.

The defendant bound to pay money at one place, pleads payment at another not good.—The defendant in a *scir. fac.* upon a recognizance to pay one hundred pounds, at Martine, in the county of Surrey, pleaded payment at Bristow, where the justice of assize without special commission cometh not, to the intent only to delay the party; therefore it is ordered, the defendant shall by Friday next, either be sworn to his said plea, or else put in such a sufficient issuable plea as he will stand unto, at his peril: Lovell, plaintiff; Hopkins, defendant (Anno 20 Eliz. [1577-78]).

RUTHEL v. LITTON.

A demurrer to a bill of revivor ordered to answer.—The defendant demurred upon a bill of revivor exhibited by the plaintiffs against her, for that she was a woman covert during the time the first suit depended; but ordered to answer for that she was party to the suit with the said Twynnehoe her husband: Ruthel and *Uxor ejus*, plaintiffs; Dom. Elizabeth Litton, late wife to Edward Twynnehoe, defendant (Anno 20 Eliz. [1577-78]).

PARROT v. RANDALL.

The wife after the death of her husband sueth a bill of revivor, and good.—The plaintiff and her husband exhibited their bill against the defendant; the husband dieth. the wife now plaintiff, exhibiteth a bill of revivor, and good: Alice Parrot, widow, plaintiff; Randall and Cowarden, defendants (Anno 20 Eliz. [1577-78]).

ANONYMOUS.

To take bond of such as appear upon contempt, to attend from day to day.—It is ordered, that from henceforth no entry be made by any of the attornies into the register's book of this Court, of any appearance of or upon any attachment, or commission of re-[71]-bellion, but that the party so appearing shall first enter into sufficient bond by obligation to this Court, to be taken by the register of this Court, with condition to attend from day to day, and not to depart before he be specially licensed by this Court (Pascha, 20 Eliz. [1578]).

DIXE v. LINTOFT.

The defendant demurs for that there is remedy at common law, but ordered to answer.—The defendant refuseth to answer the receipt of rent, and demurred for that the plaintiff may have remedy by law for the same; therefore ordered a subpoena be awarded to make direct answer: Dixe and Cantrell, plaintiffs; Lintoft, defendant (Anno 20 Eliz. [1577-78]).

WARD v. CROUCH.

Habeas Corpus to the warden of the Fleet, to have the defendant in Court, to be charged with a debt upon a recognizance.—Whereas information was made to this Court, on the behalf of George Stidenham, Esquire, now Sheriff of the county of Somersetshire, that whereas a *capias* upon a recognizance of £133, 6s. 8d. issued out of this Court in Hilary term last, to the Sheriff against the said defendant, the said Sheriff had a *capias* also for a debt due to Her Majesty, to him directed out of the Court of Exchequer, both which *capiasses* the Sheriff returned into the said several Courts the last term a *cepi corpus et languidus in prisona*; whereupon a *duces tecum* issued out of the said Court of Exchequer to the said Sheriff, for bringing in of the body of the defendant into the said Court of Exchequer; whereupon the said Sheriff hath brought up the said defendant, and made request this present day to this Court, that some order might be taken by this Court, that the defendant may remain in execution for the debt of the said plaintiff, after he hath answered his said debt to Her Majesty, so that the said Sheriff may not hereafter be charged by the return made by the *capias* upon the said re-[72]-cognizance in this Court: it is therefore ordered, by the advice of the right honorable the Lord Treasurer, and the Lord Chief-Justice of England being present in Court, that a *habeas corpus* be awarded to the warden of the Fleet, to bring the said defendant into this Court on Thursday next, to the end the said warden may be also charged with the said defendant by this Court, till he have satisfied, or taken order for the payment of the debt due to Her Majesty; and that then he shall keep him in his custody, until he answer unto the plaintiff, this said debt of one hundred and thirty-three pounds six shillings and eight pence: Ward, plaintiff; Crouch, defendant (Anno 20 Eliz. [1577-78]).

GREDLOW v. PRESTWICH.

Costs for the solicitor's charges, in making affidavit for serving process, and the defendant's impotency, no bill being in Court.—Thomas Boulton made oath, that the defendant was served with a billet in paper to appear 15 Trinitat., and no bill in Court against her at the plaintiff's suit; therefore the plaintiff is adjudged to pay the defendant thirty-three shillings and four pence, sustained in sending up the said Boulton, who hath made oath, that she is so impotent, that she is not able to travel up hither thereupon personally: Gredlow, plaintiff; Prestwich, defendant (Anno 20 Eliz. 1577-78)).

SYMONT v. PINSONBY.

Costs for want of a bill upon shewing the writ, but not delivering it.—The plaintiff is adjudged to pay to the defendant forty shillings costs, for want of a bill, for that the defendant made oath the plaintiff shewed a subpoena wherein his name was written, but would not deliver him the same, for that there were others to serve with the same writ: Symont, plaintiff; Pinsonby, defendant (Anno 20 Eliz. [1577-78]).

CLEGGE v. WARBERTON.

Attachment discharged, and a bill of perjury for procuring it indirectly.—John Clegge was served with a subpoena, by the name of Robert Clegge, and John Warberton,

made oath, that he served a subpoena upon Robert Clegge; and an attachment was served upon [73] John Clegge, and ordered that he should be discharged thereof; and might exhibit his bill into this Court, against the said John Warberton, and call him in by process to answer his perjury: Robert Clegge, plaintiff; Thomas Warberton, defendant (Anno 20 Eliz. [1577-78]).

STORY v. PAWLET.

The Lord Chancellor writ his letter to a nobleman that had broken a decree.—A motion for an attachment against the defendant, for breach of a decree and injunction, and ordered by the Lord Chancellor Bromley, that for that time he stayed the granting of the attachment, and vouchsafed to write his letters, requiring him to perform the same, trusting he would have such regard thereunto, as no attachment shall after be required against him: Story, plaintiff; Dominus Pawlet, defendant (21 & 22 Eliz. [1579]).

PARRE v. TIPELADY.

Injunction against the spiritual Court.—A motion, that where the plaintiffs had exhibited their bill to be discharged of a legacy, the defendant since his suit, sued in the spiritual Court; and therefore day to shew cause why an injunction should not be granted: Parre & uxore, plaintiffs; Tipelady & uxore, defendants (Anno 21 & 22 Eliz. [1579]). [S. C. Ch. Ca. Ch. 138.]

WATERS v. BERD.

Attachment upon the defendant's confession he was served.—William Smallwood made oath, the defendant confessed he was served with a subpoena at the plaintiff's suit, who not appeared: therefore an attachment is awarded against the defendant, to the Sheriff of Essex: Waters, plaintiff, and Berd, defendant (Anno 21 & 22 Eliz. [1579]).

COTTON v. MANERING.

Jurisdiction of Oxford allowed.—The defendant, a Master of Art in Oxford, pleaded his privilege of the University under the seal there, and demanded judgment whether he should be driven to answer contrary to the privilege, and the privilege was allowed, and the attachment discharged: Cotton, plaintiff; and Manering, defendants (Anno 21 & 22 Eliz. [1579]).

BAMBOROW v. ALEXANDER.

Decree for copyhold land.—A decree is made for the defendant to enjoy certain lands, as well copyhold, as customary: Bamborow, plaintiff; Alexander, defendant (Anno 21 & 22 Eliz. [1579]).

METHAM v. FAYRBANCK.

Costs for want of a bill, the subpoena being lost.—The defendant made oath, that he was served with a subpoena at the plaintiff's suit to appear in this Court; and that he hath lost by casualty the subpoena; and upon his appearance, there was no bill in Court against him, at the said plaintiff's suit: therefore the plaintiff is adjudged to pay the defendant forty shillings costs for want of a bill: Domina Edith Metham, plaintiff; Michael Fayrbanc, defendant (Anno 21 & 22 Eliz. [1579]). [S. C. Cary, 77; Ch. Ca. Ch. 133, 139.]

TOWNLY v. OSNEY.

Dismission because under forty shillings per annum.—For that it appeared as well by the plaintiff's bill, as that Osney, one of the defendants, hath made oath that the lands in the bill is not worth forty shillings per annum; therefore dismissed generally, and not without costs: Townly & uxore, plaintiffs; Osney & uxore & Parsons, defendants (Anno 21 & 22 Eliz. [1579]).

[Mews' Dig. tit. Court, C. Chancery Jurisdiction.]

EASTCOURT v. TANNER.

Jurisdiction of Wales allowed being under £10.—The defendant made oath, that the plaintiff and defendant are both dwelling within the jurisdiction of the Marches of Wales; and for that it appeareth by the bill, that the money complained for is under ten pounds, therefore the cause is dismissed: Eastcourt, plaintiff; Tanner, defendant (Anno 21 & 22 Eliz. [1579]). [S. C. Ch. Ca. Ch. 139.]

OWEN v. JONES.

Suit retained after judgment and execution.—Debt upon a single bill, satisfied, and the bill not delivered was sued, and execution gotten, and yet retained in Chancery, notwithstanding a motion to be dismissed, because after judgment and execution ; for it was said the [75] judgment and execution may stand, and this suit for that he formerly paid : Owen, plaintiff ; Jones, defendant (Anno 21 & 22 Eliz. [1579]).

PARSONS v. HILFORD.

Costs against the plaintiff for want of a bill.—The defendant maketh oath, that one Rook, served him with a subpoena in the name of the plaintiff, and at his suit, as he affirmed ; but would not deliver neither writ, label, nor note of the day of appearance, but told him, it was to appear the first day of this term, and now no bill in Court ; therefore costs is granted against the plaintiff : Parsons, plaintiff ; Hilford, defendant (Anno 21 & 22 Eliz. [1579]).

ALL SOULS' COLLEGE v. EVERAL.

Commission to set out meet ways for passages.—An order for a commission, to set out meet ways, and cauesages, moved in presence of Mr. Egerton, of counsel with the defendant. *Custos* of All Souls College in Oxford, plaintiff ; Everal and *Aliis*, defendants (Anno 21 & 22 Eliz. [1579]). [S. C. Ch. Ca. Ch. 126.]

GRIFFITH v. JENKIN.

An English bill for perjury.—Upon an oath made for impotency of Jenkin, the defendant in a former suit by the said Goose, by the name of William ap William, they procured a *dedimus potestatem* to take the answer of Jenkin to John Floyd, and William Goose himself, whereas the party was under fifty years of age and not impotent : hereupon the plaintiff exhibits an English bill of perjury into this Court, against the said Goose for perjury, and Jenkin for the procuring of it ; whereupon they being served with a subpoena to answer the perjury, they get a stay of the proceedings from the counsel of the marches ; where, upon motion, Sir Thomas Bromley, Lord Chancellor, marvelled at such their stay, and writ his letters to the said counsel, and granted a new subpoena against the defendants to answer the perjury ; Joan *Uxor* Griffith, plaintiff ; Richard ap Jenkin, [76] and William Goose, defendants (Anno 21 & 22 Eliz. [1579]). [S. C. Ch. Ca. Ch. 133.]

GALLEY v. CAVENDISH.

Injunction to stay judgment in an action of waste.—The bill was to be relieved against a judgment indirectly gotten by Ralph Cavendish in the name of Thomas Cavendish his brother by default in an account of waste ; and because it so appeared, an injunction is granted : Galley, plaintiff ; Ralph Cavendish and Thomas Cavendish, defendants (Anno 21 & 22 Eliz. [1579]).

ROOKE v. STAPLES.

Relief for a trust upon a lease, after it is sold.—The suit was to be relieved upon a lease made to the defendant in trust to the use of the plaintiff : and because it so appeared, it was ordered that the plaintiff should enjoy the lands against the defendant, and all claiming under him, that had notice of the trust : and if the lease were sold to such as had no notice of the trust, then the defendant shall pay to the plaintiff so much money as the lease was worth : Rooke, plaintiff ; Staples, defendant (Anno 21 & 22 Eliz. [1579]).
[Mews' Dig. tit. Trust and Trustee, D. The *Cestui que* Trust, F. Following Trust Property, 3. Relief against Purchasers.]

ADAMS v. DODDESWORTH.

A bill for relief after judgment and execution dismissed.—A bill to be relieved upon a bond after judgment and execution, and because no material matter alleged for maintenance thereof, therefore dismissed : Adams, plaintiff ; Doddesworth, defendant (Anno 21 & 22 Eliz. [1579]).

HAMBY v. NORTHAGE.

A bill upon a promise for leave to dry clothes in a garden, dismissed.—The bill was to be relieved for egress and regress into a garden of the defendant's for drying of clothes, promised by word only by the defendant to the plaintiff: therefore dismissed, for that the Court ought not to be burthened with such small matters: Hamby, plaintiff: Northage, defendant (Anno 21 & 22 Eliz. [1579]).

MORGAN v. EVON.

Attachment for not appearing upon a subpoena.—Guilliam made oath, that he saw a subpoena served on the defendant, who hath not appeared: therefore an attachment: Morgan, plaintiff; Evon, defendant (Anno 21 & 22 Eliz. [1579]).

[77] CROMPTON v. MERIDITH.

Day given to the Sheriff, to return an attachment, upon pain of £5.—An attachment was delivered to the Sheriff to execute, who did not return the same: and upon affidavit of the delivery, a day was given to return the writ, upon pain to be amerced five pounds: Crompton, plaintiff; Meridith, defendant (Anno 21 & 22 Eliz. [1579]).

HAMBEY v. WIGHT.

Consil.—Affidavit made for the delivery of an extent to the Sheriff, which he hath not returned; therefore a day is given to the Sheriff to return the writ, upon pain of ten pounds: Hambey, plaintiff; Wight, defendant (Anno 21 & 22 Eliz. [1579]).

PASCHAL v. SMITH.

Injunction to stay suits, because the Queen was deceived of her fine.—Three bonds put in suit in the King's Bench, and stayed by injunction by order, because the Queen was hindered of her fine: Paschal, plaintiff; Smith Miles, defendant (Anno 21 & 22 Eliz. [1579]).

[Mews' Dig. tit. Crown, D. Crown Grant.]

CALVELY v. PHILIPS.

Consil.—Calvely, plaintiff; Philips, defendant; bonds put in suit in the King's Bench, stayed by injunction, because the Queen was hindered of her fine (Anno 21 & 22 Eliz. [1579]).

KEEM v. MEERE.

The heir is sued to make a lease, for which his elder brother took a fine, or to repay the fine.—The bill prayeth relief against the defendant as brother and heir, for that the plaintiff paid to his brother deceased, a fine of thirty-four pounds for a lease, who died before the same was made; and therefore desireth either to have the lease made by the heir, or his money again; thereupon it is ordered, the defendant shall answer an injunction; Keem alias Mogge, plaintiff; Meere, defendant (Anno 21 & 22 Eliz. [1579]).

FRANCKBLANCK v. METHAM.

The clerk is fined forty shillings for his mistake in making a subpoena.—The defendant got costs for want of a bill, and bespake of Robert Bayles a clerk, a subpoena for those costs, who made her a subpoena *ad sectam*, whereupon the plaintiff got costs: this being moved for discharge of these costs so got—[78]—ten by default of the clerk: It is ordered, that the defendant shall be discharged, and the plaintiff also of the costs gotten by the defendant; and neither of them should have process against the other for the same, but the defendant might take a subpoena against the clerk that made the erroneous process for the forty shillings costs, which she should have had against the plaintiff: Franckblanck, plaintiff; Domina Metham, defendant (Anno 21 & 22 Eliz. [1579]). [S. C. Cary, 74; Ch. Ca. Ch. 133, 139.]

PILGRIME v. READ.

Subpoena delivered to the wife, good.—Oath is made for the delivery of a subpoena to the wife of the defendant at his house, who hath not appeared: therefore an attachment: Pilgrime, plaintiff; Read, defendant (Anno 21 & 22 Eliz. [1579]).

[S. C. Ch. Ca. Ch. 139.]

ROWLES v. ROWLES.

The plaintiff refusing to seal a release, the defendant puts a bond in suit, and stayed by injunction.—The plaintiff desireth to be relieved against an obligation of one hundred pounds, which had an intricate and insensible condition put in suit, for that the plaintiff, being desired by the defendant to seal a release, desired only time to be advised thereof, which the defendant would not yield unto, but hath put the bond in suit, though no ways damnified; and now the plaintiff is ready to seal the release; therefore an injunction is granted: Rowles, plaintiff; and Rowles, defendant (Anno 21 & 22 Eliz. [1579]).

TRUSSEL v. WILLOUGHBY.

Attachment with proclamation discharged, paying the ordinary fee, answer being in before.—The defendant took out a commission to take his answer in the country, and thereby answered, he could not directly answer without sight of evidences, which are in Nottinghamshire, far distant from Dorsetshire; the defendant afterwards made a perfect answer, and yet the plaintiff took out attachment, and attachment with proclamation; both which were discharged, paying the ordinary fees, and two shillings and six pence to the [79] Warden of the Fleet: Trussel *et aliis*, plaintiffs; Willoughby Miles, defendant (Anno 21 & 22 Eliz. [1579]).

COTTON v. CAUSTON.

One executor sueth the other to put in sureties to perform the will.—John Cotton, the plaintiff's brother, devised divers goods to his two sons, to be delivered at their full age, and made the plaintiff and defendant executors; one hundred pounds of the goods came to the plaintiff's hands, two hundred and fifty pounds came to the defendant's hands: the plaintiff desireth, by his bill, that in respect of the trust and joint-charge which may survive, that the plaintiff and defendant may each be bound to the other, to pay the children their portions in their hands at their full age; and if either plaintiff or defendant die before, then the executor shall pay that which was in the testator's hands to the survivor; which this Court thought in conscience to be meet, because the defendant by answer confesseth the trust and receipt of two hundred and fifty pounds. Therefore a subpoena is awarded against the defendant, to shew cause why it should not be decreed: Cotton, plaintiff; Causton, defendant (Anno 21 & 22 Eliz. [1579]).

MARSHAL v. HARWOOD.

The contempt discharged, and a new commission granted to take the defendant's answers.—An attachment and other process of contempt issued out of this Court, for not returning the defendant's answer by commission, is discharged, paying the ordinary fees, because the plaintiff named one commissioner, who refused to join with one of the defendant's commissioners in taking the defendant's answer; and a new commission is granted to indifferent commissioners named by the defendants: Marshal, plaintiff; Harwood, defendant (Anno 21 & 22 Eliz. [1579]).

WOLFE v. CLUMS.

Prohibition for tithes of land held in capite.—It is moved, that where a prohibition was six [80] months since granted for stay of a suit in the Ecclesiastical Court at Hereford, upon surmise the lands are held in *capite*, whereas it appeared by letters patent thereof the lands holden of East Greenwich; therefore consultation, unless cause shewed; and the party to pay double costs according to the statute, whereby the prohibition is granted: Wolfe, plaintiff; Merrick Clums, defendant (Anno).

WHITE v. CARPENTER.

Costs for want of a bill, oath made before the Mayor of Totnes.—Forasmuch as the Mayor of Totnes hath certified, under his common seal, that the defendant made oath before him, that he was served with a billet in paper, at the plaintiff's suit, and upon his appearance, no bill, therefore costs: White, plaintiff; Carpenter, defendant (Anno 21 & 22 Eliz. [1579]).

BISHOP v. JESSOP.

Attorney present in Court enjoined not to proceed at common law.—Brent, an attorney at common law, for the defendant, being present in Court, is enjoined, in open Court, upon pain of two hundred pounds, not to proceed at common law, upon an action of debt, upon an obligation, against the plaintiff : Bishop, plaintiff ; Jessop and Wats, defendants (Anno 21 & 22 Eliz. [1579]).

KNIGHTON v. ALLEN.

Suit for rent of ten shillings.—Forasmuch as the said Thoroughgood made oath, that the matter in the bill is for a portion of rent, of ten shillings by year, being of small value, it is dismissed : Knighton, plaintiff ; Allen and Thoroughgood, defendants (Anno 21 & 22 Eliz. [1579]).

[Mews' Dig. tit. Court, C. Chancery Jurisdiction. S. C. Ch. Ca. 137.]

VAUX v. GLASIERS.

Affidavit, that he saw a subpoena served.—John Vaux made oath, that he saw a subpoena served upon the defendant, therefore for not appearance an attachment is granted : Vaux, plaintiff ; Glasiers, defendant (Anno 21 & 22 Eliz. [1579]).

MIDDLETON v. SPERIGHT.

Attachment against witnesses served to testify.—John Leigh made oath for the serving of a subpoena on a witness, to testify, on the plaintiff's behalf, before certain commissioners, [81] who hath not so done : therefore an attachment is awarded against the defendant : Middleton, plaintiff ; Speright, defendant (Anno 21 & 22 Eliz. [1579]).

[Mews' Dig. tit. Evidence, V. Attendance of Witnesses, 8. Remedy for Non-attendance, a. Attachment.]

STOW v. MADDOCK.

Attachment upon the defendant's confession he was served.—The plaintiff made oath, that he heard the defendant confess he was served with a subpoena, and hath not appeared ; therefore an attachment is granted : Stow, plaintiff ; and Maddock, defendant (Anno 21 & 22 Eliz. [1579]).

SPRING v. UPTON.

Two joint-tenants ; the one dieth, the other ordered to make estate according to the will.—The defendant, and one Thomas Butcher, whose executors, the said Joan and Alexander, have purchased certain lands jointly ; the defendant promised the said Thomas, upon his deathbed, he would take no advantage of the survivorship, but that the said Thomas might by his will dispose them ; Thomas by his will devised his part of the lands towards payment of his debts ; therefore decreed by the ascent of the defendant, that the defendant should make estate accordingly : Spring *et Uxor*, *et* Alexander Butcher, plaintiffs ; Upton, defendant (Anno 21 & 22 Eliz. [1579]).

FISH v. MOUNTFORD.

Witness that answers insufficient again examined.—Robert Medigate, Esquire, was served with subpoena to testify, and hath not answered to certain interrogatories administered unto him on the plaintiff's behalf, at the time of the executing of the said commission, excusing himself, that he could not to some for want of certain Court Rolls, and to some other interrogatories he referred himself to former depositions, but doth not shew where they remain, nor when they were taken ; it is therefore ordered, that the considerations of the depositions of the said Medigate be referred to Mr. Doctor Carew, one of the masters of this Court ; and if he certify that he hath not sufficiently answered, then order shall [82] be taken, that he shall directly answer the same : Fish, plaintiff ; Mountford *et alii*s, defendants (Anno 21 & 22 Eliz. [1579]).

HEYWARD v. SHERINGTON.

Jurisdiction of Chester allowed.—It is ordered, that upon affidavit made, that the defendants dwell within the county palatine of Chester, and the cause of the bill is to be relieved of certain debts there, the cause is therefore dismissed into the said county : Heyward, plaintiff ; Sherington, defendant (Anno 21 & 22 Eliz. [1579]).

GLASIERS v. MASSIE.

A suit for a hawk, and evidences, dismissed.—The effect of the suit is for a hawk, and certain evidences supposed to be come to the defendant's hands; and because it seemeth to the Court, the matter of evidences was only inserted to give colour to the Court to hold plea, and the matter of the hawk is no meet matter for this Court; therefore the matter is dismissed: Glasiers, plaintiff; Massie, defendant (Anno 21 & 22 Eliz. [1579]).

GRISTING v. HORE.

The bill dismissed, because the counsellor's hand is counterfeit.—The bill is dismissed, because that Mr. Massie's name was put to the same, as of counsel, without his privity: Gristing, plaintiff; Hore and Hore, defendants (Anno 21 & 22 Eliz. [1579]).

[Mews' Dig. tit. A, Practise XXV. Pleading, a. General Principles and Rules.]

WRAYFORD v. WEIGHT.

Costs for prosecuting contempts, and none proved.—The plaintiff is adjudged to pay to the defendant fifty shillings costs, for prosecuting the process of contempt against him, and no contempt proved: Wrayford, plaintiff; Weight and Hingestone, defendants (Anno 21 & 22 Eliz. [1579]).

IREBY v. GIBONE.

Fraud by making a lease after a feoffment, and before livery and seisin.—The bill setteth forth, that Gibone, one of the defendants, in consideration of two hundred and eighty-six pounds, did bargain and sell unto the plaintiff certain lands in the bill mentioned; and made unto him a deed of feoffment, and a letter of attorney, to make livery and seisin; and before livery, made a lease to Cateline, who knew of the bar-[83]-gain, and he leased to Brown, who knew also of the bargain, and this appearing to this Court to be true, an injunction is granted to the plaintiff, until the cause should be heard and determined: Ireby, plaintiff; Gibone, Cateline, and Brown, defendants (Anno 21 & 22 Eliz. [1579]).

CLIFFE v. TURNOR.

Suit stayed in the King's Bench, because it was removed from London.—A special certiorari to remove a cause out of London; the plaintiff proveth the surmises of his bill; the defendant beginneth suit in the King's Bench for the same cause; therefore stayed by injunction: Cliffe, plaintiff; Turnor, defendant (Anno 21 & 22 Eliz. [1579]).

CHOCK v. CHEA.

Suit for common.—The plaintiff's suit is to be relieved for a common, and a subpoena is awarded against the defendant, to shew cause why an injunction should not be granted to stay the suit at the common law; Chock, plaintiff; Chea and Wast, defendants (Anno 21 & 22 Eliz. [1579]).

MARBAR v. KEMPESTER.

A bill for six pounds dismissed.—The matter is dismissed, because the suit is for six pounds only; Marbar, plaintiff; Kempester, defendant (Anno 21 & 22 Eliz. [1579]).

[Mews' Dig. tit. Court, C. Chancery Jurisdiction. S. C. Ch. Ca. 135.]

COOK v. BARKER.

Costs upon a billet delivered to a brother, and no bill in Court.—The said Edmund Barker, defendant, maketh oath, that he received a billet of paper of John Barker, his brother, who affirmeth likewise, upon his oath, the same billet was delivered to him by the plaintiff; and because upon the defendant's appearance, no bill is in Court, therefore twenty-six shillings and eight pence is adjudged against the plaintiff: Cook, plaintiff; Barker, defendant (Anno 21 & 22 Eliz. [1579]).

WOTTON v. LEWESCOMBE.

Commission to take the defendant's answer, upon oath of impotency, before the Mayor of Totnes.—The Mayor of Totnes certified under his common seal, that the

defendant made oath before him, that he was impotent, and not able to travel : therefore a commission is awarded to take the defendant's answer in the country : Wotton, plaintiff ; Lewescomb, defendant (Anno 21 & 22 Eliz. [1579]).

[84] DODDERIDGE v. LASLY.

Consil.—Dodderidge, plaintiff ; Lasly, defendant, upon oath, made before the Mayor of Exeter, of the descendant's impotency, and unfitness to travel, a commission is granted to take his answer in the country (Anno 21 & 22 Eliz. [1579]).

VIVEAN v. NAPPAR.

Consil.—*The defendant seventy years old.*—Thomas Fursden made oath, the defendant is above seventy years of age ; therefore a commission is awarded to take his answer in the country : Vivean, plaintiff ; Nappar, *alias* Sande, defendant (Anno 21 & 22 Eliz. [1579]).

MORGAN v. BITHELL.

Jurisdiction of Wales allowed.—George Elliot made oath, that all the parties are inhabitants, and dwelling within the Marches of Wales ; and that the matter contained in the bill of complaint is for no title of land : therefore the cause is dismissed to the determination of the said commissioners : Morgan, plaintiff : Bithell and Evan, defendants (Anno 21 & 22 Eliz. [1579]). [S. C. Ch. Ca. Ch. 136.]

PHILIPS v. POWEL.

Consil.—Philips, *alias* Phelps, Long, and Spincke, plaintiffs : Powel and Singleton, defendants : upon oath made, that all the parties dwell within the jurisdiction of the Marches of Wales, the cause is dismissed, to be tried there (Anno 21 & 22 Eliz. [1579]). [Ch. Ca. 136.]

GRIFFETH v. EDWARD.

Attachment upon oath before the bailiffs of Montgomery.—Forasmuch as the bailiffs of Montgomery have certified, under their common seal, that the plaintiff made oath before them, for the serving of a subpoena on the defendant, who hath not appeared [85] : therefore an attachment is awarded against the defendant : Griffeth, plaintiff ; Ap Edward, Ap John, defendants (Anno 21 & 22 Eliz. [1579]).

PRESTON v. SMITH.

Consilio.—Forasmuch as the Mayor of Exeter hath certified, under his common seal, that the plaintiff hath made oath before him, for the serving of a subpoena on the defendants, who have not appeared ; therefore an attachment is awarded against them : Preston, plaintiff ; Smith *et uxor*, defendants (Anno 21 & 22 Eliz. [1579]). [S. C. Ch. Ca. Ch. 135.]

MORGAN v. RICHARD.

Dismission because under forty shillings per annum.—Ap Richard maketh oath, the lands complained of are under forty shillings by the year : therefore dismissed : Morgan, plaintiff : Ap Richard and Lewis, defendants (Anno 21 & 22 Eliz. [1579]). [Mews' Dig. tit. Court. C. Chancery Jurisdiction.]

BROCKHURST v. COTTON.

Injunction for defrauding the Queen of her fine.—An action upon the case, commenced in the King's Bench, to the defendant's damage, one hundred marks, is stayed by injunction, for that Her Majesty is hindered of her fine, which should have been paid upon the original : Brockhurst, plaintiff ; Cotton, defendant (Anno 21 & 22 Eliz. [1579]).

[Mews' Dig. tit. Crown, D. Crown Grant.]

WARD v. COBONE.

Consil.—An action upon the case commenced in the King's Bench, to the damage of the defendant, five pounds is stayed by injunction, for that Her Majesty's fine was not paid : Ward, plaintiff ; Cobone, defendant (Anno 21 & 22 Eliz. [1579]).

[Mews' Dig. tit. Crown, D. Crown Grant.]

DINNIS v. MORGAN.

Attachment upon oath before the Mayor of Totnes.—Attachment is granted for not appearing upon a certificate, by the Mayor of Totnes, under his common seal, that John King made oath, he saw a subpoena served upon the defendant : Dinns, plaintiff; Morgan, defendant (Anno 21 & 22 Eliz. [1579]).

WILKINS v. GREGORY.

Jurisdiction of the manor of Woodstock over-ruled.—The plaintiff's bill is to be relieved for copyhold lands ; the defendant doth demur, for that the lands are ancient demesne lands of Her Majesty's manor of Woodstock, and there only pleadable ; it is ordered, a subpoena shall be awarded to the defendant to make a better answer : Wilkins, plaintiff ; Gregory, defendant (Anno 21 & 22 Eliz. [1579]).

[Mews' Dig. tit. Copyhold, B. Courts. S. C. Ch. Ca. Ch. 136.]

DACRES v. SOUTHWELL.

Commission to examine in perpetual memory.—Upon a subpoena, in perpetual memory, the defendant appearing, assented to join in commission, so as the Lord Bacon's orders touching [86] examination of witnesses in perpetual memory might be observed ; but upon motion it was ordered, that the commission should be made general, as in like cases where the parties join, for that it seemed to the Court, the Lord Bacon's orders were intended to be observed, where the plaintiff hath a commission alone : Dominus Dacres *et uxor*, plaintiffs ; Southwell, defendant (Anno 21 & 22 Eliz. [1579]).

BUTLER v. DODTON.

Lessee not named in the premises, decreed for him.—The plaintiff desired to be relieved for a lease made by the defendant to him for years, which the defendant endeavourth to impeach, because in the premises of the lease, there is no lessee named, but only in the *habendum* ; and the cause being referred to the two Lord Chief-Justices, and the Lord Chief Baron, they certified their opinion in law, that the lease was good in law, notwithstanding the lessee was not named in the premises of the lease, but in the *habendum* ; and therefore decreed accordingly, that the plaintiff should hold the said lease : Butler, plaintiff ; Dodton, defendant (Anno 21 & 22 Eliz. [1579]).

WRAY v. SAPCOTE.

One executor gets the estate, and dieth, the other sueth his executor, and ordered for him.—The case is, that the Lord Wray, and Sappcote's father, were made executors to the use of children ; Sappcote's father having gotten a great part of the testator's estate into his hands, deviseth divers legacies to strangers ; and maketh the defendant, his son, executor, and dieth : and the defendant, by answer, confesseth his father had divers goods of the first testator's in his hands, but said, that the defendant had not goods sufficient, more than would satisfy the legacies given by his father ; therefore ordered, that the defendant shall first pay to the plaintiff the goods which [87] were the first testator's, and so much of his estate as came to his father's hands : Wray, Chief Justice, plaintiff ; Sappcote, defendant (Anno 21 & 22 Eliz. [1579]).

SANKY v. GOLDING.

Feme covert sueth for maintenance put into another's hands ; he demurs, but ordered to answer.—The plaintiff setteth forth in her bill, that she joined with her husband in sale of part of her inheritance, and after, some discord growing between them, they separate themselves ; and one hundred pounds of the money received upon sale of the lands was allotted to the plaintiff for her maintenance, and put into the hands of Nicholas Mine, Esquire, and bonds then given for the payment thereof unto Henry Golding, deceased, to the use of the plaintiff ; which bonds are come to the defendant, as administrator to the said Henry Golding, deceased, who refuseth to deliver the same to the plaintiff, and hereupon she prayeth relief ; the defendant doth demur in law, because the plaintiff sueth without her husband ; and it is ordered the defendant shall answer directly : Mary Sanky, alias Walgrave, plaintiff ; Golding, defendant (Anno 21 & 22 Eliz. [1579]).

RICE v. GRANOE.

One subpoena served on two defendants, two bills exhibited, ordered to answer both.

The plaintiff served the two defendants with one subpoena, but exhibited two bills; the defendants appeared, and answered the one, but not being served with any other subpoena to answer the second, departed: whereupon an attachment is awarded against them: and ordered, the defendants answering the second bill be discharged of the attachment: Rice Ap, plaintiff; Granoe et Granoe, defendants (Anno 21 & 22 Eliz. [1579]).

DUFFIELD v. GREAVES.

The defendant demurred generally, ordered to answer.—The defendant demurred generally, without shewing any manner of cause; and therefore or-[88]dered, that a subpoena be awarded against him, to make a perfect answer; Duffield, plaintiff; Greaves et alii, defendants (Anno 21 & 22 Eliz. [1579]).

MAUNDER v. WRIGHT.

Two executors exhibit two bills, ordered to answer the one, the other dismissed with costs.—The plaintiff, as sole executor to Robert Maunder, exhibited a bill against the defendants, for the same matter for which the plaintiff and David Gome, as executors to the same Maunder, exhibited another bill; and ordered, that both bills should be referred; and if both, for one cause, the defendants shall be dismissed from one of the bills, with costs: John Maunder, plaintiff; John Wright et alii, defendants (Anno 21 & 22 Eliz. [1579]).

SENHAWES v. SENHAWES.

Witnesses examined in perpetual memory; the one dead, and the other sick; moved to use their testimony.—Christopher Askame hath made oath, that John Bleverhasset, being a deponent in perpetual memory, is dead, and John Harrison, another of the deponents is, and hath been of long time, sick, and not able to travel without danger of his life: and that their depositions are very needful for the plaintiff, to be given in evidence, in a matter now depending at the common law: Senhawes, plaintiff; Senhawes et alii, defendants (Anno 22 Eliz. [1579–80]).

[Mews' Dig. tit. Evidence, VIII. Perpetuation of Testimony, 4. Publication and Uses of Depositions.]

SMITH v. WEARE.

A subpoena served within two days of the term's end, the attachment discharged answering.—The defendant made oath, the plaintiff caused him to be served with a subpoena the Saturday before the end of the term, returnable the Thursday following, being but two days before the end of the term, he, the defendant, dwelling in Devonshire, seven score miles distant from London; wherefore the defendant could not conveniently appear, and make answer by the return of the said subpoena: and yet nevertheless the plaintiff had procured out an attachment against the defendant: therefore, and for [89] that the plaintiff's bill is but for evidences, it is ordered, the defendant be discharged of the attachment, putting in his answer; Smith, plaintiff; Weare, defendant (Anno 21 & 22 Eliz. [1579]).

KELWAY v. KELWAY.

The solicitor of the plaintiff ordered to be examined with caution.—Upon certificate of Henry Ughard and Thomas West, two commissioners, that Thomas Marshall, one of the defendant's witnesses, being warned by precept from them, refused to appear before them, and that Roger Taylor, another witness, appeared, but refused to be examined, because he solicits the plaintiff's cause; it is therefore ordered, that the defendant shall examine, before one of the examiners of this Court, before the end of this term, as well the said Roger Taylor, upon any interrogatory, which shall not be touching the secrecy of the title, or of any other matter, which he knoweth as solicitor only, as also the said Marshall, or any other necessary witness, whereof the defendant shall first set down their names, so that the plaintiff, may likewise examine them if he will: Kelway, plaintiff; Kelway, defendant (Anno 22 Eliz. [1579–80]).

[Mews' Dig. tit. Evidence, VI. Examination of Witnesses, 8. Privilege. a. Legal Professional Confidence, ii. Solicitors.]

BINGHAM v. WARREN.

A bill without a counsellor's hand, or attorney retained, dismissed.—It is informed, that the plaintiff exhibited his bill without a counsellor's hand, or retaining an attorney, and the same is for matter formerly decreed; therefore ordered, if cause be not shewed to the contrary, and if the bill be to bring the matter in question that was decreed, then it is to be dismissed: Bingham, plaintiff; Warren, defendant (Anno 22 Eliz. [1579-80]).

KEYES v. HILL.

Jurisdiction of Wales over-ruled.—The defendant demurred upon the bill for uncertainty, which was certain enough; and also for that all the parties are dwelling within the jurisdiction of the Marches of Wales, which is no cause of demurrer for title of lands; there[90]-fore ordered, if cause be not shewed, a subpoena is awarded against the defenders to answer: Keyes, plaintiff; Hill *et uxor*, defendants (Anno 22 Eliz. [1579-80]).

GRIFFETH v. PENRINE.

Jurisdiction of Wales over-ruled.—The plaintiff exhibits his bill, touching a practice and misbehaviour supposed by the plaintiff to be used by the defendant against him, in bringing him up by subpoena, at the suit of one Anthony Hinek, whereas the plaintiff never knew any such man, and for divers other misdemeanors used by the defendant in this Court towards the plaintiff; the defendant demurred, for that both parties dwell within the jurisdiction of the Marches of Wales, where he supposes the plaintiff is to seek his remedy, which kind of demurrer this Court alloweth not, for that misdemeanors committed in this Court are most meet to be here examined: Griffeth, plaintiff; Penrine, defendant (Anno 22 Eliz. [1579-80]).

BUSH v. FIELD.

The defendant stayed, by injunction, to pull down rooms, to the prejudice of another's rooms.—The plaintiff sheweth, by his bill, that his house and the defendant's are joining together, and supported by one main wall, standing partly upon the freehold of either of the said parties; and the plaintiff having also an entry, garret, and other necessary rooms standing upon the kitchen of the defendant, he the defendant went about to pull down the said wall, and thereby to overthrow the said garret; the defendant made title to some of the upper rooms, and hath pulled down part of the wall; an injunction is awarded to stay the defendant, to pull down any more of the wall, or any other part of the said house, whereby the said upper rooms may be overthrown, or impaired, until the matter be heard: Bush, plaintiff; Field, defendant (Anno 22 Eliz. [1579-80]).

[Mews' Dig. tit. Easements and Prescriptions, B. Right of Support, 2. From adjoining Buildings.]

[91] HOLLINGWORTH v. LUCY.

Upon a commission warning given but to one defendant, a new commission is granted, and the defendants to have the carriage.—A commission to examine witnesses on both parts, upon fourteen days warning to be given to the defendant; Lucy, one of the defendants, made oath, that neither he nor Varney had any warning, but if any warning was given, it was given to Smith, the other defendant, who is little interested in the cause, but made a party, as the defendants' counsel supposeth, to take away his testimony from the other defendants: Therefore ordered, a commission be awarded, whereof the said Lucy shall have the carriage, directed to the former commissioners, and fourteen days warning shall be given to the plaintiff, and he to examine if he will: Hollingworth, plaintiff; Lucy, Varney, and Smith defendants (Anno 22 Eliz. [1579-80]).

[Mews' Dig. tit. Evidence, VII. Examination of Witnesses under Commission or Mandamus, 12. Second Commission.]

ANONYMOUS.

A subpoena left in the defendant's hall, an attachment.—Humphrey Loyde made oath, that he saw one Lewis leave a subpoena in the hall of the defendant, and that the

defendant was at home the same time, who hath not appeared : therefore an attachment is awarded against the defendant (Anno 22 Eliz. [1579-80]).

HAREFORTH v. GATES.

Witnesses examined before the town clerk of York suppressed.—A commission to examine witnesses issued, but the plaintiff at the place and day appointed brought not his commissioners, nor the commission, whereby the defendant's commissioners could not sit to examine, but the plaintiff procured certain witnesses to be examined before one of the town-clerks of York, touching the matter in variance ; but ordered, no witnesses so taken shall be received into this Court, nor the plaintiff take any benefit thereby, and a new commission is awarded : Hareforth and Lowther, plaintiffs ; Gates, defendant (Anno 22 Eliz. [1579-80]).

DASTOINES v. APPRICE.

The server of a subpoena imprisoned, therefore attachment against the defendant.—John Davis made oath that his boy served a [92] subpoena upon the defendant, for the which the said boy was apprehended, and imprisoned in the Marches of Wales : therefore an attachment is awarded against the defendant : Dastoincs, plaintiff : Apprice, defendant (Anno 22 Eliz. [1579-80]).

MOORE v. MARSHALL.

Jurisdiction of Wales admitted.—The defendant made oath, that both the said parties dwell in the jurisdiction of the Marches of Wales ; and that the matter of the plaintiff's bill, is but for a lease for years, and no title of freehold : therefore dismissed : Moore, plaintiff ; Marshall, defendant (Anno 22 Eliz. [1579-80]).

ZOUCH v. SIDDENHAM.

A rent reserved and paid, the heir ordered to pay it.—John Lord Zouch deceased, late father to the plaintiff, did give the manor of Winford Eagle with the appurtenances in the county of Dorset, intailed to the father of the defendant, reserving forty pounds a-year rent to him and his heirs, and after about three years last past, granted twenty-five pounds, parcel of the said rent, to the plaintiffs for their lives ; and the defendant's father did attorn, and pay the rent to the plaintiffs, until about two or three years before his death, which was about six years since : since which time the defendant being issue in tail and seised, refused to pay the said rent, but ordered by this Court to pay it, if he shew not good cause to the contrary : Zouch & *uxor*, plaintiffs ; Siddenham, defendant (Anno 22 Eliz. [1579-80]).

DOLMAN v. VAVASOR.

A rent-charge upon several men's lands, and levied upon one, an injunction.—The plaintiff seeketh relief by way of contribution, for that one of the defendants hath a rent-charge out of his the plaintiff's lands, and out of one other of the defendants' lands, and yet seeketh to lay the whole burthen of the rent-charge upon his the plaintiff's lands ; and because the defendant would not answer, therefore an injunction is granted for staying of the [93] suits of the rent : Dolman, plaintiff : Vavasor & *alii*s, defendants (Anno 22 Eliz. [1579-80]). [S. C. Ch. Ca. Ch. 139.]

ALTHAM v. SMITH.

A dumb man is not to answer upon subpoena.—It appeareth by oath that the defendant is both senseless and dumb, and therefore cannot instruct his counsel to draw his answer ; and therefore ordered, that no attachment, or other process of contempt be awarded against the defendant for not answering, without special order of this Court : Altham, plaintiff : Smith, defendant (Anno 22 Eliz. [1579-80]).

[Mews' Dig. tit. Lunatic. VI. Actions and Proceedings By and Against.
c. Pleading. S. C. Ch. Ca. Ch. 138.]

PICKETON v. LITTECOTE.

Money paid for a reversion, which could not be enjoyed, ordered to repay the same.—The plaintiff bought of the defendant the reversion of a copyhold, which he could not enjoy, confessed by the defendant's answer : thereupon a subpoena is awarded against the defendant, to shew cause why he should not repay the money received upon the bargain : Picketon, plaintiff ; Littecote & *alii*s, defendants (Anno 22 Eliz. [1579-80]). [S. C. Ch. Ca. Ch. 139.]

SALISBURY v. HINDE.

No witnesses to be examined till the defendants have answered.—The defendants were not served with process, and yet the plaintiff brought up divers witnesses to be examined; but ordered they should not be examined, until the defendants have answered: Episcopus Salisbury, plaintiff; Hinde and Hinde, defendants (Anno 22 Eliz. [1579–80]).

KENDRICK v. HOPKINS.

An action against a drunken man's words seeketh relief, but is dismissed.—The plaintiff was drawn to drink, and filled with drink, spoke some words against the defendant, for which he brought an action upon the case at the common law; whereupon the plaintiff exhibited his bill of complaint, and got an injunction *pro non solutione finis*. It is ordered, that the defendant paying the Queen's fine, shall have liberty to proceed, and the bill to be dismissed: *Qui peccat ebrius, luat sobrius*: Kendrick, plaintiff; Hopkins, defendant (Anno 22 Eliz. [1579–80]).

[Mews' Dig. tit. Defamation, C. Practice and Procedure, 2. Pleadings, *b.* Defence, *i.* Generally.]

[94] PERIS v. THOMAS.

A subpoena shewed and offered, attachment for not appearing.—Forasmuch as the Mayor of Barnstable hath certified, that John Barker made oath before him, that he did shew and offer to deliver to the defendant a subpoena, which he would not accept, and hath not appeared; therefore an attachment: Peris, plaintiff; Thomas, defendant (Anno 22 Eliz. [1579–80]).

CLARKE v. MELLERS.

Witnesses examined, 1 & 2 Philip & Mary, ordered to prefer a bill for publication.—The plaintiffs made motion to have publication of witnesses taken 1 & 2 Philip & Mary, between one Thomas Shrub, then plaintiff, and now deceased, whose daughters and co-heirs the plaintiffs wives are, and Henry Barnard, then defendant, now likewise deceased, touching lands in the occupation of the defendant; and ordered, the plaintiffs shall exhibit a bill for publication against the defendants, and call them by the subpoena to answer, and then order shall be taken: Clarke & *uxor*, Papwell & *uxor*, Stockes, plaintiffs; Eve Mellers and Wodham, defendants (Anno 22 Eliz. [1579–80]).

BREARTON v. ROBERTS.

Attachment discharged by supersedeas, paying the ordinary fees.—The defendant was served with a subpoena at the suit of Hanmer, and for want of a bill got costs; and the plaintiff, upon affidavit that the defendant was served with a subpoena at his suit, got an attachment against the defendant, whereupon he was apprehended, and returned *languidus*: it is ordered, that the attachment be discharged by *supersedeas*, the defendant paying twenty shillings and sixpence to the warden of the Fleet, and the ordinary charges to the plaintiff: Brearton, plaintiff; Ap Roberts, defendant (Anno 22 Eliz. [1579–80]).

BENT v. ALLOT.

The defendant's wife examined as a witness.—It is informed that Colston, one of the defendants, examined his own wife as a witness: it is therefore ordered, the plaintiff may take a subpoena against her on his behalf; and if Col[95]-ston will not suffer her to be examined on the plaintiff's party, then her examination on the said Colston's party is suppressed: Bent, plaintiff; Allot and Colston, defendants (Anno 22 Eliz. [1579–80]).

GREVILL v. BOWKER.

Suit upon a promise to surrender a lease dismissed.—Upon the hearing of the cause it appeared, that the suit was to be relieved of a promise made by the defendant to the plaintiff, to surrender a lease, upon payment of one hundred marks by the plaintiff unto him, and for that the matter is meet for the common law, therefore dismissed: Grevill, plaintiff; Bowker, defendant (Anno 22 Eliz. [1579–80]).

[Mews' Dig. tit. Landlord and Tenant, J. Termination of the Contract, 4. By Surrender, *a.* Of Lease. S. C. Ch. Ca. Ch. 140.]

PRICE v. TENCH.

Subpœna to testify where no cause was depending, discharged.—The Court was informed by one Palmer, that the three defendants are his servants, and were served with subpœna to be examined before the town-clerk of London, who refused to be there examined, because the matter is not depending in London, but in Her Majesty's Bench, and yet attachment is gotten against them, which kind of examination of witnesses this Court taketh to be unorderly, and therefore ordered the attachment be discharged: Price, plaintiff; Tench, Holland, and Packhouse, defendants (Anno 22 Eliz. [1579-80]). [S. C. Ch. Ca. Ch. 141.]

HARRISON v. HARRISON.

Jurisdiction of the North allowed.—The Earl of Huntingdon, president of the North, signified by his letters to the Lord Chancellor, that the lands for which the bill is exhibited, were ordered for the defendant by the counsel of the North parts, where the parties dwell, and land lieth; and the now plaintiff, upon serving his subpœna, was ordered by the counsel there to surcease his suit in this Court, and stand to the order of the said counsel, and yet the plaintiff hath procured an attachment against the defendant; therefore ordered, the attachment be discharged, and the [96] matter dismissed: Harrison, plaintiff; Harrison, defendant (Anno 22 Eliz. [1579-80]).

LEWEN v. FAWDESLEY.

Jurisdiction of the Exchequer disallowed. The defendant demurred, because he is the Lord Treasurer's man, and therefore ought to be privileged in Her Majesty's Court of Exchequer: which cause of demurrer the Court allowed not, for that the defendant can have no privilege, unless it were in such a case as the plaintiff might have remedy in the Court of Exchequer: Lewen, plaintiff; Fawdesley, defendant (Anno 22 Eliz. [1579-80]).

MEAD v. CROSS.

A subpœna cautiously served, attachment against the plaintiff.—The defendant made oath, the plaintiff shewed him a subpœna, holding it in his own hand, and said it was against him, but would not let him have it, or see it, so that he might read it: neither would he deliver him any note of his appearance, nor tell him the same, but took witness that he had served the subpœna: and about an hour after came again to the defendant, saying, You were desirous to see the subpœna, here it is: and thereupon shewed the label to the defendant, but in such sort, as he could not see the return: whereupon the defendant appearing, found no bill: therefore attachment against the plaintiff for misdemeanor: Mead, plaintiff; Cross, defendant (Anno 22 Eliz. [1579-80]).

SWEETMAN v. EDGE.

A bill for tuition of an infant.—The plaintiff is grandfather on the mother's side, to whom the lands cannot come by the death of the infant, exhibiteth a bill against the grandfather on the part of the father's side, to have the education and bringing up of one Richard Edge, an infant, who is seised of an estate tail of lands, the remainder to the defendant, and to have the disposing of the profits of the lands: But ordered with the defendant, for [97] that it appeared there were divers remainders between the defendants and the infant's estates: Sweetman, plaintiff; Edge, defendant (Anno 20 Eliz. [1577-78]).

FRANCIS v. SACHEVERILL.

Costs for a witness served to testify.—Francis, plaintiff; Sacheverill, defendant: The defendant is adjudged to pay to John Hide twenty shillings costs, he appearing upon a subpœna, to testify on his behalf (Anno 22 Eliz. [1579-80]).

SIDENHAM v. HARRISON.

Deeds neglected to be inrolled, a subpœna to show why not.—The plaintiff purchased lands of the defendant (Anno 2 Eliz. [1559-60]), and had a recognizance then acknowledged unto him, for performing covenants of the bargain and sale, and put one in trust to get both the indenture and recognizance inrolled, and paid him for the same, and now

being evicted out of the possession of the lands, came to take out a *scire facias* upon the recognizance, but finds it not enrolled : and therefore desireth the same might now be inrolled : It is ordered, that a subpoena be awarded against the defendant, to shew cause why it should not : and Mr. Solicitor, who is present at the motion, is to give notice to some of his clients, who have purchased (as he alledged) parcel of the lands, to show cause why it shall not be inrolled : Sidenham, plaintiff ; Harrison, defendant (Anno 22 Eliz. [1579-80]).

PRICE v. LLOYD.

Jurisdiction of the Duchy of Lancaster, allowed.—The defendants inform, that the bill is exhibited for certain lands, parcel of the Duchy of Lancaster ; and therefore ordered, that for so much it shall be dismissed : Price, plaintiff ; Lloyd, Owen, and Read, defendants (Anno 22 Eliz. [1579-80]).

SUTTON v. ERINGTON.

The matter of assumpsit referred to the common law.—The matter upon hearing appeared to be for a promise, wherewith the defendant chargeth the plaintiff, and twelve pence in money accepted upon the said promise, whereupon some trials, or non-suits, have passed ; it is ordered, that for the ending of the said matter of promise, that the [98] matter be referred to the common law to be tried : Sutton, plaintiff ; Erington, defendant (Anno 22 Eliz. [1579-80]).

PIERS v. KAWSE.

Feme sole sueth out a subpoena, and the same day is married, is dismissed with costs.—The defendant informed, he was called upon by subpoena, dated the 8th of February, and by answer saith, the said Jane Piers was married the 8th of February, and so at that time purchasing the writ a woman covert ; therefore the defendant is dismissed with thirteen shillings and four pence costs : Jane Piers, plaintiff ; John Kawse, defendant (Anno 22 Eliz. [1579-80]).

HILL v. PORTMAN.

The plaintiff enters upon the defendant's possession, ordered, either a dismissal, or injunction.—The defendant was in possession at the time of the bill exhibited, the plaintiff entered upon him ; the defendant desired, that either he might have an injunction for his possession, or else that the cause might be dismissed, which the Court thought reasonable ; it is ordered, the plaintiff shall shew cause why it should not be granted : Hill, plaintiff ; Portman, defendant (Anno 22 Eliz. [1579-80]).

HILLIAR v. KENDALL.

Prohibition for tithes, parcel of the Duchy of Cornwall, but consultation if cause be not shewed.—The plaintiff, Thomas Hilliar, exhibited his bill against the said William Kendall, that the said Thomas Hilliar was seized in fee of two messuages, seventy acres of pasture, furzes, and heath in Lanlivery, parcel of the Queen's Majesty's Duchy of Cornwall ; and thereupon a prohibition against the said William Kendall, libelling in the Spiritual Court for tithes, as farmer to the said Batten, vicar there, pretending that right of tithes for lands holden of Her Majesty, as of her Duchy of Cornwall, ought to be determined in this Court ; and also that the said John Hilliar had exhibited the like bill, and procured a prohibition out of this Court against the said Batten ; it is ordered, a subpoena be awarded [99] against the plaintiff, to shew cause why a consultation should not be granted : Hilliar and Hilliar, plaintiffs ; Kendall and Batten, defendants (Anno 22 Eliz. [1579-80]).

BREARTON v. EATON.

Perjury in making oath for impotency, one of the same name sued for it, and discharged.—Oath was made in the name of one Edward Jones, that the defendant Eaton was sick, and the rest impotent, and not able to travel ; whereupon a commission was awarded to take their answers in the country ; now Edward Jones of Ruthin, was called up at the plaintiff's suit by process for perjury, and alleged he was not the party that made the oath, and brought a certificate to justify he was at Ruthin when the oath was taken ; and therefore he is dismissed : Brearton, plaintiff ; Eaton & *uxor* & *aliiis*, defendants (Anno 22 Eliz. [1579-80]).

MORE v. WOREHAM.

A witness not able to travel, discharged of contempt.—Griffen Price made oath, that where the plaintiff served a subpoena upon him to appear before commissioners, to testify on the plaintiff's party, he the said plaintiff did not give or tender him the said Griffen any money for his charges; and also that he was sick then, and not able to travel; therefore ordered the said Griffen be discharged of the process of contempt gotten out against him for not being examined: More, plaintiff; Woreham, defendant (Anno 22 Eliz. [1579–80]).

[Mews' Dig. tit. Evidence, V. Attendance of Witnesses, 8. Remedy for Non-attendance, a. Attachment.]

HATTON v. PRICE.

Jurisdiction of Wales not allowed for a promise.—The plaintiff seeketh to have the defendant to assure him certain lands sold him by the defendant, in consideration of great sums of money already paid for the same, according to the promise of the defendant made in that behalf; the defendant demurreth, for that the same promise was made within the jurisdiction of Wales, where both parties are dwelling; but this seemeth to the Court no sufficient cause of demurrer; and [100] therefore ordered, a subpoena be awarded to the defendant to answer: Hatton, plaintiff; Price, defendant (Anno 22 Eliz. [1579–80]).

PAINE v. CAREW.

A commission to answer, he returned a demurrer, therefore attachment.—The defendant took out a commission to take his answer in the country, and returned a demurrer; therefore the plaintiff took out an attachment, which this Court liked well, for that the defendant did not directly answer; yet in regard of an oath made for the defendant's impotency, a new commission is granted to take his answer, and discharged of the attachment, paying the ordinary fees: Paine & alii, plaintiffs; Carew, defendant (Anno 22 Eliz. [1579–80]).

DENNIS v. CODRINGTON.

A counsellor not to be examined of any matter, wherein he hath been of counsel.—The plaintiff seeks to have Master Oldsworth examined touching a matter in variance, wherein he hath been of counsel; it is ordered he shall not be compelled by subpoena, or otherwise, to be examined upon any matter concerning the same, wherein he the said Mr. Oldsworth was of counsel, either by the indifferent choice of both parties, or with either of them by reason of any annuity or fee: Dennis, plaintiff; Codrington, defendant (Anno 22 Eliz. [1579–80]).

[Mews' Dig. tit. Discovery, D. Objections to Disclosure, IV. Legal Professional Confidence, 2. Documents Submitted to or Received from Counsel, a.: tit. Evidence, VI. Examination of Witnesses, 8. Privilege, a. Legal Professional Confidence, i. Counsel.]

PORTER v. COLEMAN.

A billet in paper served, and no bill in Court, costs is awarded.—The said Coleman maketh oath, the said Porter did deliver him a billet in paper, and did shew him a thing in yellow wax, and told him it was a subpoena, but did not declare to him at whose suit; therefore the said Porter is adjudged to pay to the defendant 20s. costs for want of a bill: Porter, plaintiff; Coleman, defendant (Anno 22 Eliz. [1579–80]).

CASTLETON v. FITZWILLIAMS.

Feme covert, whose husband is in the gallies, must answer matter of equity wherewith she is charged.—The plaintiff shewed by his bill, that he freighted a ship into Spain, which was there confiscate and all his goods; for the defendant's [101] husband being master of the ship, had an English book found in the ship, contrary to the laws there, which he was forewarned of, and knew the laws, and the defendant's husband was condemned to the gallies for fourteen years; and since the plaintiff, as well for his own relief, as for the relief of the defendant, devised to obtain licence from Her Majesty, for transporting sixty tuns of beer yearly, for eight years, the commodity whereof

to be equally between them; and the bill exhibited to Her Majesty, was in both their names, and the party of the charge; but the defendant cautiously got the same altered into her own name, and hath sold the same away, without yielding the plaintiff any profit; the defendant doth demur, because she is a feme covert; it is ordered, a subpoena be awarded against her to make a better answer: Castleton, plaintiff; Alice Fitzwilliams, defendant (Anno 22 Eliz. [1579-80]).

BODNAM v. MORGAN.

Injunction left at the defendant's house and disobeyed, an attachment is awarded.—Thomas Jones made oath, that a writ of injunction was left at the house of the defendant; and the plaintiff maketh oath, the defendant hath proceeded in a suit in the King's Bench contrary to an injunction; therefore an attachment: Bodnam, plaintiff; Morgan, defendant (Anno 22 Eliz. [1579-80]).

LOWER v. CRUDGE.

Consil.—Lower, plaintiff; Crudge, defendant, & *uxor & aliis*, defendants. Peter Prowse made oath, that R. G. N. G. Jo. B. and others, having notice given unto them of an injunction awarded out of this Court against the defendant, have disobeyed the same; therefore an attachment is awarded against them (Anno 22 Eliz. [1579-80]).

GRIFFETH v. JENN.

Costs for want of a bill.—Matthew Davis made oath, that the defendant [102] was served with a billet of paper at the plaintiff's suit, and upon his appearance, no bill in Court against him; therefore the plaintiff is adjudged to pay the defendant thirty shillings costs: Griffeth & *Aliis*, plaintiffs; Ap. Jenn. Ap Jenkins, defendants (Anno 22 Eliz. [1579-80]).

ARDEN v. VEALE.

Jurisdiction of Wales allowed.—The defendant maketh oath, that all the parties are inhabiting and dwelling within the jurisdiction of the Marches of Wales; and for that it appeareth by the plaintiff's bill, that the matter therein contained is for a supposed lease, and for no title of land, therefore the cause is dismissed, and the plaintiff referred to take his remedy before the Commissioners of the Marches of Wales: Arden, plaintiff; Veale and Veale, defendants (Anno 21 Eliz. [1578-79]).

WARREN v. MAYNARD.

A writ of privilege disallowed.—The defendant got a writ of privilege as servant to the Lord Keeper, and removed two several suits against him by the plaintiff in London; forasmuch as the Lord Keeper declared in open Court, that the defendant is not now his servant, therefore, ordered, that the said two several causes be remanded into London, and the defendant not to be allowed the privilege of this Court: Warren and Clerke, plaintiffs; Ralph Maynard, defendant (Anno 21 Eliz. [1578-79]).

STRAINGER v. DERBY (BAILIFFS OF).

Bailiffs of a corporation not compellable to make a lease.—The plaintiff seeketh to compel the defendants to make unto him a lease, by reason of a promise made by William Allestre and Anthony Bat, when they were bailiffs of the said town; and ordered that the corporation, nor any persons which heretofore have been, nor which hereafter shall be bailiffs of the said town, shall in anywise be charged as bailiffs with the said promise; but the plaintiff, if he will, may [103] take his remedy against the said Allestre and Bat, not as bailiffs, but as common persons: George Strainger, plaintiff: Beynbridge and Edward Turnos, late Bailiffs of Derby, defendants (Anno 21 Eliz. 1578-79).

[*Mews' Dig. tit. Corporation, B. Corporations Generally, X. Contracts by and with, d. Leases by.*]

STEPHENS v. BAWDEN.

Attachment for breaking an order in Court.—Nicholas Dyer made oath, that the defendant hath broken an order made in this Court; therefore an attachment against him: Margaret Stephens, plaintiff; John Bawden, defendant (Anno 21 Eliz. [1578-79]).

ALMY v. PYCROFT.

Suit for hay, corn, and grass, not worth 40s., dismissed.—Christopher Almy, Christopher Frome, James Wood, & *alii*, inhabitants de Magna Ashley, plaintiffs; James Pycroft, defendant; the matter being for hay, corn, and grass, upon oath not worth forty shillings. It is, by order, dismissed, for that it is of so small a value (Anno 21 Eliz. [1578–79]).

[Mews' Dig. tit. Court, C. Chancery Jurisdiction.]

PARROT v. PAWLET.

Suit for the poor of a parish under 40s. per annum, retained.—Parrot & *alii*, plaintiffs; Pawlet, defendant; the suit being for the benefit of the poor of Drayton, it is retained, though under forty shillings per annum (Anno 21 Eliz. [1578–79]).

HOOPER v. BRACE.

Attachment upon oath, before the portreve of Minxhead.—Forasmuch as Richard Stodard, justice and portreve, and others his brethren of the borough of Minxhead, have certified under their common seal, that one Nicholas Hooper made oath before them for serving of a subpoena on the defendant, who hath not appeared; therefore an attachment is awarded: Hooper and Hooper, plaintiffs; Brace & *uxor*, defendants (Anno 21 Eliz. [1578–79]).

MEEREFIELD v. CLEVERDEN.

Consil.—Meerefield, plaintiff; Cleverden, defendant; upon certificate made by the Mayor of Torrington of serving a subpoena, that affidavit was made before him, for serving it upon the defendant, who hath not appeared; therefore an attachment is awarded (Anno 21 Eliz. [1578–79]).

[104] LANE v. BINDON (VISCOUNT).

A decree for the plaintiff, yet put out of possession by the defendant.—A decree was made for the plaintiff for a copyhold tenement, and yet the defendant put the plaintiff out of possession, notwithstanding the said decree; and the Lord Keeper did write his letters to the defendant, to suffer the plaintiff to enjoy the same tenement according to the decree: Lane, plaintiff; the Lord Howard Viscount Bindon, defendant (Anno 21 Eliz. [1578–79]).

BOYLE v. VIVEAN.

Defendant departing without licence, an attachment.—The defendant was examined upon interrogatories, upon the breach of an order of this Court, and departed without licence; therefore an attachment: Boyle and *uxor*, plaintiffs; Vivean defendant (Anno 21 Eliz. [1578–79]).

STRANGMAN v. VIVEAN.

Attachment discharged, paying the plaintiff 10s. costs.—The defendant being served with a subpoena the last term, and coming out of Cornwall to London, heard, by common voice, the term was adjourned, and therefore did go back again, and the plaintiff got an attachment against him; who hath appeared gratis, and put in his answer; and therefore he shall be discharged of the attachment, paying ten shillings to the plaintiff for his costs: Strangman, plaintiff; Vivean, defendant (Anno 21 Eliz. [1578–79]).

YARMOUTH (BAILIFFS OF) v. PASTON.

Liberty for a common fishing.—The question was for a liberty of common fishing, and ordered for the plaintiff; and upon affidavit made, the defendants have broken the same, ordered an attachment shall go against them: Bailiffs, Burgesses, and Commonalty of the Town of Yarmouth, plaintiffs; William Paston and *alii*, defendants (Anno 21 Eliz. [1578–79]).

ANONYMOUS.

A bond put in suit, for not performing an award, stayed by injunction.—The plaintiff and his father were bound to the defendant in five hundred pounds, to stand to the award of Sir James Dyer, Knight, and Lord Chief-Justice, who arbitrated that the plaintiff, who had the reversion [105] in fee, and the father who had the estate for life, should make such assurance as the defendant should reasonably devise.

KNIGHT v. HARTWEL.

Injunction to stay suit at common law.—The defendant did tender an assurance to the father to be sealed, who being old and blind, desired time to confer with his friends: the plaintiff, upon request, sealed the assurance, and his father afterwards sent word to the defendant he was willing to seal it, but the defendant answered, he did not pass whether he did or no, because he had but an estate for his life, and the defendant had his bond to enjoy it during his life, which he did accordingly; and yet nevertheless the defendant put the bond in suit upon his father's said refusal, but stayed by injunction: Knight, plaintiff; Hartwel, defendant (Anno 21 Eliz. [1578–79]).

[Mews' Dig. tit. Specific Performance, I. Jurisdiction, B. Exercise of,
4. Particular Contracts, b. Awards.]

ST. ASAPH (DEAN) v. REES.

Commission of rebellion for non-payment of costs.—A commission of rebellion for not payment of costs was awarded against the defendant to one John ap David, who did thereupon apprehend the defendant, and for his more safe keeping, delivered him to Thomas Moston, Esq., High Sheriff of the county of Flint, who took charge of the prisoner accordingly, and now refuseth either to deliver the prisoner to the commissioner, or to bring him himself into the Court at the day: day is therefore given to the said Thomas Moston the late Sheriff, to bring into this Court the body of the said defendant, by Thursday next, upon pain of ten pounds: Evans Clerke, Dean of St. Asaph, plaintiff; Ap Rees, Ap Bennet, defendants (Anno 21 Eliz. [1578–79]).

BAILY v. HAWLE.

The defendant discharged of the attachment because the subpoena was counterfeit.—The defendant was served with a counterfeit subpoena, at the plaintiff's suit, but answered not, because he was told the subpoena was coun-[106]-terfeit; thereupon an attachment issued against him: ordered, that as well the defendant be discharged of the attachment awarded against him, as the said Baily, who as the defendant made oath, delivered the counterfeit process to him, to shew where, and of whom he had the subpoena: Baily, plaintiff; Hawle, defendant (Anno 21 Eliz. [1578–79]).

[Mews' Dig. tit. Contempt of Court, 8. Practice, a. Generally.]

REIGNOLDS v. LATHAM.

An award ordered to be performed.—The suit was to cause the defendant to perform an award of arbitrators chosen by themselves, contrary to which award the defendant hath put in suit an obligation of one hundred pounds; wherefore an injunction was granted for stay of the suit; and upon the defendant's shewing his readiness to perform the award, ordered, that the said award shall be duly performed by both the said parties: Reignolds, plaintiff; Latham, defendant (Anno 21 Eliz. [1578–79]).

[Mews' Dig. tit. Specific Performance, I. B. Exercise of, 4. Particular Contracts,
b. Awards.]

CAREW v. BURFFAM.

The defendant licensed to depart after answer in a writ of privilege.—Matthew Carew, one of the Masters of this Court, plaintiff; Thomas Burffam, defendant. The defendant appearing this term upon an attachment of privilege at the plaintiff's suit, hath put in bail, and answered to the declaration of the plaintiff; therefore the defendant is licensed to depart till 15 Pasche next (Anno 21 Eliz. [1578–79]).

BONVILL v. BONVILL.

The defendant committed to the Fleet for a rescue, brought an action for a false return.—Richard Champion, a commissioner in a commission of rebellion, returned a rescue against Guy Bonvill, who being examined, and his examination referred to two Masters of the Court, was found to have confessed the rescue; whereupon he was committed to the Fleet, and yet afterwards brought his action upon the case at the common law, against the said Champion, for his false return; ordered that a subpoena be awarded against the said Guy Bonvill, to shew cause why an injunction

should not be awarded against him for stay of his action upon the case : [107] but afterwards, viz. 21 Eliz., the defendant was allowed to go forward in his action upon the case at the common law, because either of the parties there may plead his matter : Joan Bonvill, widow, plaintiff : Bonvill and Mary Billingham, defendants (Anno 21 Eliz. [1578-79]).

EDWARD v. JENKIN.

Subpoena against the plaintiff, to shew where he had his counterfeit writs, and answer his misdemeanor, and pay costs.—The plaintiffs exhibited a frivolous bill without a counsellor's hand, and got an injunction for stay of any suit to be commenced in any of Her Majesty's Courts, but in this ; which subpoena and injunction being served, seemed to be counterfeit, therefore ordered, a subpoena be awarded against the plaintiffs, as well to shew of whom they had the said writ, and to answer their misdemeanors, as also to pay the defendant costs for his unjust vexation : John ap Edward, ap Hugh, and David ap Howel, ap Jenkin, plaintiffs : Raffe Jenkin, defendant (Anno 21 Eliz. [1578-79]).

WILLIAMS v. WILLIAMS.]

Costs for want of a bill.—The defendants made oath, they were served with billets of paper at the plaintiff's suit, and upon their appearance no bill in Court against them ; therefore the plaintiff is adjudged to pay the defendant forty shillings costs : Edmund Williams, plaintiff : Evan Williams, David Morgan, and Merrick Grannowe, defendants (Anno 21 Eliz. [1578-79]).

BROWN v. STUIT.

Costs for want of a bill, the billet being lost.—Brown, alias Garris, alias Pawdy, plaintiff ; Stuit, defendant, made oath that he was served with a billet in paper, and upon his appearance, no bill in Court, and the defendant hath lost the billet of paper, and yet costs is awarded (Anno 21 Eliz. [1578-79]).

OFFELEY v. MORGAN.

A demurrer without shewing any cause, ordered to answer.—The defendant put in a demurrer to the plaintiff's bill, without shewing any cause of his demurrer ; it is therefore ordered, that a subpoena be awarded against him to make a better [108] answer : Offeley, plaintiff ; Morgan, defendant (Anno 21 Eliz. [1578-79]).

FOORD v. RICHARDS.

Five pounds dismissed.—The matter complained of by the bill is for five pounds debt for fish, therefore dismissed : Foord and Foord, plaintiffs, and Richards, defendant (Anno 21 Eliz. [1578-79]).

HILL v. WORLEY.

Commission to take the defendants' answers, they being seventy years old a-piece.—Symonds Brocebridge made oath, that the said Elizabeth and Anne, two of the defendants are above the age of seventy years a-piece, and that the said William was coming up to London in his company, and they were both robbed, and William his horse taken from him, whereby he could not come to make his appearance ; therefore, a commission is granted to take all the said defendants' answers in the country : Hill, plaintiff ; Elizabeth Worley, widow, William Stapleton and Anne his wife, defendants (Anno 21 Eliz. [1578-79]).

ANONYMOUS.

20th of February, Sir Nicholas Bacon died ; 12th of April, the seal delivered to Sir Thomas Bromley.—Memorandum, that the 20th day of February last, Sir Nicholas Bacon, Knt., Lord Keeper of the Great Seal of England, died at York-house, and the Seal being the same day sent for by the Lord Treasurer, remained with the Queen's Majesty till the 12th day of April last, on which day the same was delivered to Sir Thomas Bromley, Knt., Lord Chancellor of England (Pasche, 21 Eliz. [1579]).

BARKLEY v. MOORE.

Counsel on both sides to attend concerning the ratifying of an award.—Where by an order of the 10th of February last, a subpoena was awarded against the defendant,

to shew cause wherefore an award therein mentioned should not be ratified: Now Mr. Flowerdew, of counsel on the defendant's behalf, informeth, that the said award was not made by any order of this Court, and therefore desired that the said defendant may not be compelled to perform the same. It is ordered, that counsel on both sides shall attend the morrow seven-night, and [109] then order shall be taken: Barkley Miles, plaintiff; Moore, defendant (Anno 21 Eliz. [1578-79]).

LOMLEY v. GREEN.

Jurisdiction of Chester allowed.—The plaintiff exhibited his bill as a privileged man to Sir Francis Kempe, Prothonotary of this Court, for lands lying in the County Palatine of Chester; and for that it appeareth by letters patents openly shewed in Court, under Her Majesty's Great Seal of England, that this Court by any privilege should not hold plea of any lands lying within the said County Palatine; it is therefore ordered to be dismissed, if the plaintiff shew not good cause: William Lomley, plaintiff; Thomas Green, Thomas Marlow, Robert Taylor, and James Wagge, defendants (Anno 21 Eliz. [1578-79]).

READ v. HAWSTED.

No costs to be allowed upon a disclaimer.—The plaintiff was adjudged to pay the defendant £1. 17s. 6d. costs, for that he being served with a subpoena in Hilary Term, appeared, and by his answer disclaimed; and yet, after the plaintiff served him with a subpoena to rejoin; but afterwards the same costs were discharged by motion, for that the defendant had before the costs put in his rejoinder; but upon a disclaimer no costs is to be allowed: Read, plaintiff; Hawsted, alias Lane, defendants (Anno 21 Eliz. [1578-79]).

MORGAN v. GOWGE.

Costs allowed the defendant, being taken upon a commission of rebellion.—The defendant was taken upon a commission of rebellion at the plaintiff's suit, required his costs to be allowed him; the Court asking the opinion of the clerks, it was agreed with one consent, that he should have his costs allowed, therefore ordered accordingly: Morgan, plaintiff; Ap John Gowge, defendant (Anno 21 Eliz. [1778-79]).

BROWN v. STOYCK.

Costs for want of a bill, the billet lost.—The defendant maketh oath, that he was served with a billet in paper at the plaintiff's suit, which billet he lost by misfortune; and upon [110] his appearance no bill is in Court against him; therefore costs is awarded: Brown, alias Garriss, alias Pawdy, plaintiff; Stoyck, defendant (Anno 21 Eliz. [1578-79]).

HEARING v. FISHER.

A commission to examine witnesses in perpetual memory.—The plaintiff exhibited his bill to examine witnesses in perpetual memory, touching a lease of lands, which he, and those by whom he claimeth, hath enjoyed forty years; the defendant by answer claimeth the lands as copyhold of inheritance to Mr. Southwell, who is owner of the inheritance, and within age; and therefore prayed, that no witnesses might be examined; till Mr. Southwell be of full age: and yet, because the witnesses being old, and may die in the interim, therefore a subpoena is awarded against the defendant, to shew cause why a commission should not be granted: Hearing, plaintiff; Fisher, defendant (Anno 21 Eliz. [1578-79]).

[Mews' Dig. tit. Evidence, VIII. Perpetuation of Testimony, 3. Taking Evidence.]

PERRY v. GATTER.

Attachment for not appearing.—John Budden maketh oath, that the defendants confessed unto him, they were served with a subpoena at the plaintiff's suit, and have not appeared; therefore an attachment is granted: Perry Ar, plaintiff; Gatter, alias Sharde and Cole, defendants (Anno 21 Eliz. [1578-79]).

KINSTON v. PIGOT.

Dismissal for that they have been in possession one hundred years.—Upon the hearing of the matter for the manor of Laughton, and the advowson of the church of Laughton, in the County of Buckingham, it appeared that the defendants, and they from whom they claimed, have been in possession one hundred years, with divers

descents; therefore the defendants are dismissed: Kinston, plaintiff; Pigot and *alii*s, defendants (Anno 21 Eliz. [1578-79]).

[Mews' Dig. tit. Waiver and Acquiescence, 1. General Principles, Knowledge of Rights, *b*. Lapse of Time.]

FARMER v. FOX.

Attachment for putting in a demurrer instead of an answer.—The defendant in Hilary Term, made oath, that he could not answer without sight of evidences in the country; and having day given [111] him, he now hath put in no answer, but a demurrer, contrary to the orders of this Court: therefore an attachment is awarded against the defendant: Farmer and *alii*s, plaintiffs; Fox, defendant (Anno 21 Eliz. [1578-79]).

JOANES v. WHITNEY.

Day given to the defendant to rejoin.—John Harry made oath for the serving of a subpoena on the defendants to rejoin; therefore Monday next is given to the defendants to rejoin, or else to lose the benefit thereof: Joanes and *alii*s, plaintiffs; Whitney Miles and *alii*s, defendants (Anno 21 Eliz. [1578-79]).

SHEPHARD v. SHEPHARD.

A new commission to examine witnesses, because they appeared not before.—Whereas a commission issued out to examine witnesses on both parties, which is returned executed, upon oath made by Giles Brever, that he served precepts from the commissioners upon W. S. Tho. Lin. T. C. and Jo. Peers, to be examined on the defendant's behalf before the said commissioners, who appeared not: and it is therefore ordered, that a new commission be awarded to the former commissioners at the defendant's charge, as well to examine the said four witnesses as any other: Shephard, plaintiff; Shephard and *alii*s, defendants (Anno 21 Eliz. [1578-79]).

[Mews' Dig. tit. Evidence, VII. Examination of Witnesses under Commission or Mandamus, 12. Second Commission.]

R. v. COLBORNE.

Not to extend one man's lands only, where many are subject.—The Duke of Northumberland acknowledged a recognizance of one thousand marks to the Lord Cromwell, and after granted certain lands to the defendant; afterwards both the Duke, and the Lord Cromwell were attainted of treason, whereby the recognizance came to the Queen, and in her name was put in suit by one Lane, to whom Her Majesty had granted the same recognizance, who sought to extend the defendant's said lands alone, whereas there are divers other lands to a great value in other men's hands liable to the said recognizance; therefore it is [112] ordered that no liberate go out upon the said extent, until the Court order the same: the Queen's Majesty, plaintiff; Colborne, defendant (Anno 21 Eliz. [1578-79]).

[Mews' Dig. tit. Crown, F. Extent, Execution by, 2. Extent in Chief, *a*. What may be Taken Under.]

OSBORNE v. HAVERS.

Injunction to stay suit at common law.—The plaintiff sought to be relieved upon an obligation of £300, which he entered into to make a jointure unto his wife, in consideration of £174, promised to him by the defendant in marriage, which was never paid unto him; therefore an injunction is awarded, if cause be not shewed: Osborne, plaintiff; Havers, defendant (Anno 21 Eliz. [1578-79]).

MACKWORTH v. SWAYEFIELD.

A new commission to the defendant, and publication is stayed of witnesses examined by the plaintiff in Court.—The plaintiff and defendant both joined in commission to examine witnesses, and the plaintiff having the carriage of the commission, did not execute the same, but did examine witnesses here in Court: therefore ordered the defendant should have a new commission to the former commissioners, wherein the plaintiff might also examine if he list; and at the return thereof, publication, and in the mean time publication is stayed: Mackworth, plaintiff; Swayefield and *alii*s, defendants (Anno 21 Eliz. [1578-79]).

[Mews' Dig. tit. Evidence, VII. Examination of Witnesses under Commission or Mandamus, 12. Second Commission.]

EARLY v. CHILDE.

The defendant not to answer, till a counsellor's hand be put to the bill.—A frivolous bill was exhibited against the defendant, without a counsellor's hand : and therefore ordered the defendant should not answer, until a counsellor's hand were put to the bill, and the contempt for not answering is suspended : Early, plaintiff : Childe, defendant (Anno 21 Eliz. [1578-79]).

POTTINGER v. COGAYNE.

Dismissal the lands being under forty shillings per annum.—The defendant made oath that the lands complained of by the plaintiff's bill is under forty shillings per annum, therefore dismissed : Pottinger, plaintiff ; Cogayne, defendant (Anno 21 Eliz. [1578-79]).

JOANES v. WHITNEY.

Injunction to stay a suit of quo minus, in the Exchequer.—The plaintiff sued here to be relieved for a [113] lease of one thousand years of certain lands, and depending the suit, the defendant by *quo minus* out of the Exchequer, being tenant of other lands to the Queen, brought an *ejectione firmæ* against the under-tenants of the plaintiff : therefore an injunction to stay the said suit of *quo minus*, if cause be not shewed : Joanes and *aliis*, plaintiffs ; Whitney Miles and *aliis*, defendants (Anno 21 Eliz. [1578-79]).

TURNOR v. WARREN.

Attachment against witnesses, served to testify.—The plaintiff made oath for the serving of a subpoena on Mary Cavendish, John Gilgate, William Pipe, and Edmond Stiles, to appear before commissioners to be examined on his behalf : therefore an attachment is awarded against them : Turnor, plaintiff ; Warren, defendant (Anno 21 Eliz. [1578-79]).

SUELL v. ROGERS.

Attachment for costs.—John Quippe made oath, the defendant confessed he was served with a subpoena for costs, and hath not paid it ; therefore an attachment : Suell, plaintiff ; Rogers, defendant (Anno 21 Eliz. [1578-79]).

THOROUGHGOOD v. MAY.

Injunction to stay suits at common law.—The defendant, since the bill exhibited, commenced several suits at the common law for the cause here complained of against the plaintiff, and his under-tenants ; therefore an injunction is awarded against him : Thoroughgood, plaintiff ; May and *aliis*, defendants (Anno 21 Eliz. [1578-79]).

PEACHIE v. TWYECROSSE.

A demurrer generally ordered to answer.—The defendant demurred generally without shewing any cause of his demurrer : therefore ordered, if he shew not good cause of his demurrer upon Friday next, a subpoena is awarded against him to make a better answer : Peachie, plaintiff ; Twyecrosse, defendant (Anno 21 Eliz. [1578-79]).

WINGFIELD v. FLEETWOOD.

The defendant charged upon account, shall not answer ; if upon a promise, he shall.—It is ordered, that if the plaintiffs do charge the defendants by their bill for the issues and [114] profits of land, which do lie in the county of Lancaster, merely by way of account, then the defendants shall not be compelled to answer : if the defendants be charged in respect of their promise, then they are to answer : Wingfield Miles and *uxor*, plaintiffs ; Fleetwood and *aliis*, defendants (Anno 21 Eliz. [1578-79]).

BORROUGH v. A B.

A commission by consent to prove the receipt of rents, fines, and wood sales.—The suit was for certain rents, fines, and wood sales received by the defendant's testator during the plaintiff's minority. It appeared, that if the plaintiff had made good proof, he was to be relieved : therefore a commission is awarded by consent : Borrough, plaintiff ; A B, defendant (Anno 21 Eliz. [1578-79]).

[115] THE KING'S ORDER AND DECREE IN CHANCERY. FOR A RULE TO BE OBSERVED BY THE CHANCELLOR IN THAT COURT; EXEMPLIFIED AND ENROLLED FOR A PERPETUAL RECORD THERE. ANNO 1616.

JAMES by the Grace of God, &c. Whereas our Right Trusty and Well-beloved Sir Francis Bacon, Knight, our Counsellor and Attorney-General, received a letter from our Chancellor of England, dated the 19th of March, An. Dom. 1615. Written by our express Commandment, directing him, and requiring him, and the rest of our learned Counsel, to peruse such precedents as should be produced unto them, from time of King Henry the Seventh, and since, of complaints made in the Chancery, there to be relieved according to equity and conscience, after judgments in the Courts of the Common Laws, in cases wherein the Judges of the common law could not relieve them: And thereupon to certify us of the truth of that they shall find, and of their opinions concerning the [116] same, which letter followeth in these words:—

Master Attorney, his Majesty being informed, that there be many precedents in the Court of Chancery, in the time of King Henry 7, and continually since, that such as complained there to be relieved according to equity and conscience, after judgments in the Courts of the Common Law, in cases where the Judges of the common law could not relieve them (being bound by their oath, to observe the strict rules of the law) is willing to understand, whether there be such precedents as he is informed of: And therefore hath commanded me to let you know, that his will and pleasure is, that you call to assist you his Majesty's Serjeants and Solicitor, and to peruse such precedents of this kind, as shall be produced unto you: and thereupon to certify his Majesty of the truth of that you shall find, and of your opinions concerning the same: and for your better directions therein, I have sent you here enclosed a note in writing delivered unto me, mentioning some such precedents in King Henry the Seventh's time and since. And I am told [117] that there be the like in former times: his Majesty expecteth your proceeding in this with as much speed as conveniently you may: And so I rest,—Your very assured loving Friend,

T. ELLESMERE. *Canc.*

At York House, 19th Martii, 1615.

And whereas our Attorney-General, and the rest of our learned Counsel did thereupon return unto us their certificate, subscribed with all their hands, according to our commandment and direction given them by the said letter, which certificate followeth in these words:—

According to your Majesty's commandment, we have advisedly considered of the note delivered unto us, of precedents of complaining and proceeding in Chancery after judgments in Common Law: and also have seen and perused the originals, out of which the same note was abstracted: upon all which we do find, and observe the points following:—

1. We find that the same note is fully verified, and maintained by the originals.

[118] 2. We find that there hath been a strong current of practice of proceeding in Chancery after judgment, and many times after execution, continued from the beginning of Henry the Seventh's reign, unto the time of the Lord Chancellor that now is, both in the reigns (*separatim*) of the several Kings, and in the times of the several Chancellors, whereof divers were great learned men in the law: it being in cases where there is no remedy for the subject, by the strict course of the common law, unto which the Judges are sworn.

3. We find that these proceedings in Chancery, hath been after judgments, in actions of several natures, as well real as personal.

4. We find it hath been after judgments in your Majesty's several Courts, the King's Bench, Common Pleas, Justice in Oyer, &c.

5. We find it hath been after judgments obtained upon verdict, demurrers, and where writs of error have been brought.

6. We find in many of the cases, that the judgments are expressly mentioned in the bills in the Chancery themselves [119] to have been given, and relief prayed thereupon sometimes for stay of execution, sometimes after execution, of which kind we find a great number in King Henry the Seventh's time.

7. We find the matters in equity laid in such bills in most of the cases, to have been matter precedent before the judgments, and not matter of agreement after.

8. We find in the said cases, not only the bill preferred, but motions, orders, injunctions, and decrees thereupon, for the discharging and releasing of the judgments, or abiding the possession thereupon obtained, and sometimes for the mean profits, and the release of the costs, &c.

9. We find in some of the cases in this very point, that judgment hath been given, hath been stood upon by the defendants, and alledged by them by way of demurrer, and over-ruled.

10. We find that the Judges themselves, in their own Courts, when there appeared unto them matter of equity, because they by their oath and office could not stay the judgments, except it be for some small time, have directed the par-[120]-ties to seek relief in Chancery.

11. We find that this hath not only been in the times of the several Chancellors, but by the Judges themselves, and that without difficulty, when they sat in Chancery, in the vacancy or absence of the Chancellor.

12. We find the hands of sundry principal Counsellors at Law, whereof divers of them are now Judges, and some in chief place, in bills of this kind.

13. Lastly, here were offered to have been shewed unto us many other precedents, whereof we heard some read, and found them to be of like nature with those contained in the note.

FRANCIS BACON.
 RANDELL CREW,
 HENRY MOUNTAGUE,
 HENRY YELVERTON.

And whereas also our said Attorney received one other letter from our said Chancellor, with a case there inclosed, written likewise by our express commandment, dated the 27th of March, 1616, directing and requiring him, and the rest of our learned counsel, together with the attorney of our dear Son the Prince, to confer together upon the said cause, and to consider advisedly of all the parts thereof; and thereupon to peruse [121] all the statutes of *præmunire*, or provisoes, and all other statutes as they shall conceive to be necessary to be considered of, for the resolving the question propounded in that case; and thereupon to report unto us their opinions in writing concerning the same; which letter and case there inclosed follow in these words:—

Master Attorney, His Majesty hath perused this case inclosed, and hath commanded me to send it to you; and his will and pleasure is, that you call unto you Mr. Serjeant Mountague, Mr. Serjeant Crew, Mr. Solicitor, and Mr. Walter, the Prince's Attorney, and that you confer together thereupon, and consider advisedly and deliberately of all the parts thereof; and thereupon to peruse all the statutes of *præmunire* or provisoes, and all other such statutes as you shall conceive to be necessary to be considered of, for the resolving the question propounded in this case: this His Majesty would have be done with mature deliberation, and yet with as much speed as conveniently you can; and when you have sufficiently informed [122] yourselves therein, then to report to him your opinions in writing; and so I commit you to God, and rest,—Your very loving friend,

T. ELLESMERE, *Canc.*

At York House, the 27th of March, 1616.

A hath judgment and execution in the King's Bench or Common Pleas, against B in an action of debt of one thousand pounds. And in an *ejectione firmæ*, of the manor of D, B complains in the Chancery to be relieved against those judgments according to conscience and equity, allowing the judgments to be lawful and good by the rigour and strict rules of the common laws; and the matters in conscience and equity, such as the Judges of the common law (being no Judges in equity, but bound by their oaths to do the law) cannot give any remedy or relief for the same, either by error or attain, or by any other means. *Questio*. Whether the Chancery may relieve B in this or such like cases, or else leave him utterly remediless and undone; and if the Chancery be restrained by any statute of *præmunire*, [123] &c. Then by what statute, or by what words in any statute, is the Chancery so restrained, and conscience and equity banished, excluded and damned?

And whereas, according to our said commandment, our said learned Counsel, and the Attorney of our dear Son the Prince, returned unto us a certificate of their opinions upon the said statutes, under all their several hands, concerning the same case, which certificate followeth in these words :—

According to your Majesty's commandment, we have deliberately advised of the case sent unto us by the Lord Chancellor, and of the statutes, as well those of *præmunire* as others, as far as we take it may concern the case ; and for our better information therein, we have thought fit to send for and peruse the original records themselves, remaining in the Tower of London, of those statutes not only appearing upon the roll of Parliament, with the King's answers, which is the warrant to the roll of Parliament.

We have also taken into consideration, as well book laws, as divers other acts of Parliament, which may give light [124] unto the statutes, whereupon the question properly grows, together with such ancient records and precedents as we could find, as well those which maintain the authority of the Chancery, as those which seem to impeach the same ; and upon the whole matter, we are all of opinion, that the Chancery may give relief to the case in question ; and that no statute of *præmunire*, &c., or other statute restrains the same.

And because we know not what use your Majesty will be pleased to make of this our opinion, either for the time present or future, we are willing to give some reasons of the same, not thinking fit to trouble your Majesty with all those things whereupon we have grounded ourselves, selecting out some principal things, which moved us to be of this opinion, to the end this same may be a fuller object of your Majesty's princely judgment, whereunto we always submit ourselves.

And first, we must lay for a sure foundation that which was contained in our former certificate, concerning the continual practice, by the space now of six score years, in the times of King [125] Henry the 7th, King Henry the 8th, King Edward the 6th, Queen Mary, and Queen Elizabeth, of this authority ; and that in the time when the same authority was managed, not only by the Bishops, which might be thought less skilful, or less affectionate towards the laws of the land, but also divers great lawyers, which could not but know and honour the law, as the means of their advancement, Sir Thomas More, and the Lord Audly, the Lord Rich, Sir Nicholas Bacon, Sir Thomas Bromley, and Sir John Puckering ; and further, that most of the late Judges of the kingdom, either as Judges when they sat in Chancery by commission, or as counsellors at law, when they set their hands to bills, have by their judgment and counsel upheld the same authority ; and therefore, forasmuch as it is a true ground, that *optimus legum interpres consuetudo*, especially when the practice or custom passeth not amongst vulgar persons, but amongst the most high and scient magistrates of the kingdom ; and when also the practising of the same should lie under so heavy a pain as the *præmunire* : this is to us a principal and implicit satisfac-[126]-tion ; and those statutes ought not to be construed to extend to this case ; and this of itself we know is of far more force to move Your Majesty than any opinion of ours, because Kings are fittest to inform Kings, and Chancellors to teach Chancellors, and Judges to teach Judges ; but further, out of our own science and profession, we have thought fit to add these further reasons and proofs very briefly, because in case of so ancient a possession of jurisdiction, we hold it not fit to amplify.

The statutes upon which the question grows are principally two ; whereof one is a statute of *præmunire*, and the other is a statute of simple prohibition : that of *præmunire* is the statute of 27 Edw. 3. c. 1. And the statute of simple prohibition is the statute of 4 Hen. 4. c. 23. There are divers other statutes of both kinds ; but the question will rest principally upon those two, as we conceive it.

The entrance in Selden's Discourse, fol. 63b.—For the statute of 27 Edw. 3 it cannot in our opinions extend unto the Chancery, for these reasons :—

1. First, Out of the mischief which the statute provides and recites, viz. [127] that such suits and pleas (against which the statute is provided) were in prejudice and disinherison of the King and his crown, which cannot be applied to the Chancery ; for the King cannot be disinherited of jurisdiction, but either by a foreigner, or by his subject ; but never by his own Court.

2. Out of the remedy which the statute points, viz. that the offenders shall be warned within two months to be before the King and his Counsel, or in his Chancery, or before the King's Justices of the one Bench, or of the other, &c. By

which words, it is opposite in itself, that the Chancery should give both the offence and the remedy.

3. Out of the penalty, which is not only severe, but hastily, namely, that the offenders shall be put out of the King's protection : which penalty altogether savours of adhering to foreign jurisdictions, and would never have been inflicted upon an excess only of jurisdiction in any of the King's Courts, as the Court of Chancery is.

4. Out of the statutes precedent and subsequent, 25 E. 3. c. 1, and 16 R. 2. c. 5, which are of the same nature, [128] and cannot be applied but to foreign Courts ; for the word *alibi*, or elsewhere, is never used, but where Rome is named specially before.

5. The disjunctive in this statute (which only gives the colour), viz. that they which draw any out of the realm in plea, whereof the cognizance pertaineth to the King's Court (or) of things whereof judgments be given in the King's Court, or which do sue in any other Court, to defeat or impeach the judgments given in the King's Court : this last disjunction, we said (which must go further than Courts out of the realm, which are fully provided for by the former branch), hath sufficient matter and effect to work upon in respect of such Courts, which though they were totally within the realm, yet in jurisdiction were subordinate to the foreigner, such as were the Legate's Court, the Delegate's Court, and in general all the Ecclesiastical Courts within the realm at that time, as it is expressly construed in the Judges. 50 Edw. 4. fol. 6.

6. In this the sight of the record of the petition doth clear the doubt, [129] where the subjects supplicate to the King, to ordain remedy against those which pursue, in other Courts than his own, against judgments given in his Court, which explains the word (other) to be other than the King's Courts.

7. With this agreeth notably the book of entries, which translates the words (in other Court) not *in alia Curia*, but *in aliena Curia*.

8 This statute of *vicesimo septimo* Edw. 3, being in corroboration of the common law (as itself recites) we do not find in the register any precedents of the writs of *ad jura regia*, which are framed upon chief cases that were afterwards made penal by the *præmunire*, but only against the Ecclesiastical Courts.

9. Lastly, We have not found any precedent at all of any conviction upon the statutes of *præmunire* of this nature, for suits in Chancery, but only two or three bills of indictment preferred, *sed nihil inde venit*, for aught appears to us.

For the statute of Hen. 4, that we doubt was made against proceeding within the realm, and not against foreign, and therefore hath no penalty annexed ; nevertheless we conceive that it extends [130] not to the Chancery in the case delivered, for these reasons :—

1. First, This statute recites, where the parties are made to come, upon grievous pain, sometimes before the King himself, sometimes before the King's Counsel, and sometimes in the Parliament, to answer thereof anew, &c., where it appeareth that the Chancery is not named, which could not have been forgotten, but was left out upon great reason, because the Chancery is a Court of ordinary justice for matter of equity ; and the statute meant only to restrain extraordinary commissions, and such like proceedings.

2. This appears fully by view and comparing the two petitions, which were made the same Parliament of 4 Hen. 4, placed immediately the one before the other. The first, which was rejected by the King, and the second, whereupon this statute was made : whereof the first was to restrain the ordinary proceedings of justice, that is to say, in the Chancery, by name, in the Exchequer, and before the King's Counsel, by process of Privy Seal : unto which the King makes a royal and prudent answer in [131] these words : The King will charge his officers to be more sparing to send for his subjects by such process than heretofore they have been ; but notwithstanding it is not his mind, that the officers shall so far obtain, but that they may call his subjects before them, in matters and causes necessary, as it hath been done in the time of his good progenitors ; and then immediately follows the petition, whereupon the act now in question was made, unto which the King gave his assent, and wherein no mention is made at all of the Chancery or Exchequer.

3. If the Chancery shall be understood to be within the statute, yet the statute extends not to this case ; for the words are, that the King's subjects are driven to answer thereof anew, which must be understood, when the same matter formerly judged is put in issue or question again, but when the cause is called into the Chancery only upon point of equity, there, as the point of equity was never in question in the

Common Law Court, so the point of law or fact (as it concerns the law) is never in question in the Chancery, so [132] the same thing is not twice in question, or is answered anew : for the Chancery doth supply the law, and not cross it.

4. It appeareth to our understanding, by the cause of error and attainit in the same statute, what jurisdiction it was that the statute meant to restrain, viz. such jurisdiction as did assume to reverse and undo the judgment, as error or attainit doth, which the Chancery never doth, but leaves the judgment in peace, and only meddles with the corrupt conscience of the party ; for if the Chancery should assume to reverse the judgment in the point adjudged, it is void, as appeareth (39 Edw. 3. fol. 14).

5. We find no precedents of any proceeding to conviction or judgment upon any indictment framed or grounded upon this statute, no more than upon the statute of *præmunire* ; and the late indictments are *contra diversa statuta*, not mentioning the particular statutes.

6. Lastly, It was a great mischief to force the subject in all cases to seek remedy in equity, before he knew whether the law will help him or no, which [133] oftentimes he cannot do till after judgment, and therefore he is to seek his salve properly, when he hath his hurt.

There be divers other things of weight which we have seen and considered of, whereupon we have grounded our opinion, but we go no further upon that we have seen.

But because matters of precedents are greatly considerable in this case, and that we have been attended by the clerks of the Chancery, with the precedents of that Court, and have not been yet attended by any officer of the King's Bench, with any precedents of judgments, if it shall please your Majesty, a faithful report of them, as we have done of the other ; all which, &c.

FRANCIS BACON,
RANDALL CREW,
JOHN WALTER,
HENRY MOUNTAGUE,
HENRY YELVERTON.

Now, forasmuch as mercy and justice be the true supports of our Royal Throne, and that it properly belongeth to us, in our princely office, to take care and provide, that our subjects have equal and indifferent justice ministered [134] to them : and that where their case deserveth to be relieved in course of equity, by suit in our Court of Chancery, they should not be abandoned, and exposed to perish under the rigour and extremity of our laws ; We, in our princely judgment, having well weighed, and with mature deliberation considered of the said several reports of our learned Counsel, and of all the parts of them, do approve, ratify, and confirm, as well the practice of our Court of Chancery, expressed in the first certificate, as their opinions for the law upon the statutes mentioned in their latter certificate, the same having relation to the case sent them by our said Chancellor ; and do will and command, that our Chancellor, or Keeper of the Great Seal, for the time being, shall not hereafter desist unto our subjects upon their several complaints (now or hereafter to be made) such relief in equity (notwithstanding any former proceedings at the common law against them) as shall stand with true merits and justice of their cases, and with the former ancient and continued practice and proceeding of our Chancery ; and for that it apper [135] taineth to our princely care and office only to judge over all our Judges, and to discern and determine such differences as at any time may or shall arise between our several Courts, touching the jurisdictions, and the same to settle and decide as we in our princely wisdom shall find to stand most with our honour, and the example of our Royal Progenitors, in the best times, and the general weal and good of our people, for which we are to answer unto God, who hath placed us over them : our will and pleasure is, that our whole proceedings herein, by the decrees formerly set down, be enrolled in our Court of Chancery, there to remain of record, for the better extinguishing of the like questions or differences that may arise in future times.

Per Ipsum Regem.

FRANCIS BACON,
HENRY YELVERTON.

Decimo octavo Julii, Anno 14 R. Regis, &c.

CHOYCE CASES IN CHANCERY [1557-1606].

[105] PORTER *v.* PRETTY.

Legacies devised out of land upon condition.—In a Case between Pretty and Porter. It fell out that the Ancestor of Michael Pretty the Defendant had devised Land to his eldest Son, on condition he should pay Legacies of £40 to his Sisters at the age of 21 years, or else the Land to remain to the said Legatees.

The eldest son enjoyed always the land, and Porter having bought the extent of a Statute, which the said Heir had acknowledged. Pretty entered on him after 34 years possession, supposing the condition to be broken for non-payment of the Legacies: But proof being made of payment, not precisely, but by acquittances: The Lord Chancellor ordered, that the possession so long continued, should not be stirred upon pretences, but decreed it with the Plaintiff. *Et nota per Coke Attorney.* That upon such a condition the money must be demanded at the instant of coming to 21 years of age: And by [106] the Lord Chancellor that the condition was void, for the Heir should have entred; but yet Judgement was given in the Kings Bench, that the Legatees should have the Lands as being a limitation, and not a condition, 5 Febr. 1 Jacobi [1604].

DIGBY *v.* KILDARE (EARL OF).

Examination of Witnesses in causes to be tried in Ireland.—In a Case between Sir Robert Digby, Plaintiff, and the Earl of Kildare Defendant, for Lands in Ireland, the Defendant demurred, and upon reference to Gawdy and Warberton Justices, they reported that Witnesses might be examined upon the Bill in perpetual memory to be sent close over into Ireland, and there to be used as the Judges of that Court who should have Conusance of the matter in Ireland would appoint: and the Lord Chancellor said, if the matter had originally begun in Ireland, by Commission under the great Seal of Ireland, Witnesses appertaining to that cause might have been examined in England. Philips being of Council with the Defendant, moved that they sought to prove forgery, and then if the Witnesses were examined here and committed perjury, they were not punishable here; for it was out of the Statute of 5 Eliz. But the Lord Chancellor said they were punishable. *Sed non dixit quomodo* 24 April. An. 1603.

ANONYMOUS.

A steward is Judge at Common Law of Copyhold-cases, &c., the Lord of the manor is Chancellour there.—In a Case of two Copyholders of the Mannor of Byffet in Surrey, one claimed by an ancient title against which the possession had gone since 5 of E. 6. The Lord Chancellor would not retain it in Chancery, but bade them try it in the Court of the Mannor: and that if need were, a learned steward or assistant to him should be appointed by this Court. And that [107] no Writ of false Judgment lay of a Copyhold case in a Mannor, because from a Steward they might appeal to the Lord as a Chancellour. 24 April. 1605.

BEVELS *v.* MANNORS.

In Bevels case *versus* Mannors & uxorem being in remainder intail with Fee expectant, and suing for the deed of Intail which was in the Lady Bevels hands being Tenant in Joynture, it was doubted whether upon conveyance by use the Deed should go to *cestuy* use or the Feoffee. And by the Attorney strongly to the Feoffee. But the Lord Chancellor was contrary, and at last ordered that the Heir at common Law.

viz. Bevel should have all Deeds whereby he might vouch or rebut, but not of warranties against himself for maintenance of the Joynture, and it appeared not whether the Joynture were life or in Fee. 30 Aprilis 1605.

ANONYMOUS.

Answers good to common intent, but things secret not to pass doubtful.—Note, that the Lord Chancellour said that answers be good to common intent of things not in the Defendants knowledge alone but if publicly done, ought not to be cavelled at by Councel, who thereby delay their Clients causes; But if it be of things secret, it is otherwise, 30 Aprilis 1605.

ANONYMOUS.

Case of an occupancy.—In Case of an occupant, as house and land granted to J. S. for term of the life for three of his Sons for one rent, they that have the possession of the house must have the occupancy of the land, for otherwise every servant that were digging should have a several peice, and *pedis positio* is not sufficient, but there must be a claim also published to hold it as occupant, 30 Aprilis 1605

[108] POPE v. WORTH.

Decree not signed, now ordered by the L. Chan. to be done by a day.—In a cause between Pope and Worth, the cause was heard and ordered for the Defendant who sued out an *Executione ordinis*, but made not up the decree the next term, whereupon the Plaintiff put it in hearing again without any new order for the same: And whether he should pay costs for so doing, was debated, but not adjudged. *Et nota per Wilkinson.* Except he perfect it the same term, or before the next, so as he get the Lord Chancellors hand to it and pay for the enrolling, he shall take no benefit thereby. But the excessive charge thereof makes parties slow in the same, 1 Maii, 1605.

HERLE v. BUTLER.

Widow & heir of purchaser ordered to pay the money for lands himself should have paid—Infant feud.—Inter Herle and Butler lands sold, and Bond given for the same money and imbaselled, the same comes to the Widow of the Purchaser for life, and the heir in reversion being under age, one year or thereabout, they covenant to pay the money, and being sued in the Chancery, the Defendant alledged the woman had it but for life, and that the heir was under age at the making of the Covenant, & *non allocatur*, but ordered by the Lord Chancellor that they two should pay it, and agree amongst themselves for the rate, 3 Junii 1603, 3 Jacobi.

SLOCOMBE v. —.

Mistaking names of Corporations.—Inter Slocomb. & al. *Nota*, by the L. Chancellor Elsemere said, that it is no conscience for a Corporation to avoid their Grant by a misnomer. And from the time of the first printed reports till the time of E. 6, no such thing in the year-Books. They would take advantage thereof when they were sued sometimes, *sed non E contra*: And Tenant for years after his years determined yielding possession to one claiming [109] by another title dealeth dishonestly, though the Lessor will presently thrust him out, not so of Tenant at will. And therefore in this Case the possession ordered with the first Lessee against Title and Tenant. [See *Anonymous*, Cary, 31.]

COTES v. FRESTON.

An Injunction to stay Execution.—A Writ is awarded against the Defendant, his Councillors and Attorneys, that they upon penalty of £100 shall sue no execution of Judgement in an Action of debt commenced by the Defendant against the Plaintiff at the common Law, until further order be taken therein by this Court of Chancery. Robert Cotes Clerk Plaintiff, John Freston Defendant. Anno 5 & 6 P. & M. [1558].

WILLIAM v. LLENKE.

Jurisdiction of Wales allowed.—John Wynne ap Rice maketh Oath that both parties be inhabitants within the jurisdiction of the Commissioners in the Marshes of Wales, therefore the matter between the said parties is remitted to the determination of the Commissioners. William ap John ap Richard Plaintiff. Llenke, viz. Riffith Defendant. Anno 5 & 6 P. & M. [1558].

ANONYMOUS.

Jurisdiction of Wales allowed.—Green Plaintiff ap Jenn. t. 2, pleads the jurisdiction of Wales, and dismissed. Anno 5 & 6 P. & M. [1558].

ANONYMOUS.

Consimiliter.—Thomas Plaintiff ap Meredith f. 3, pleads the jurisdiction of Wales, and it is allowed him by this Court. Anno 5 & 6 P. & M. [1558].

WARCOP v. HEYBER.

Jurisdiction of the North allowed.—Thomas Heiber, one of the Defendants made oath as well for the impotency of James Heiber one other of the Defendants, as also that all the parties are inhabiting within the jurisdiction of the Commission in the North parts; Therefore the matter is remitted to the determination of the said Commissioners. James Warcop Plain-[110]-tiff, James Heyber and Thomas Heyber Defendants, f. 2, Anno 5 & 6 P. & M. [1558].

ROGERS v. MEREHOUSE.

Consimiliter.—Rogers Plaintiff, Merehouse Defendant, plead the jurisdiction of the North parts, and dismissed thither, Anno 5 & 6 P. & M. [1558].

TAYLOR v. WALKER.

The Defendant payeth costs for not attending the hearing.—The Defendant did not attend the hearing of the cause at the day appointed by order of the Court, therefore he is ordered to pay to the Plaintiff six shillings eight pence costs, and the Cause is to be heard mens. Mrch. next, at the Defendants peril. John Taylor Plaintiff, Rowland Walker Defendant. Anno 5 & 6 P. & M. f. 3 [1558].

MASON v. ROTHERAM.

Consimiliter.—Mason Plaintiff, Rotheram Defendant, payes costs for not attending the hearing of the cause. 5 & 6 P. & M. fol. 4 [1558].

LACY v. PRICE.

Consim.—Lacy contra Price, pays costs for not attending the hearing of the Cause. Anno 5 & 6 P. & M. f. 5 [1558].

BELLAMY v. DEAN.

Consim.—Bellamy Plaintiff, Dean Defendant, payes costs for not attending the hearing of the Cause. 5 & 6 P. & M. f. 17 [1558].

CLARK v. AVORY.

The Plaintiff payeth costs for not attending the hearing.—Forasmuch as the Plaintiff did not give his attendance neither by himself nor Counsel for hearing of the Cause at the time appointed by order of the Court, therefore it is ordered the Plaintiff shal pay the Defendant for his costs six shillings eight pence, and the matter to be heard between this and Tuesday next. John Clark Plaintiff, Thomas Avory Defendant 5 & 6 P. & M. [1558].

CREED v. LONG.

The cause is dismissed for the Plaintiffs not attending hearing.—Creed Plaintiff Long Defendant, the Defendant dismissed for the Plaintiffs not attending the hearing Anno 5 & 6 P. & M. [1558].

NOWEL v. GREVE.

The manner of entring of a Decree.—A final Decree is made for the Plaintiff, as [111] by the Record thereof signed with the hand of the Lord Chancellor as doth appear. And the said Record is delivered to Thomas Powel for the said Plaintiff to be inrolled. William Nowel Plaintiff, William Greve Defendant. 5 & 6 P. & M. f. 6 [1558].

KNIGHT v. NEWNHAM.

Injunction for defrauding the Kings fine.—Forasmuch as the Defendant hath commenced an Action of Debt of £200 against the Plaintiff in the Kings Bench whereby the King and Queens Majesty are hindred of their Fine which should have been paid upon the original, which should have been pursued out of this Court; Therefore an Injunction is awarded against the Defendant upon the pain of £400 to sursease until further order be taken by this Court. John Knight Plaintiff, Thomas Newnham Defendant. 5 & 6 P. & M. [1558].

LINSEY v. BARBER.

Consim.—Linsey Plaintiff, Barber Defendant, stayed by Injunction for not paying the Kings Fine. 5 & 6 P. & M. f. 8 [1558].

GRENEACRES v. HENNAGE.

Consim.—Greneacres contra Hennage Defendant: The Defendant stayed by Injunction for not paying the Kings Fine, 5 & 6 P. & M. f. 12 [1558]. *Cum multis aliis.*

GUIDOT v. KEMP.

The fine to the King paid, the Injunction is discharged.—Domina Dorothea Guidot Plaintiff, Francis Kemp Defendant, whereas an Injunction was awarded for stay of the proceeding at the common Law for not paying the Kings Fine: It is ordered because the Plaintiff hath that day paid her Fine, that she may proceed notwithstanding the Injunction to stay her, Anno 1 Eliz. fol. 117 [1558–59].

SHELDON v. BARNES.

A ground to induce the Court to retain a cause in Court.—Forasmuch as Serjeant Catlyne of Councel with the Plaintiff, hath undertaken that the Plaintiff shall not distrein or otherwise molest [112] the Defendant at Common Law; It is ordered the matter shall be here retained, and the Defendant make a better answer. Sheldon Plaintiff, Barnes Defendant. 5 & 6 P. & M. & fol. 10 [1558].

TYNDALL v. —.

Witnesses in perpetuam rei memoriam published.—The Plaintiff hath taken Oath, that certain Depositions of witnesses examined on his behalf in *perpetuam rei memoriam*, and remaining in this Court, are to be given in evidence at the Common Law, therefore publication is granted of the said witnesses. Thos. Tyndall Plaintiff. 5 & 6 P. & M. f. 10 [1558].

KNIGHT v. BEWMAN.

Injunction upon a Petition.—An Injunction is awarded against the Defendant upon pain £1000 to sursease prosecution of any action against the Plaintiff touching the matter in the petition exhibited by the Plaintiff into this Court until further order be taken by this Court. Knight Plaintiff, Bewman Defendant. Anno 5 & 6 P. & M. fol. 11 [1558].

TAYLOR v. LENNOX (EARL OF).

Stay of Execution by assent of Councel.—Richard Forset being of Councel with the Defendant, hath undertaken in open Court, that he nor any other in the name of the Defendant shall call for Execution of Judgement in an Action commenced by the Defendant against the Plaintiff at Common Law until this Court be made privy therunto. Taylor *et al.* plaintiffs, Earl of Lenox and Dame Martha his wife defendants. 5 & 6 P. & M. f. 11 [1558].

PIME v. SMITH.

The Plaintiffs Father seized in fee. A condition to re-enter for non-payment of rent : deviseth the land to another for life ordered ducens tecum, for the Evidence and Bond to pay the rent.—The Plaintiffs Father did purchase in Fee-farm to him and his Heirs the mannor of long Eason in the County of Derby, of one Runwelmarsh, rendering eight pounds rent with a condition of re-entry for non-payment of the rent. The Plaintiffs Father devised the said mannor [113] to the defendants wife for her life. And the plaintiff sued the defendant to have him put in bond to pay the said eight pounds rent lest the land should be forfeited, and to have the Evidence concerning the said mannor, and ordered the plaintiff should have a Subpœna to the defendant with a *ducens tecum* for the Evidence, and to enter bond for payment of the said rent. Pime plaintiff, Smith defendant. Anno 19 Eliz. [1576-77].

PLOWRIGHT v. PARMETER.

Process of contempt issued out, the Defendant appears, no Bill filed, and costs awarded.—Forasmuch as the Plaintiff hath procured process against the Defendant unto Attachment of Proclamation, and yet hath exhibited no Bill against him the said defendant, he now appearing thereupon : Therefore the plaintiff is adjudged to pay to the defendant thirty three shillings four pence costs for his wrongful vexation. Plowright plaintiff, Parmeter defendant. Anno 19 Eliz. [1576-77].

RELICK v. EYES.

Two years value in fine for an admittance to copyhold.—The plaintiff being copyholder, sued the defendant being the Lord of the mannor to accept a reasonable fine for his admission into certain copyhold-lands, and offered five pounds for a fine, so as the Defendant would never take above two years value of the Tenants of the mannor for a fine upon any admission, which the defendant yeilded unto ; And therefore ordered by assent accordingly. Rellick plaintiff, Eyes, Best, Bristow, and Goulton defendants. Anno 19 Eliz. [1576-77].

ALLEN v. DINGLEY.

The Plaintiff having an Injunction against the Defendant and published, yet Serjeant Powtrel moved for judgement, and is enjoined not to depart the town without licence.—Forasmuch as Mr. Dr. Yale, one of the Masters of this Court, to whom the consideration of a contempt in the breach of an Injunction was committed by Master Serjeant Powtrel was referred, hath made reports that the said Serjeant Powtrel after the open publishing of the [114] same Injunction, and after perfect knowledge thereof did move at the Kings Bench-Barre for Judgement for the Defendant iterating his motion for the same, which he did after the sight of the said Injunction. Therefore the said Mr. Serjeant Poutrel being this present day called into this Court is openly enjoined in the sun of one hundred pounds, not to depart out of the Town until he shall be licenced thereunto by the Right Honourable the Lord Keeper of the Great Seal of England. Allen plaintiff, Dingley defendant. Anno 19 Eliz. [1576-77].

The like order was made the same Term against Master Robert Snagg for moving for the Defendant in the Kings Bench in the same cause.

ANONYMOUS.

A Bond made to the L. Keeper upon a Commission of rebellion.—The Defendant hath this day made his personal appearance in this Court upon a Commission of rebellion according to this Bond made to the Right Honourable the Lord Keeper in that behalf.

SIDAL v. BUTLER.

A Subpœna to testifie before the Mayor, the witness appearing found no Suit there, yet an Attachment gotten, but ordered to be discharged with costs, and after no Subpœna to testifie before the Mayor without the L. Keepers hand.—The Defendant being commanded by Subpœna out of this Court to testifie in a Case depending before the Mayor of London between one Ralph Sidell and Timothy Nottingham, the defendant came accordingly into the Mayors Court and found there no matter depending, and yet nevertheless offered to be desposed, so he might have his charges, which was

refused him, and yet nevertheless the plaintiff hath procured an Attachment against the said defendant which this Court utterly misliketh; Therefore the defendant to be dismissed with good costs, if the cause be not shewed to the contrary. And it is further ordered that no Subpœa *ad testifican.* [115] be made by any Clerk of this Court before the Mayor of London as aforesaid, without the Lord Keepers hand be first procured thereunto. Sidal plaintiff, Butler defendant. Anno 19 & 20 Eliz. [1577].

DENNY v. WILFORD.

After witnesses examined one of the defendants Commissioners another day appointed, cometh not the plaintiffs Commissioners proceed to examine and certify all without the other Commission; ordered the Depositions shall be preserved, and a ducens tecum to bring in the Commission.—A joynt Commission went out to examine witnesses on both parts to 4, 3, or 2, Commissioners: three met and examined divers witnesses and appointed a new day to examin again. The defendants Commissioners took up the Commission and carried it away, and came not the day appointed. The Plaintiffs Commissioners came and examined witnesses without Commission, and certify these and the former Depositions taken with all the whole matter; And ordered that the Depositions certified be sealed up again, and so remain close in this Court. And a Subpœna *ducens tecum* is awarded against the Commissioners to bring in the said Commission. Thereupon further order shall be taken. Denny plaintiff, Wilford and Hearing defendants. Anno 19 & 20 Eliz. [1577].

CROWDER v. ROBINSON.

An Injunction to stay an action at Common Law the suite in this Court having the precedence.—An Injunction was awarded against the defendant for stay of an Action of the Case upon an Assumpsit by him brought in her Majesties Bench against the plaintiff for or concerning an agreement or contract for a Lease for the which before the plaintiff had exhibited his Bill. Crowder plaintiff, Robinson defendant. Anno 19 & 20 Eliz. [1577].

ARNOLD v. ROBERTS.

The Sheriff amerced for making a false returne.—The Sheriff upon an Attachment returned *Cepi Corpus, & languidus in prisona.* Whereupon a *ducens tecum* was awarded, and thereupon the Sheriff returned *adhuc languidus.* Forasmuch as Walter Williams made an oath that the [116] defendant neither at the time of the return, nor now is so sick but that he goeth abroad; Therefore the Sheriff is amerced five pounds for his false return. Arnold plaintiff, Roberts defendant. Anno 19 & 20 Eliz. [1577]. [Cf. Stradling v. Pembroke, 1559–60, Cary, 44.]

PARKE v. PEAKE.

Copyhold surrendered to a man and his wife without words to carry the Inheritance; but because it was intended to be a fee-simple, therefore decreed to the Plaintiff and his Heirs.—John Beale Father to the plaintiffs Wife surrendered certain copyhold lands, parcel of the Mannor of Ferneham, All Saints, in the County of Suff. to Richard Peake and Anne his Wife (the said Anne being sole daughter and heir to the said Beale) without any words to carry an estate of Inheritance but only in the *C. in liberat. est inde sesina Tenend. sibi hered. & assign. suis.* And for that it was meant by the said Beale to passe a Fee-simple, and many other Coppies as well in the same Mannor as Mannors adjoynd were passed in like words; Therefore decreed, the plaintiff and his heirs shall enjoy the lands from the defendant and his heirs. Parke plaintiff, Peake defendant. Anno 19 & 20 Eliz. [1577].

DUCKETT v. BESWICK.

The defendant being free of the Salters in London, & trading as a Linnen Draper, got a writ of privilege as servant to a Master of the Chancery to discharge an arrest, but disallowed.—The plaintiff arrested the defendant in London in an action of £100 for Wares sold, and the defendant using the trade of a linen Draper, and free of the Salters, got a writ of priviledge out of this Court, supposing himself to be servant of Doctor Clark, one of the Masters of this Court, which this Court disliketh that any such person should have priviledge: It is therefore ordered that if the defendant be free of the Salters, and trade as a linnen Draper in London, he shall not be allowed his priviledge. Duckett plaintiff, Beswick defendant. Anno 19 & 20 Eliz. [1577].

WORSLEY v. TILDESLEY.

Jurisdiction of Lancaster not allowed, for that the plaintiff ought to have priviledge of this Court.—The defendant demurred unto the plaintiffs [117] Bill, for that he was inhabitant in the County Palatine of Lancaster: But because the plaintiffs are such as ought to enjoy the priviledge of this Court, viz. Worsley servant to the Lord Keeper, and Anderton a Clerk of this Court: Therefore a Subpœna is awarded to the defendant to answer or shew cause why he should not so do. Worsley and Anderton plaintiffs, Tildesley defendant. Anno 19 & 20 Eliz. [1577].

PETETSON v. SHELLEY.

The plaintiff in reversion of a Lease hath a grant of the woods, he in possession wasts the woods: Therefore an Injunction.—The plaintiff hath a lease in reversion granted unto him of certain lands in the defendants occupation by Lease almost expired within a year, and the Plaintiff hath Wood and Timber granted to him, and the defendant having no authority to sell the said woods, doth cut down the same and make waste. Therefore a Subpœna awarded against him to shew cause why an Injunction should not be granted against him. Petetson plaintiff, and Shelley defendant. Anno 19 & 20 Eliz. [1577].

HIGGENSON v. MARROWE.

A Bill of Revivor begun by the plaintiffs father—A Commission to answer in the Countrey.—The plaintiff exhibited a Bill of Revivour against the defendant to revive a suit, which before that time the plaintiffs father had commenced against the now defendant, which said Bill the defendant did in the plaintiffs Fathers lifetime answer: Therefore now for the defendants ease and avoiding his charges in coming up: It is ordered, a Commission be awarded for taking the defendants answer, wherein the plaintiff may joyn. Higgenson plaintiff, Marrowe defendant. Anno 20 Eliz. [1577–78].

HIDE v. MARTIN.

One hangs the Subpœna for a space on the defendants door, and by a note in writing he leaves the day of appearance, and carries away the Writ to serve another.—John Rogers made oath, he left a note of the defendants appearance at Master Blakes house in Eynam in Hampshire, where the defendants most abiding is: And that he hanged [118] the Writ upon the dore for a certain space. And after carried the Writ to Agnes Hides house and hanged it upon the door, she then being within the said house, who hath not appeared. Therefore several Attachments. Hide plaintiff; Martin and Agnes defendants. Anno 20 Eliz. [1577–78].

CROKER v. HAMBDEN.

Defendant demurreth because the suite is for goods, being a matter of Legacy, and for that one Executor cannot sue another ordered to answer.—The defendant demurred, for that the matter of goods, chattels and specialties, being a matter of Legacy, is determinable by the Ecclesiastical Court. And further demurreth, for that by the order of the Common Laws of this Realm one Executor may not sue another, which causes this Court thinketh not sufficient: therefore a Subpœna. Croker plaintiff, Hambden defendant. Anno 20 Eliz. [1577–78].

WIGNAL v. BLAND.

The suite is to have remedy for altering a Record in the Majors Court of London.—The plaintiff by his Bill seeketh remedy in this Court for the altering or amending of a Plea or Record of Attachment in the Majors Court of London. The defendant refused to answer, alledging, that the same fault being amendable by the Common Laws of this Realm was amended by order of this Court. It is ordered, that if the defendant bring a Certificate from the Judge of the Court in London, that the said Plea was amended with the assent of the said Court, Then the defendant shall not be compelled to answer any further in this Court. And afterwards Pasche 20 Eliz. The defendant brought a Certificate from the Recorder of London, that the Record was altered by order of the Court: and therefore the defendant was dismissed. Wignal plaintiff, Bland defendant. Anno 20 Eliz. [1577–78].

BOND v. KILLIFIT.

After two demurs the plaintiff examines witnesses, and dies, a Bill of revivor to have the benefit of those witnesses—But ordered that no publication be had.—John Bond late husband of the plaintiff, exhibited a Bill against the defendant, whereupon [119] the defendant demurred, and yet the said John Bond replied, and the defendant likewise demurred upon Replication, and after the demurrers put in, the said John Bond examined divers witnesses in Court, and died. And now his wife hath put in a Bill of revivor to have the benefit of the said witnesses; It is therefore ordered, that no publication of the said witnesses so unorderly examined, be published without special order of Court. Bond widow, plaintiff, Killifit & uxor defendants, Anno 21 Eliz. [1578-79].

HARDWECK v. BARKER.

Attachment for want of a Bill.—Ralph Barker maketh oath that one Robert Love the plaintiffs servant served the defendant with a Subpœna in his Masters name, but refused to deliver them the Subpœna, but promised them a copy, and appearing found no Bill in Court; Therefore an Attachment is awarded, and costs to be paid by the Plaintiff to the Defendants. Hardweck widow plaintiff, Barker and Others defendants. Anno 21 Eliz. [1578-79].

WOLFE v. POWEL.

A Plea upon oath ordered, or a nihil dicit.—The defendant to a *Scire fac.* upon a Recognisance of £400 pleaded the Statute of Usury in a forreign County, but neither in person nor upon oath: ordered that the defendant shall before Wednesday next plead such a plea as he will stand to, or else the former plea upon his oath in person, else a *nihil dicit* shall be entered. Morgan Wolfe plaintiff, Powel defendant. Anno 21 Eliz. [1578-79].

STANBY v. BRACEWELL.

Ordered for sale of Lands.—The Suit is to cause the Defendant to make sale of certain Lands which one Cranach former husband to the said Anastace, whose Executor she is, devised by his Will, should be sold by the defendant within the year after his death toward the payment of his debts, the o-[120]-verplus to his wife. Three quarters of a year being past, and the defendant being offered seven hundred pounds for the land by the plaintiff, and the debts remain unpaid, and the lands like to fall if there be not speedy sale: Ordered upon motion the defendant shall be in Court upon Wednesday next; And thereupon the Court will take such speedy order for the sale as shall be thought meet. Stanby & Anastace uxor ejus plaintiffs, Bracewell & al. defendants. Anno 21 Eliz. [1578-79].

COXE v. HOPKINS.

Costs for want of a Bill.—The defendant made oath that one William Cope shewed him a Bill, affirming the same to be at the plaintiffs Suit, but refused to deliver the same or any note of his appearance; And yet the defendant appeared upon the same and found no Bill in Court at the plaintiffs Suit against him; and therefore the plaintiff is adjudged to pay the defendants costs. Coxe plaintiff, Hopkins defendant. Anno 21 Eliz. [1578-79].

DALE v. MANTELL.

Answer respited.—The said Mantel one of the defendants maketh oath that his wife hath a young childe sucking upon her, without whom he cannot directly answer. And that the other defendant is an infant under the age of 21 years; Therefore they are respited for answer untill Trinity term next. Dale plaintiff, Mantell uxor ejus & Dale defendants. Anno 21 Eliz. [1578-79].

PATE v. FREVILL.

A Suit against a man and his wife, the husband dieth, a Bill of revivor against the wife.—The plaintiff exhibited his Bill against Frevill and Jane his wife and one Bankes. After Frevill died, It is ordered that the plaintiff may exhibite a Bill of Revivor against the said Jane in her own name and so to proceed. Pate plaintiff, Jane nuper ux. Frevill & Banks defendant. Anno 21 Eliz. [1578-79].

[121] OSSLEY'S CASE.

Value of lands extended.—In Ossleys Case, *Nota*, the Lord Chancellor said, that no remedy is to be given in Chancery, for extending over low, except there be fraud or practise: And an *Audita querela* lies upon a second defeasance, whether the Statute be forfeit or not as well as upon the first. The principal Case was, Ossley the Father lending money for usury, and taking a Statute, the same was forfeited, but not extended till the land came to the Purchasers hands; and being extended, the Father devised the extent to a younger son, there being more levied by the extent according to the true value then the penalty of the Statute. The purchaser was plaintiff against the devisee, and the Lord Chancellour inclined to relieve him, to Febr. 1 Jacobi [1604].

CREED *v.* TRAP.

A Councillor or Solicitor not to be examined upon any matter which came to his knowledge as Solicitor or Councillor.—Thomas Colwel was served with process to testify on the plaintiffs behalf, and had formerly been of Council or Solicitor for the defendant in the matter in variance: Therefore ordered that Colwell shall not be examined upon any Interrogatories which shall compel him to discover any matter which came to his knowledge as a Solicitor or as of a Council in this case: But for any other matter it shall be lawful for the plaintiff to examine him. Creed plaintiff, Trap's and others defendants. Anno 21 Eliz. [1578-79].

KNIGHT *v.* SMITH.

An Obligation of £8 sued, dismissed.—The matter of the plaintiffs Bill being but for an obligation of eight pounds, it is dismissed. Knight plaintiff, Smith defendant. Anno 21 Eliz. [1578-79].

CAREWE *v.* BURSAND.

The plaintiff demurred on the defendants answer.—The defendant appeared upon an Attachment of privilege at the plaintiffs Suit, and hath answered the Declaration, whereupon the plaintiff hath demurred, therefore the defendant is re-[122]-spited to depart until Crast. Trin. next. Carewe one of the Masters of this Court Plaintiff, Bursand Defendant. Anno 21 Eliz. [1578-79]. [S. C. Cary, 106.]

CARIE *v.* CORRITON.

One appearing on a Commission of Rebellion is committed.—The Defendant appeared upon a Commission of Rebellion: It is ordered that he be committed to the Fleet, Carie, plaintiff, Corriton defendant. Anno 21 Eliz. [1578-79].

PASTON'S CASE.

A vidimus or insperimus of two ancient Deeds granted, but with great caution.—They exhibited their Petition to the Lord Chancellor to have a *Vidimus* or *Insuperimus* of two ancient Deeds granted to their Ancestors under the hand & privy Signet of King Edward the fourth, whereupon the Lord Chancellor sent for the Queens Attorney, who could alledge no cause to the contrary, hereupon it was ordered that Doctor Carewe and Doctor Forth two of the Masters of this Court should go to the Tower and there compare the Kings hand in those Deeds, and the privy Signet to other writings of the same time: And if they agree, then a *Vidimus* or *Insuperimus* shall be granted. William Paston *mil & al.* supplicantes. Anno 21 Eliz. [1578-79].

MERRICK *v.* WOLFE.

A Scire facias granted to shew cause why a consultation should not be granted.—Merrick clark Plaintiff being Viccar of Mansell lacy in Comit. Heref. sued the Defendant in the Ecclesiastical Court for Tyth-wood, and the Defendant got a Prohibition out of this Court for stay of his proceedings, upon suggestions that the land were holden of the Queens Majesty in Capit. Therefore a *Scire facias* according to the form and course of the Register, was desired by the Plaintiffs Council, and granted returnable Octab. Mich. to shew cause wherefore a consultation should not be granted. Merrick clark Plaintiff, Wolfe Defendant. Anno 21 Eliz. [1578-79].

[123] FOX v. WILCOCKS.

Ordered to make a full answer upon a demurrer.—This Suit is to be relieved of a Bond of 200 Marks made for payment of 100 Marks delivered as an escrome, to be delivered as his deed, if the 100 Marks for which the Bond was made, was paid. The defendant demurred, because the Plaintiff may have remedy by Law, if the Bond were delivered upon such condition ; but because the witnesses that could testify the delivery of it, are dead ; Therefore the defendant is ordered to make a full answer. Fox Plaintiff, Wilcocks Defendant. Anno 21 Eliz. [1578–79].

HELBROKE v. BEAUMONT.

A distringas against the old Sheriff to bring in money levied.—The Plaintiff had a *levari fac.* upon a Judgement of a Recognisance against the Defendant to the Sheriff of Leicestershire, upon which Writ the Sheriff returned that he had taken goods of the defendants. Thereupon the plaintiff had another Writ to make sale of the goods, which Writ the said Sheriff neither returned, nor paid the money to the plaintiff : Therefore a Distringas was awarded to the new Sheriff to distrein, the old Sheriff to bring in the money by him levied. Helbroke plaintiff, Beaumont defendant. Anno 21 Eliz. [1578–79].

BYARD v. BYARD.

An order to make Bonds to save harmless touching Legacies.—The Plaintiffs desire to have a Bond made to them by the Defendant, to save them harmless against the Defendants three Daughters concerning certain Legacies bequeathed by the Testator to the defendants said three daughters, which the plaintiffs have paid to the defendant. And because the defendant at the day of hearing appeared not, therefore referred to two Masters of this Court, to see whether it be proved that the plaintiffs paid the defendant the Legacies or no, to the use of his Daughters ; which if they did, then a Decree shall be made [124] for the plaintiffs, that they, their executors or administrators shall be saved harmlesse against his said three daughters, their executors and administrators, for so much as the defendant hath received. Byard & al. plaintiffs, Byard defendant. Anno 21 Eliz. [1578–79].

FRANCIS v. BURNEL.

Lands recovered by assize, The assize reversed by error, and thereupon damages the land again recovered, & suit to be releived for the damages.—The Plaintiff recovered certain lands in Paddington by assize against the Defendant in 7 Eliz. and continued possession until by a Writ of Error the same was reversed in 20 Eliz. for want of a Warrant of Attorney. And thereupon damages to the value of £78 14s. for the mean profits was awarded to the now defendant, then plaintiff in the said Writ of Error. And since that time the now plaintiff upon a new entry hath again recovered by a new assize against the defendant upon the same title : And therefore the plaintiff prayeth releif here to stay the execution for the said £78 14s. damage, for that (as he alleadged) he had no remedy by Law to recover anything in recompence of the said mean profits so recovered upon the reversal of the Writ of Error. The Court for the rareness of the Case doth referre the consideration thereof to Master Justice Southcote, and Master Justice Gawdie, and they to inform the Court of their opinions. Francis plaintiff, Burnel defendant. Anno 21 Eliz. [1578–79].

OSLEY v. MORGAN.

The defendant being not of safe memory to answer without oath, or by his prochian amie.—The Defendant by order of Court was to make a perfect answer upon oath, if he were of safe memory ; if he were not without oath : The defendant made answer without oath by his *prochian amie*, and moved by Master Egerton that he was not in sufficient case to make answer upon oath : Therefore ordered that Master [125] Waldron one of the Masters of this Court shall go to him to see if he be in sufficient state to make answer upon oath or no, and to certifie the Court. Osley plaintiff, Morgan defendant. Anno 21 Eliz. [1578–79].

ATWELS v. CLAXTON.

Costs for want of a Bill.—The defendant made oath a Subpœna was hanged on his door by a man unknown, having no plaintiff indorsed on the backside: But it was affirmed unto him by one John Atwels that it was at the Suit of Robert Atwels his Brother, and no Bill nor order: Therefore costs awarded against the Plaintiff. Atwels Plaintiff, Claxton Defendant. Anno 21 Eliz. [1578–79].

HAY v. AVERIE.

Attachment for not returning answer upon a Commission.—Forasmuch as the said Defendant had Commission to take his wives answer in the Countrey, and hath not caused the same to be returned; therefore an Attachment against the Defendants. Hay Plaintiff, Averie and his wife Defendants. Anno 21 Eliz. [1578–79].

WRAYFORD v. CAREWE.

A title of copyhold land decreed in Chancery.—For that it appeared, the Lands in question were demised and letten by Coppy of Court-roll by the space of sixty years and upwards as Coppyhold lands of the Mannor of Upton billons in Com. Devon. And that the Plaintiff had a Coppy thereof granted unto him by the Lord of the Mannor for his life: Therefore decreed for the Plaintiff. Wrayford Plaintiff, Carewe & uxor Defendants. Anno 21 Eliz. [1578–79].

STODDARD v. HOLLAND.

For not appearance upon a Subpœna, served an Attachment, &c.—The Defendant appeared upon an Attachment granted upon oath that a Subpœna was served upon him for his not appearance, and now would excuse himself that he was ridden forth two dayes before the Subpœna was served; But for that it is confessed by Affidavit made, the Defendant is to be examined upon Interrogato-[126]ries, and as it shall fall out upon examination, order shall be taken therein. Stoddard plaintiff, Holland defendant. Anno 21 Eliz. [1578–79].

ALL SOULS' COLLEDGE v. EVERAL.

Common of pasture Estover, &c. prayed to be relieved, but dismissed, yet a Commission to set out the ways.—Upon hearing of the cause touching the common of Estovers, Common of pasture, Herbage and Pannage and other profits apprender demanded by the plaintiffs by two several Bills in Abberbury wood in Com. Salop, and in other lands mentioned in the Bill. Forasmuch as the same seem more meet to be determined by the Common Law; Therefore ordered for those matters to be dismissed. And forasmuch as it seemed the plaintiffs, their servants and tenants should have necessary wayes through the said Woods; It is therefore ordered by assent, that a Commission be awarded to set them out. The Gardians of All Souls Colledge in Oxon. plaintiffs, Everal and others defendants. Anno 21 Eliz. [1578–79]. [S. C. Cary, 75.]

FRANCKLAND v. GRUNSDICH.

A witness served with a Subpœna, not coming, an Attachment is granted.—William Franckland made oath that William Fulwood confessed unto him that he was served with a Subpœna, to testifie in the Court on the plaintiffs behalf, and hath not so done; Therefore an Attachment against the said Fulwood. Franckland plaintiff, Grunsdich defendant. Anno 21 Eliz. [1578–79].

STONE v. LEVESON.

A Subpœna hanged on the dore of the house supposed to be the defendants lodging, not appearing an Attachment.—William Cooke made oath, that he did see one Nicholas Stone hang a Subpœna upon the Street dore of the house in St. Clements parish where the defendant did lie, as one of his servants said, who hath not appeared; Therefore an Attachment. Stone plaintiff, Leveson defendant, Anno 21 Eliz. [1578–79].

JACKSON v. BARRODEL.

One of the chief of the Defendants being seventy years old, and the rest dwelling in Cumberland, a Commission is granted.—Forasmuch as John Barodal made oath, that the matter of the Bill doth chiefly concern the [127] said Isabel who is above seventy years old, and all the Defendants dwell in Cumberland: Therefore a Commission is awarded to take all their Answers in the countrey. Jackson plaintiff, Isabel Barrodel widow and others defendants. Anno 21 Eliz. [1578–79].

MERCER v. TELKIN.

A Writ of Error brought to reverse a Judgement given in Rie, being a member of the Cinque-ports, and allowed, because Rie was incorporate by Letters Patents in K. Ed. 4ths time.—Whereas by an order of the 20 of June, the Plaintiffs further proceeding was stayed in a Writ of Error brought by the Plaintiff against the Defendant to reverse a Judgment given by the Mayor and Jurats of the Town of Rie for the Defendant in an Action of Debt of 200 Marks, for that the Court was then informed on the Defendants behalf, that the Writ of Error would not lie into any of the Cinque-ports, whereof the said Town of Rie is a member. And a Supersedeas was then also awarded for discharge of an Attachment awarded against the said Mayor and Jurats; for that after an *alias* and *plures* upon the said Writ of Error to them awarded, they returned not the same Writ of Error, as by the same order appeareth. Forasmuch as this Court was this present day informed by Master Serjeant Fenner, that albeit, no Writ of Error will lie to reverse any Judgement given by the said Mayor and Jurates of Rie, for that they have cognisance of Plea by Letters Patents of King Edward the fourth; It is therefore ordered that Friday next be given the said Defendant to shew cause wherefore the said Writ of Error should not be allowed, and the further process continued thereupon. Mercer Plaintiff, Telkin Defendant. Anno 21 Eliz. [1578–79].

HAYNES v. FILMINGHAM.

An Attachment for not performing of an order.—Simon Crampe made oath of the serving of [128] an Order made in this Court between the said parties the first of June last, who hath not performed the same; Therefore an Attachment. Haynes Plaintiff, Filmingham & uxor Defendants. Anno 21 Eliz. [1578–79].

WRIGHT v. RAPH.

The Defendant demurres, pretending to be a feme covert, but the contrary alledged, she is ordered to answer, that if it prove otherwise the proceedings to be void.—The Defendant demurred upon the Plaintiffs Bill, for that she supposed she was a Feme covert, and her husband living in Barbary. But for that it was informed on the Plaintiffs behalf that the Defendants husband was burnt in a Ship in Barbary two years since, and she understanding thereof, hath since dealt as a Feme sole; Therefore ordered the Defendant shall answer. And if it shall hereafter appear by good proof to the Court that the husband is in life, then it is ordered, by assent all proceedings shall be void. Wright & uxor Plaintiffs, Margaret Raph Defendant. Anno 21 Eliz. [1578–79].

CROSS v. UPTON.

Process ad audiend. judicium served on the Defendants door and holden good.—Affidavit was made that process was hanged on the Defendants door by the Plaintiffs wife to hear judgement, and was thought by the Court to be a good service: And the Court thereupon, proceeded to hearing. Cross Plaintiff, Upton Defendant. Anno 21 Eliz. [1578–79].

GARDINER v. UGNALL.

An Injunction against one that would take advantage of a lease upon a fraudulent rick.—The Plaintiffs Bill was, for that by his lease his rent was reserved to be paid at he two most usual Feasts in the year, or within one moneth after. And if it shall appen the said rent to be behind after any of the said dayes, terms or times wherein t ought to be paid, or by the space of fourteen dayes, then it shall be lawtul for the Lessor, his Heirs or Assignes to re-enter, which rent hath most commonly before been

paid at the Feast dayes, or within fourteen days after, until of late the Defendant having pur-[129] chased the reversion (whereof the plaintiff had no notice) demanded the rent on the last instant of the fourteen days after the moneth, seeking thereby to avoid the plaintiffs lease, although the rent was tendered at the fourteen dayes end next after the Feast, and was also within a very short time after tendered to the Defendant himself : Therefore an Injunction is awarded against the said defendant. Gardiner plaintiff, Ugnall defendant. Anno 21 Eliz. [1578-79].

MARTIN v. HAMPTON.

The Bill is for Trover and conversion of goods the defendant answers not guilty, and ordered to make a better answer.—The Bill was, that his testator bought and paid for certain commodities which afterwards came to the defendants hands, and they converted the same to their own use : The defendants answered no other in effect, but that they nor either of them are guilty of the matter laid to their charge : Ordered that defendant shall make a better answer. Martin Plaintiff, Hampton & Rogers Defendants. 21 Eliz. [1578-79].

SIDALL v. DARLASTON.

He at whose suit the Subpœna is, doth not appear, plaintiff ordered to pay costs.—The Defendants made oath, that they were served with a Subpœna to appear in this Court by the Plaintiff. But upon the Subpœna it doth not appear at whose suit ; Therefore the said Sidall shall pay to the Defendant good costs. Sidall Plaintiff, Darlaston and Tailor Defendants. 21 Eliz. [1578-79].

GRIFFITH v. JOANES.

Jurisdiction of Wales allowed.—John ap Rice ap Morgan made oath, as well that all the said parties are inhabiting and dwelling within the jurisdiction of Her Majesties Commissioners in the Marches of Wales, as also that the matter therein contained is for no title of land, but for an Obligation of £30. Therefore dismissed, and the party left to take his remedy before the said Commissioners and counceel of Wales. Griffith plaintiff, Owen [130] Joanes & Gibbe defendants, Anno 21 Eliz. [1578-79].

CALCOT v. YARBURY.

This suit dismissed out of the Court of Requests, therefore motion is made to be dismissed hence, and ordered to put the same in by answer upon oath.—The defendant by his Council made request to be dismissed from the Plaintiffs Bill, for that it contained the same matter heretofore dismissed out of the Court of Requests where the Plaintiff exhibited the like Bill. Ordered by this Court, that the Defendant shall put in the same by the way of answer upon oath, and demand Judgement thereupon, whether this Court would any further plea thereupon, Calcot plaintiff, Yarbury defendant. Anno 21 Eliz. [1578-79].

NOKES v. SHERESHAWE.

Injunction to stay proceedings for non-payment of the Queens fine.—Forasmuch as this Court was informed, that the defendant hath commenced suit in her Majesties Bench against the plaintiff upon an action of debt, supposing himself to be damnified to the value of £100 whereby her Highness is hindred of her fine, which should have been paid upon the Original, & ought to have been pursued out of this Court : Therefore an Injunction is awarded against the defendant, Nokes & uxor plaintiffs, Shereshawe defend. Anno 21 Eliz. [1578-79].

Consim.—Hopton plaintiff, Chase defendant. }
 Morgan & uxor plaintiffs. }
 Woller & uxor defendants. } Anno 21 Eliz. [1578-79].
 Skeiton plaintiff, With defendant. }
 Fisher plaintiff, Bowes defendant. }

BLAGRAVE v. WOTTON.

Consim.—A like Injunction granted for not paying the Queens fine where the action was trespass to the damage of 1000 Marks. And for breach of the said Injunction

the defendant was committed to the prison of the Fleet. And now upon motion he is ready to pay the fine, upon payment whereof he is discharged of his imprisonment. Blagrove plaintiff, Wotton defendant. Anno 21 Eliz. [1578-79].

[131] BROWN v. BENION.

For want of a Bill costs is gotten and discharged, for that by the defendants means he was stayed to proceed by authority of the Council of Wales.—The defendant got costs for want of a Bill, and after the plaintiff shewed forth a commandment from the Council of the Marches of Wales at the defendants suite, procured after the serving of the Subpoena, to shew cause why he should not stay his proceeding in this Court, whereupon he staid the putting in of his Bill. Therefore discharged of the costs. Brown Plaintiff, Benion Defendant, Anno 21 Eliz. [1578-79].

PAWLINGE v. HOMFREY.

Jurisdiction of Oxford allowed.—Forasmuch as the Commissary of the University of Oxford hath certified under the seal of the said University, that the said Gilbard, one of the defendants, is a Master of Arts and Batchellor of Divinity within the said University: And that by the confirmation of our Sovereign Lady the Queens Majesty, and by the grant and confirmation of her Highness Noble Governours, none of the said University, which the said Commissary shall certifie to be a necessary member of the same, shall be compelled to answer to any suit or action whatsoever out of the same University, except it be for felony, mayhem, or free-hold, as by the same Certificate more at large appeareth. And for that also it seemeth unto this Court, that the matter wherewith the said Nicholas Gilbard is charged, is for a supposed going about to get a copy of a Court Roll out of the hands of the said Margaret Pawlinge, another of the said defendants: It is ordered that the said Gilbard be dismissed, and the Plaintiffs referred to take their remedy before the Chancellor of Oxford, Vice-Chancellor or Commissary of the same University. Pawlinge Plaintiff, Homfrey Sacre Theolog, Professor, Gilbard and Pawling [132] widow defendants. Anno 21 Eliz. [1578-79].

HANTON v. WENTWORTH.

Procedendo to the Major of London, and nothing done, the Lord Chancellor writ his letters to give judgement, or shew cause.—The plaintiff procured a *Procedendo ad judicium* to the Lord Major of the City of London, to proceed to Judgement upon a verdict given in the Sheriffs Court in London, and an *alias* and *plures* thereupon. And yet the plaintiff can get no Judgement thereupon, nor the Writs returned: wherefore the Lord Chancellor vouchsafed to write his letters to the Lord Major, either to give judgement or to certifie why he doth not. Hanton Plaintiff, Wentworth defendant. Anno 21 Eliz. [1578-79].

FOX v. WILCOCKS.

Subpoena returnable the last day of the term, answered three days before the term, Attachment gotten & discharged.—The defendant was served with a Subpoena, returnable the very last day of the Term, then appearing took a copy of the Bill, and put in his answer three days before the next Term, and yet the plaintiff procured an Attachment against the defendant, for that his answer was not put in in time: Ordered to be discharged. Fox plaintiff, Wilcocks defendant. Anno 21 Eliz. [1578-79].

PARSONS v. ILFORD.

A Subpoena served, but no Writ labell or note left yet upon oath, costs is awarded for want of a Bill.—The Defendant made oath, that he was served with a Subpoena by Thomas Rock in the name of the Plaintiff, and at his suite as he affirmed but would neither deliver the Writ or note of appearance, but told him his day to appear, was the first day of the Term, and upon his appearance no Bill is in Court: Therefore costs is granted against the plaintiff. Parsons plaintiff, Ilford Defendant. Anno 21, 22 Eliz. [1579]. [S. C. Cary, 75.]

BAYNOW v. GORGANE.

Oath made he saw a Subpoena served.—John Musgrave maketh oath, that he saw a Subpoena served on the defendant *ad audiendum judicium*, about a fortnight past. Baynow plaintiff, Gorgane Defendant. Anno 21, 22 Eliz. [1579].

BILLING v. PATE.

Attachment for breach of an order. An attachment is awarded against the Defendant [133] for proceeding in the Court of the Mannor of Bersted, contrary to the order of this Court. Billing plaintiff, Pate and others Defendants. Anno 21 & 22 Eliz. [1579].

FRANKLIN v. WATKINS.

Consim.—Franklin Plaintiff, Watkins Defendant. An Attachment granted against the Defendant for breach of an order of this Court. Anno 21 & 22 Eliz. [1579].

Consim.—Stodard plaintiff, Holland defendant. } Anno 22 Eliz. [1579–80].
Couper plaintiff, Woodward defendant. }

GRIFFITH v. JENKING.

A bill of perjury.—A Subpœna was awarded out of this Court to answer a Bill of perjury committed by the defendant Goze, in swearing for the impotency of the other Defendant, whereas he was not above fifty years old, and able to travell. Griffith Plaintiff, *ap.* Jenking & Goze Defendant. Anno 21, 22 Eliz. [1579]. [S. C. Cary, 75.]

FAIRBANCK v. METHAM.

Costs against the Clerk for mistaking the Subpœna.—The defendant was dismissed for want of a Bill, and forty shillings given him; whereupon he bespake the Subpœna for costs, and Robert Bailes Clerk made the Subpœna *ad comparend.* which being served, the other appeared and got costs, both which costs were discharged, and ordered that the plaintiff may have a Subpœna against the said Clerk Robert Bailes for the costs. Fairbanck Plaintiff, Domina Metham defendant. Anno 21 & 22 Eliz. [1579]. [S. C. Cary, 74, 77; *post*, Ch. Ca. Ch. 139.]

SEGRAVE v. NORTON.

The defendant examined upon Interrogatories touching abuse of the plaintiff in serving Process.—An Attachment was awarded against the defendant, upon oath he abused the Plaintiff in serving a Subpœna upon him, the defendant appearing gratis to answer what could be objected against him touching the contempt; whereupon [134] it was ordered by the Court, that the defendant should be examined upon Interrogatories before his departure, Segrave plaintiff, Norton defendant. Anno 21, 22 Eliz. [1579].

MORE v. MORE.

To be relieved or discharged for Legacies paid to the defendant.—The Bill was, for that the plaintiff being Executor to the defendants father, paid the defendants Legacies, for which the plaintiff desired the defendant might give him a release or other discharge, depending which suite the defendant sued the plaintiff for the same Legacies in the Spiritual Court; Therefore an Injunction. More plaintiff, More defendant. Anno 21, 22 Eliz. [1579].

SHARPE v. MORE.

A suite against a Bailif of a Liberty for not returning a Process, and dismissed.—The Bill was, for that the defendant being Bailiff of the liberty of Wenlock denied to allow an esseigne unto the plaintiff, and to return a Writ of Error and other processe, yet dismissed. Sharpe plaintiff, More defendant. Anno 21, 22 Eliz. [1579].

KEENE v. MEERE.

The heir sued to make a lease promised by his ancestors, for which he took fine.—The Bill shews, the plaintiff paid to the defendants Brother, whose heir he is, a summe of money; for a fine of a Lease to be made unto him of certain lands. The brother died before the Lease made, and the land descended to the defendant: And the plaintiff exhibited his Bill against the defendant, either to have the Lease made unto him, or to have his money repaid, which he paid for a fine, which the Court refused, but ordered the defendant should directly answer and stay proceedings at Law untill licence of this Court be had: But afterwards ordered, for that the defendant came to the lands

by the remainder, and not by descent, and the promise made fifteen years before, therefore dismissed. Keene *alias* Mogg plaintiff, Meere de-[135]-fendant. Anno 21, 22 Eliz. [1579].

TRUSSEL v. WILLOUGHBY.

A Commission to take the defendants answer in the country, he delays his answer. Attachment out against him, yet before the return he puts in his answer, and is discharged.—The defendant had a Commission to take his answer in the Country, but answered not perfectly, but said he could not answer without sight of Evidences in Com. Nottingham, farre distant from Dorsetshire where he was: Thereupon an Attachment and Proclamation issued: And because the defendant before the return of the Attachment put in a perfect answer, and was sworn thereto in the Country before Master Walrond one of the Masters of this Court; Therefore the said Processe of contempt were discharged, paying the ordinary charges of the same, and 2sh. 6d. to the Warden of the Fleet. Trussel & al. plaintiffs, Willoughby Miles defendant. Anno 21 & 22 Eliz. [1579].

MARBUT v. KEMPSTER.

A Bill for £6 dismissed.—Marbut plaintiff, Kempster defendant. The Bill being but for six pounds in money, and no title of land; Therefore it is dismissed. Anno 21 & 22 Eliz. [1579]. [S. C. Cary, 83.]

WOTTON v. LUSCOMBE.

Affidavit made of the defendants impotency. A Commission is granted.—The Major of Totnes certified into this Court under his common seal, that the defendant made oath before him that he was impotent and not able to travel: Therefore a Commission. Wotton Plaintiff, Luscombe defendant. Anno 21 & 22 Eliz. [1579].

PRESTON v. SMITH.

Costs for want of a Bill.—Upon the Certificate of the Major of Exeter, of an oath taken before him for the serving a Subpœna, and no Bill found in Court, therefore an Attachment is awarded, Preston plaintiff, and Smith & al. defendants. Anno 21, 22 Eliz. [1579]. [S. C. Cary, 84.]

COOK v. BARKER.

Consim.—The defendant made oath he received a Billet of paper of John Barker his brother, who likewise deposeth the same was delivered unto him [136] by the plaintiff, and no Bill in Court: Therefore costs is awarded to the defendant. Cook Plaintiff, Barker Defendant. Anno 21, 22 Eliz. [1579]. [S. C. Cary, 83.]

MORGAN v. BITHEL.

Jurisdiction of Wales allowed.—George Elliot made oath, that all the parties are inhabitant within the Jurisdiction of her Majesties Commission of the Marches of Wales, and that the matter of the Bill is for no title of land: Therefore it is dismissed. Morgan plaintiff, Bithel defendant. Anno 21, 22 Eliz. [1579]. [S. C. Cary, 84.]

PHILIPS v. POWELL.

Consim.—Philips and others Plaintiffs, and Powell Defendant. Upon oath made that the Defendants are inhabiting within the Jurisdiction of the Marches of Wales, and that the Bill was not for title of lands, a dismissal is ordered. Anno 21 & 22 Eliz. [1579]. [S. C. Cary, 84.]

COOK v. ORWELL.

The Bill is for that money paid upon a Bond, & the Bond is refused to be delivered.—The matter of the Bill against the said Orrell and Barker is no other, but that the Plaintiff by the perswasion and under-dealing of the said Thomas Orrell and Edward Barker, is kept from an Obligation of £100 which he made to the said John Barker for payment of £50, which £50 is paid, and the said John Barker putteth the said Bond of £100 in suite: Therefore dismissed against Orrell and Barker Defendants, but after it was retained. Cook Plaintiff, Orwell and Barker Defendants. Anno 21 & 22 Eliz. [1579].

WILKINS v. GREGORY.

Coppyhold lands which are ancient demesne lands pleadable here, yet upon view of customary book dismissed.—The Bill prayeth releif of coppyhold lands, parcels of the Mannor of Woodstock, for which he had licence of the Steward of the Mannor to fine in this Court. The defendant did demurre because the lands are ancient demesne, &c. But ordered to answer, yet after the view of the written customes, dismissed. Wilkins Plaintiff, Gre-[137]-gory Defendant. 21, 22 Eliz. [1579].

[Mews' Dig. tit. COPYHOLD, B. COURTS. S. C. Cary, 85.]

KNIGHTON v. ALLEN.

Suit for apportionment of rent is dismissed.—The matter was for an apportionment of rent of ten shillings per annum. And the smalness of the matter is dismissed. Knighton Plaintiff, Allen and Thorogood defendants, Anno 21, 22 Eliz. [1579]. [S. C. Cary, 80.]

MAYHOE v. LOSTWITHAL (VICAR OF.)

Prohibition granted upon surmise made to the late Lord Keeper, which surmise was after proved by witnesses, and therefore ordered no consultation be granted.—The Plaintiff obtained several Prohibitions upon several suggestions exhibited to the late Lord Keeper, which suggestions were sufficiently proved by examination of witnesses in this Court; Therefore it is ordered that no consultation be granted without the Lord Chancellor be first made acquainted therewith, and the Plaintiffs Council heard. But afterwards the Prohibition being granted for that the lands are holden of her Majesty, as of her Duchy of Cornwall, a day is given to shew cause why a consultation shall not be granted. Mayhoe alias Helrae & al. Plaintiffs, Battyn Vicar of Lostwithall Defendants. Anno 21, 22 Eliz. [1579].

LIVERS v. BREND.

A witness refused to be examined concerning a lease, the reversion being in himself, and discharged of Attachment.—One Benn being produced to be examined as a witness refused to be examined, whereupon an Attachment was granted against him, and he appeared and shewed that the Articles concern a lease of land whereof the said Benn hath the reversion, and therefore discharged of the Attachment. Livers wid. & Oylands Plaintiffs, Brend & Brandon Defendants. Anno 21 & 22 Eliz. [1579].

GOODWIN v. GOODWIN.

Apparance by Audita Querela.—The Plaintiff appeared in Court according to a Recognisance by him and other surities knowledge upon the suing out of an *Audita Querela* against the defendant, and retained Master Prowle to be his Attorney for speedy prosecution thereof according to the ordinary course of the Court in that behalf. Goodwin Plaintiff, Good-[138]-win defendant. Anno 21, 22 Eliz. [1579].

OKE v. PRIDIEUX.

The defendant disclaiming, examined as a witness.—A Commission went forth to examine witnesses, and the defendant produced four witnesses which were named defendants, but had disclaimed. And yet the Commissioners refused to examin them, and a new Commission was awarded to examine the said persons. Oke plaintiff, Pridieux defendant, Anno 21, 22 Eliz. [1579].

PARR v. TIPLADIE.

Priority of suit in Chancery staves a suit in the Spiritual Court.—The plaintiffs exhibited their Bill into this Court to be discharged of payment of Legacies in regard the defendant had sued in the Spiritual Court for the same Legacies: Therefore day is given to the defendant to shew cause why the suit in the Spiritual Court should not be staid. Parr & uxor plaintiffs, Tipladie & uxor defendants. 21 & 22 Eliz. [1579]. [S. C. Cary, 73.]

BUTLER v. JENNINGS.

Defendant of non sane memory.—Alexander Wood maketh oath, that the defendant hath not at this present, nor almost these two years past hath had his perfect senses, by reason whereof he is not able to answer the Bill. Butler plaintiff, Jennings defendant. Anno 21, 22 Eliz. [1579].

ALTHAM v. SMITH.

The defendant senselesse and dumb, no Attachment, yet after recovery must answer. The defendant being both senselesse and dumb, ordered that no Attachment shall go out against him. But after upon information that he is come to his senses, a Commission is awarded to some discreet Commissioners to take his answer. Altham plaintiff, Smith defendant. Anno 21, 22 Eliz. [1579]. [S. C. Cary, 93.]

OWEN v. WID.

Suit after judgment at Law and outlawry, thereupon dismissed.—The plaintiff after Judgement at the Common Law and Outlawry thereupon, seeketh relief in this Court, but dismissed, and yet after retained, Owen plaintiff, James Wid defendant. Anno 21 & 22 Eliz. [1579].

[139] METHAM v. FAIRBANK.

Costs for want of a Bill.—The defendant made oath he was served with a Subpoena to appear in this Court, but hath casually lost it. And now upon his appearance no Bill in Court, therefore costs. Domina Metham plaintiff, Fairbank defendant. Anno 21, 22 Eliz. [1579]. [S. C. Cary, 74 & 77; ante, Ch. Ca. Ch. 133.]

ESTCOURT plaintiff. } Anno 21, 22 Eliz. [1579].
TANNER defendant. }

Jurisdiction of Wales allowed, and under £10 value.—For that it appears by the Bill, that the matter is for money under ten pounds value, and also the defendant made oath that both parties dwell within the Marches of Wales, therefore dismissed to take their remedy there. [S. C. Cary, 74.]

PILGRIME v. READ.

A Subpoena delivered to the defendants wife, and at his house a good service.—John Sperhawke made oath for delivery of a Subpoena to the wife of the defendant at his house, who had not appeared, therefore an Attachment is granted. Pilgrime plaintiff, Read defendant. Anno 21, 22 Eliz. [1579]. [S. C. Cary, 78.]

[Mews' Dig. tit. HUSBAND AND WIFE, XI. ACTION BY AND AGAINST, 2. *Procedure, Pleadings and Practice, c. Other Points of Practice.*]

DOLMAN v. VAVASOR.

Rent charge out of several mens lands, the granter of the land chargeth on mans lands only. He sueth the other that is chargeable, and the grantee for contribution.—The plaintiff seeketh for relief touching several rent-charges of the said Ralph, Robert and Thomas, whereunto certain lands as well of the plaintiffs as of the said Edwards the other defendants are chargeable; for that the said three defendants charged the lands of the plaintiff only therewith. And ordered, because the plaintiff is troubled for the rent of the said Thomas, by distresse, and he is beyond the seas, and will not answer, that an Injunction be awarded against him, Dolman plaintiff, Edward Vavasor, Ralph Vavasor, Robert Vavasor and Thomas Vavasor defendants. Anno 22 Eliz. [1579–80]. [S. C. Cary, 92.]

PICKTON Plaintiff. } Anno 21 Eliz. [1578–79].
LIDCOTE & AL. Defendants. }

Reversion of a copyhold sold which cannot be enjoyed, therefore the defendant is ordered to shew cause why he should not repay the money received.—The defendant had of the plaintiff certaine [140] money for the reversion of the copyhold which cannot be enjoyed according to the said agreement: Therefore ordered that a Subpoena be awarded against the Defendant, to shew cause wherefore he should not repay to the Plaintiff his money by him received in consideration of the said grant. [S. C. Cary, 93.]

EPISCOPUS SARUM v. HINDE.

The plaintiff shall examine no witnesses before the defendant have answered.—The Defendants were never served with processe, and yet the Plaintiff served divers witnesses with Processe to examine them. But ordered that no witnesses shall be examined until the defendant be called in by Processe, and have answered according to the ordinary course of the Court. Episcopus Sarum, Plaintiff, Hinde & Hinde Defendants. Anno 22 Eliz. [1579–80].

BUTLER v. WID.

Attachment against him that makes a rescue upon Commission of rebellion.—Divers Commissioners in a Commission of Rebellion have returned upon the same, that one Ellis made a rescue upon the execution thereof; Therefore an Attachment is awarded against the said Ellis, Butler & al. Plaintiffs, Isaack Wid defendant, Anno 22 Eliz. [1579–80].

GREVILL v. BOWKER.

The suite is for a promise supposed by the Plaintiff to be made to him by the defendant, to yeeld up and surrender a Lease of a pasture and certain tithes upon the payment of 100 Marks by the plaintiff to the defendant, and dismissed upon hearing, as more meet to be decided at the Common Law then in this Court. Grevill plaintiff, Bowker defendant. Anno 22 Eliz. [1579–80].

SUTTON v. ERINGTO.

Consim.—Sutton Plaintiff, Eringto Defendant, a suit upon a promise, and twelve pence accepted in [141] consideration, referred to the Common Law, Anno 22 Eliz. [1579–80].

HOBBS———plaintiff.)
HOBBS & CHURCHILL defend.) Anno 22 Eliz. [1579–80].

The plaintiff is excommunicate after answer, and cannot proceed untill absolution.—The plaintiff after the defendants answer put in, was excommunicate, notwithstanding the plaintiff replied and served the defendant to rejoyne, who by way of rejoynder pleaded the excommunication, and shewed a Certificate thereof; And yet the plaintiff proceeded and took out a Commission to examine witnesses. And ordered that all proceedings by replication and Commission since the Excommunication, is void, and shall be suppressed, and no further proceedings untill the plaintiff bring and shew forth in this Court letters of Absolution.

PRICE v. FENCH.

Subpoena to examine witnesses before the Town-Clerk of London for matters depending at Common Law disliked by the Court.—The plaintiff procured an Attachment against the defendants, for that they refused to be examined before the Town-Clerk of London, being served with a Subpoena for that purpose. The matter in question whereupon they should be examined depending not in London, but in her Majesties Bench, which kind of examination the Court holdeth to be disorderly, and therefore discharged the Attachment. Price plaintiff. Fench, Holland and Parkhouse Defendants. Anno 22 Eliz. [1579–80]. [S. C. Cary, 95].

VAUGHAN v. WILLIAM.

A party served with Processe in the name of one unknown, for vexation ordered.—The defendant knoweth no such Thomas as is named for the plaintiff, nor the town where he is named to be dwelling, and the same defendant and his two brethren were likewise served at the suit of one Thomas Vaughan, whereas [142] none of them knew any such man, but suppose the Processe was procured against them for vexation by Matthew ap Richard and Charles ap Richard, who are now in town; Therefore ordered that

the Warden of the Fleet shall warne the parties to be in Court to morrow morning to answer the premisses, and then further order shall be taken. Thomas Vaughan Plaintiff, William Defendant. Anno 22 Eliz. [1579-80].

JONES v. WYNNE.

Consim.—Ap Richard served a Subpœna in the Plaintiffs name, where there is no such party; therefore an Attachment against ap Richard. Jones plaintiff, Wynne defendant. Anno 22 Eliz. [1579-80].

LEWYN v. FANDESEY.

Jurisdiction of the Exchequer over-ruled.—The Bill was to be releived upon the extremity of a Bond of £100 for not payment of £25 at the very instant. The defendant demurred because he is servant to the Lord Treasurer, and ought to be priviledged in the Exchequer; which cause of demurrer this Court alloweth, not for that the defendant can have no such priviledge unlesse the plaintiff might have remedy in the said Court of Exchequer. Lewyn Plaintiff, Fandesev Defendant. Anno 22 Eliz. [1579-80].

ALL SOULS' COLLEDGE v. LEIGHTON.

Suit for interest of Common and profits apprender dismissed.—The plaintiffs Bill is for certain wayes, interests of common and profits apprender, and also for taking of Hawkes, cutting of Woods, and taking of distresses. The interest of common and profits of apprender upon hearing thereof were dismissed. The ways referred to in different Commissioners. And a day given to shew cause wherefore the matter of distresses, taking of Hawkes, and cutting of Woods should not be dismissed. The Warden of All Souls Colledge in Oxford plaintiff, Leighton, Mawde and others defendants. Anno 22 Eliz. [1579-80].

[143] BEECHER v. HASELWOOD.

Executor charged with goods received by the Testator.—The defendants demurred for that they are executors, and therefore not chargeable in Law to accompt for goods received by the Testator: But ordered to answer. Beecher and others plaintiffs. Haselwood defendant. Anno 22 Eliz. [1579-80].

VAVASER v. FOWBERY.

Jurisdiction of North Wales allowed.—Because the Bill was for certain frivolous matters grown within the Jurisdiction of her Majesties Commission of the North parts, where both parties dwell, and where also the same matters are depending: Therefore ordered to be dismissed, if good cause be not shewed to the contrary. Vavaser plaintiff. Fowbery defendant. Anno 23, 24 Eliz. [1581].

LEWIS v. NEEDHAM.

The Bill being to be relieved for amerciaments is dismissed.—The suit was, for that the Defendant Needham being Steward and Farmer to her Majesty of the hundred of Bradford in the County of Salop; he that said Needham doth set unreasonable fines and amerciament for not appearance, whereas it was never used to be above six pence, and dismissed as unmeet for this Court, and the plaintiff left to seek his remedy in the Exchequer. Lewis Plaintiff, Needham & al. defendants. Anno 23 & 24 Eliz. [1581].

HARRIS v. SMITH.

Jurisdiction of Wales disallowed.—The Bill was, to be relieved upon a bond of £60, the defendant demurred, for that all the Defendants dwell within the Jurisdiction of the Marches of Wales Albeit the Council in the Marches cannot award an Injunction for stay of the defend. proceedings in the Common Pleas; Therefore ordered, if the Defendant will agree to stay proceeding at Law, it shall be dismissed, otherwise it is to be retained, and the defendant must answer. Harris and others plaintiffs. Smith defendant. Anno 23, 24 Eliz. [1581].

ARCHBOULD v. BURRELL.

Jurisdiction of Chancery is maintained.—Whereas the said defendant coming up upon [144] Attachment of privilege at the suit of the plaintiff, being one of the Clerks of Master Dr. Carew one of the Masters of this Court : And being this day according to a former order in that behalf made, brought into this Court by the Warden of the Fleets man (to put in such bail as by the ancient privilege of the Court is required) allowed by Master Serjent Anderson and Master Broughton being of this Council, that where in her Majesties Bench and other Courts at Common Law, the Bayl or main-pernours by bringing in the body of the party condemned, are excused ; the now plaintiff doth not only require four special main-pernours of the defendant, where two onely might Suffice, but would also have them bound by recognisance, simply to pay summes of money as he shall recover in this suit, without this disjunctive clause, viz. or to bring in the body of the Defendant ; and therefore desired the plaintiff might accept of two main-pernours onely to be bound, either to pay such summes of money as shall be recovered in this suit against the defendant, or else to yield the defendants body to prison. Neverthelesse for as much as they were shewed forth divers and sundry ancient Presidents of Bailes taken in like case as aforesaid, as well of old time, as of late time, whereby it generally appeared that four special sureties for main-pernours, and the party also are bound to satisfie to the plaintiff both damages and costs to be adjudged, and to appear from day to day, *donec & quousque*, &c. with which Presidents the Civil Law (as divers of the Masters of the Court affirmed) doth in that point concur, viz. that the Bail and [145] main-pernours are to pay the money received and not to be excused thereof by the yielding of the body condemned. It is therefore ordered that according to the ancient customes and form, (for the infringing whereof no sufficient matter could be shewed by the defendants council) the said defendant shall be forthwith bound himself in £400 and four sufficient main-pernours in £100 apeece by Recognisance to the plaintiff, to satisfie unto him both such damages and costs also as shall be adjudged unto him in this suit or action ; and to have the body of the defendant in Court ; and that he shall appear from day to day, *donec & quousque*, &c. as by the said Bail or Recognisance taken in open Court this present day it may appear. John Archbould plaintiff, William Burrell Defendant. Anno 23 & 24 Eliz. [1581].

RITHER v. TEMPEST.

A Fine with a render for years reserving a rent was charged on more lands then was intended, therefore an Injunction to stay execution.—A Fine was knowledged by the plaintiffs father and one Leonard Atherton deceased, to Robert Atherton and William Griniston with a render back to the said Leonard Atherton for twenty one yeares, rendering nine pounds rent, which Fine was levied to make good a lease for yeares of five closes, containing about eighty acres ; but in the same Fine were more number of acres contained : And the defendant having procured letters of Administration of the said Leonard Atherton's goods, preceiving the plaintiffs father had more lands neer adjoining to the said five closes, which by the generality of the words of the said Fine, did passe in law by the said Fine, being with a rent and render, and so not averable to any other uses, brought a *scire facias* upon the said Fine to ex-[146]-ecute the same against the plaintiff : And an Injunction is granted to stay the said *scire facias* : Rither Plaintiff, Tempest Defendant. Anno 23, 24 Eliz. [1581].

BIRKET v. BERESLEY.

Lands Assured for joynture or marriage never effected, was decreed against the woman.—Certain lands were assured to the Defendant Katherine, for a joynture upon a marriage intended with one Paslow, which marriage was never effected. But the said Katherine after married the other defendant, and never claimed the said lands till of late, that the same being come into the hands of divers Purchasers now plaintiffs, and the Feoffment made was intended conditionally, (though by fraud made absolute) to be void if the marriage take not effect, upon repayment of £100 which was repaid. Therefore decreed for the plaintiffs, if no cause be shewed to the contrary by a day. Birket and others Plaintiffs, Beresley and Katherine his wife Defendants. Anno 23, 24 Eliz. [1581].

BARTY v. SHAW.

Suit for pasturing or common dismissed.—The matter of the Bill was for pasturing or common claimed in the Fenne of Gosberton, and because the matter is more meet to be decided by the Common Law; Therefore dismissed. Barty Plaintiff. Shaw Defendant. Anno 23, 24 Eliz. [1581].

GARLICK v. GARLICK.

A lease for life to one remainder to another, he surmised it is intended to destroy his remainder, ordered to bring the leases into the Court.—The plaintiffs Father being husband to the defendant, devised by his will certain leases to the defendant for her life, the remainder after her death to the plaintiff. And upon surmise the defendant seeks to put away the said leases, and to surrender the same, and take new. It is ordered she shall bring the leases into the Court, to remain in safe custody for preservation both of the plaintiffs and defendants interests. Garlick plaintiff. Garlick widow defendant. Anno 23, 24 Eliz. [1581].

[147] CHEESEBROKE v. HASLEWOOD.

Assignee of a lease cannot bring a bill of revivor.—The matter in variance could not be judicially heard in the Court upon the Bill of revivour exhibited by the plaintiff for the reviving of a former Bill exhibited by one Reinolds deceased, of the plaintiff being assignee of the lease in question could not revive the same. Cheesebroke Plaintiff. Haselwood and al. Defendants. Anno 23, 24 Eliz. [1581].

ROSE v. REINOLDS.

The husband dead leaveth his wife a lease, yet she sueth for a dower at Common Law, decreed against her.—The suit was to stay a Writ of dower brought by the defendant against the plaintiff, and the cause was, the plaintiffs grandfather was bound to leave the now defendant, then his wife, either £40 joynture, or a lease of Nayland Park, which he then had for many years enduring. The Grandfather assured the lease of Nayland Park accordingly, by reason whereof the Feoffees of this land had a Decree in this Court against the said wife. Therefore a Subpœna to the defendant to shew cause why a like Decree shall not now be made for the plaintiff. Rose plaintiff. Reinolds and Rose his wife defendants. Anno 23, 24 Eliz. [1581].

[Mews' Dig. tit. ELECTION, 4. ELECTION BY WIDOW; see Dillon v. Parker, 1833. 1 Cl. & F. 303. 7 Bligh N. S. 325; and below, 1 Swanst. 359, especially notes p. 398 *et seq.*; Douglas v. Douglas, 1871, L. R. 12 Eq. 617.]

PASMORE v. FORD.

The defendant charged for tearing a Bond. In the replicatio he saith it is an Indenture: the defendant demurres, for that contradiction, but ordered to rejoyne.—The Bill charged the Defendant with tearing an Obligation or Bill obligatory. The Defendant, for that it was in truth a Bill of Indenture of Covenants, denied the tearing of any Obligation, by his answer. The plaintiff by way of Replication shewed it was an Indenture of Covenants. The Defendant demurred; for that the Plaintiff departed from his Bill, which this Court accounted no departure: Therefore ordered the defendant shall forsake his demurrer, and rejoyne, and joyne in Commission, or lose the benefit thereof, and the plaintiff to have a Commission alone. Pasmore Plaintiff. Ford de-[148]-defendant. Anno 23 & 24 Eliz. [1581].

HITCHAM v. THYNNE.

Jurisdiction of Wales not allowed.—Motion was made that the cause might be dismissed into the Marches of Wales, for that all the parties dwell there, and onely touching a lease. But for that the matter is here proceeded into issue, and witnesses examined, and the matter ready for hearing; Therefore it is retained. Hitcham plaintiff, Thynne defendant. Anno 23 & 24 Eliz. [1581].

HAVERS v. RANDOLL.

An attorney for the plaintiff examined for the defendant.—One Colborne an Attorney at Common Law for the plaintiff, is ordered to be examined, for the defendant, being served with Subpœna, refusing to be examined touching the pulling off, or breaking off a seal from an Indenture, not any thing concerning his clyents title. Havers Plaintiff, Randoll Defendant. Anno 23 & 24 Eliz. [1581].

PAGE v. SPENSER.

A lease paroll sued for, is dismissed.—The matter in question being for a lease paroll, pretended to be made to the plaintiff for divers years yet to come of divers lands in the Bill mentioned, is dismissed. Page Plaintiff, Spenser and al. Defendants. Anno 23, 24 Eliz. [1581].

PURSERIE v. THROGMORTON.

Non-age and forreign birth pleaded.—The matter is touching a lease made by the defendant himself which he would avoid by his non-age, and being borne beyond Seas, hard to be proved, and ordered, because the defendant seeks to avoid his own deed, that one Katherine Throgmorton (who is like to know of the birth of the Defendant) shall be examined, though after publication *ad informandam conscientiam Judicis* Purserie plaintiff, Throgmorton defendant. Anno 23, 24 Eliz. [1581].

MASKALL v. HARIS.

A Pursevant to bring in witnesses that will not be found.—Upon information that one Hampton and Lane, two necessary witnesses, do absent them-[149]selves so as they cannot be found to be served with Process; Therefore a pursevant is granted to bring them in. Maskall plaintiff, Haris and al. defendants. Anno 23, 24 Eliz. [1581].

BRACEBRIDGE v. BRACEBRIDGE.

Injunction granted to settle possession recovered at the Common law.—The Plaintiff recovered dower at the Common Law, and had judgement and execution. But the defendant being rich and wilful, would not let her have any benefit thereby; whereupon she set forth her title by Bill in Chancery, and prayed the aid of this Court to have her possession established by Injunction: And upon a Letter written by my Lord Dyer Chief justice of the Common-Pleas and justice Meade, before whom the tryall was had, craving the Lord Chancellors aid for the plaintiff: He granted an Injunction for her possession. Bracebridge widow plaintiff, Thomas Bracebridge Defen. Anno 23, 24 Eliz. [1851].

NELSON v. NELSON.

The Jurisdiction of North allowed.—The matter of the Bill is concerning the buying of the title of certain lands in Cumberland, being within the Jurisdiction of the Commission of the North, where all the parties dwell, and where the Defendants title was decreed against the Plaintiffs title. And for that the matter of buying of titles is not meet for this Court; And if it were; yet being decreed, this Court thinks not meet to retain the same: Therefore dismissed. Nelson plaintiff, Nelson and Nelson Defendants. Anno 23, 24 Eliz. [1581].

HUSSEY v. TANKERD.

Matter of Common dismissed.—The matter of the Bill being for interest of Common, was upon hearing after witnesses examined on both parts, and both parts being sufficiently able, referred to triall at Law. Hussey plaintiff, Tankerd and others defendants. Anno 23, 24 Eliz. [1581].

WALKER v. LATHES.

Jurisdiction of the North allowed.—Upon hearing the matter, being for tenant [150] right demanded by the Plaintiff for which he paid unto Lathes one of the defendants £20, it is dismissed to the order of her Majesties Commissioners for the North. But Lathes ordered to pay back the £20, Walker plaintiff, Lathes and others Defendants, Anno 23, 24 Eliz. [1581].

HULTON v. LACY.

A cause formerly dismissed, because under value, and is retained, in regard it is proceeded to issue.—Whereas by order of the Eleventh of November last, it was ordered the cause should be dismissed, because the lands in the Bill are under 40s. per annum : But now upon information that the suit is proceeded into Bill, answer, replication, rejoinder, and examination of witnesses, before any exceptions taken : Therefore retained to be heard here : But after a new motion dismissed. Hulton Plaintiff, Lacy and others defendants. Anno 24 Eliz. [1581–82].

KENT v. HADOCK.

Jurisdiction of Chester not allowed.—The Defendants moved by Master Warberton to have the cause dismissed into the County Palatine of Chester, where the Defendants dwell, and the matter riseth : But because the plaintiff is one of the Yeomen of the Guard, and to be necessary here attending : therefore retained. Kent and uxor plaintiffs, Hadock and Young defendants. Anno 24 Eliz. [1581–82].

BRERETON v. DONE.

Consim.—Upon motion made to have the cause dismissed into the County Palatine of Chester where the parties dwell ; Because it appears to this Court, that in this suit having formerly continued against the same defendants, they offered to bring into this Court certain Bonds concerning the matter now demanded, and to set down upon their oaths the surplusage of goods remaining in their hands ; therefore it is here retained. Brereton & uxor plaintiffs, Done & uxor defendants. Anno 24 Eliz. [1581–82].

[151] LITCHFIELD (BAILIFFS OF) v. OTELY.

A Subpœna against one that will not take upon him the office of a Sheriff of a City, being chosen thereto.—Upon certificate made by the Plaintiffs under their common seale, that the defendant being chosen Sheriff of the County of the said City refuseth both the oath that belongs thereunto, and also the execution of the same Office : A special Subpœna was awarded against the Defendant, commanding him either to take upon him the said office, or else to appear immediately, and shew cause to the contrary. The defendant being served with the Subpœna, appeared before the Master of the Rolls, but shewed no such cause as he liked of. And yet did not only contrary to the commandement of the Master of the Rolls given unto him, not to depart the town without licence or giving better satisfaction to the Court ; but also hath hitherto refused to take upon him the said office : Therefore an Attachment against the Defendant to answer his said contempt. The Bailiffs of Litchfield Plaintiffs, Richard Otely Defendant. Anno 24 Eliz. [1581–82].

QUICK v. ST. CLEERE.

The plaintiff being a copyholder, and not able to satisfie a recovery in a writ of dower, hath an Injunction.—The Plaintiff being a copyholder, had the rent due upon the freehold extended upon a Statute knowledged by his word, how after sold the freehold to one Dowrish, against whom the defendant after the death of her husband being first Lord brought a Writ of Dower. And the said Dowrish pleaded, *Ne unques seisie* and dower, whereas he might have pleaded in Barre a Fine levied by the husband, and five years past after his death before the Defendants claimed, and so have barred the Defendant, and so the Defendant recovered in the said Writ of Dower, and had the Plaintiffs said copyhold lands assigned for her Dower, whereby [152] the plaintiff is enforced by the Law, because they cannot falsefie the record to be as well subject to the distresses of the tenant in Dower for this rent, as of him that hath the same extended. Therefore, and because the Plaintiff cannot plead recovery of Dower to avoid the said extent upon the Statute, for that the same Writ of Dower might have been barred by pleading the Fine, whereof the Conusee of the Statute may take advantage : Therefore if cause be not shewed, (by such a day) to the contrary, tenant in Dower proceeding by distress and the avowry, is staid by Injunction. Quick Plaintiff, St. Cleere widow defendant. Anno 24 Eliz. [1581–82].

REEVE v. HARWARD.

Contribution of rent.—The Mannor of Monden in Suffolk is chargeable with a rent of thirteen pounds per annum, to Pepes one of the Defendants, Harward in the name of Pepes, upon the Plaintiffs lands (sometimes parcel of the said Mannor) takes a distress, and avowes for the arrearages of the said rent, and in the name, and by the commandment of Pepes, whereas the greatest part of the Mannor is in the other Defendants hands; Pepes by his answer denies the distresses or avowry to be taken or made by his commandment, whereby it seems the other defendants do collude to transferr the whole charge of the rent upon the Plaintiffs lands; therefore if no sufficient cause be shewed to the contrary (by such a day), ordered that the proceedings by distress and avowry be stayed by Injunction. Reeve plaintiff, Harward and others Defendants. Anno 24 Eliz. [1581-82].

SMITH v. FERRY.

An Excommun. copierend, a Supersedeas is granted, because it is contrary to the form of the Statute.—The plaintiffs were taken by a Writ of *Excommunicato capiend*, out of this Court, and [153] in prison in the North; And because the same is contrary to the form of proceedings of the Statute of the 5 Eliz. c. 23. Therefore a Supersedeas is granted to discharge the said *Excommunicato capiend*, and for the enlarging of the Plaintiffs. Smith and *uxor ejus* Plaintiffs, Ferry and Ferry Defendants. Anno 24 Eliz. [1581-82].

BANISTER v. JOANES.

Consim.—The Plaintiff being taken by an *Excommunicato capiend*, a Supersedeas is awarded, because the Writ is made contrary to the Statute out of term, and without return. Bannister and others Plaintiffs, Joanes defendant. Anno 24 Eliz. [1581-82].

BARRAS v. BAST.

The plaintiff unknown, costs awarded against him that served the Subpœna.—The defendants got 40s. costs for want of a Bill, and made oath they knew not any such man as the plaintiff is, and that the Subpœna was served on them by one Michael Barrow; Therefore ordered upon the motion of Cordell the defendants Attorney, that a Subpœna be awarded against the said Michael Barrow either to pay the costs, or to direct the defendants to the knowledge of the pretended Plaintiff. Barras plaintiff, Bast and others defendants. Anno 24 Eliz. [1581-82].

BOURN v. PIGOT.

Attachment unduly gotten, discharged.—The plaintiff arrested the defendant in the Kings Bench, and then served her with a Subpœna out of this Court to be examined before the Town-Clerk of London, to discover matter against her self in the same cause; and because she was not examined got an Attachment against her, and got her arrested, whereupon she appeared and was discharged of the contempt by the Court. Bourn plaintiff, Pigot defendant. Anno 24 Eliz. [1581-82].

BAINES v. WRENNE.

A Subpœna to hear judgement served to the defendants brother.—A Subpœna *ad audiend. Judicium* was delivered to the defendants brother, and the next day a ticket delivered to the defendant himself [154] of the day of his appearance, and the Court held it good service. Baines plaintiff, Wrenne defendant. Anno 24 Eliz. [1581-82].

HOLLINGWORTH v. HARDING.

Commission of rebellion discharged, because the former Process was not entered in the Register, and the Clerk ordered to pay costs.—The defendant was apprehended upon Commission of Rebellion, where neither Attachment nor Proclamation of Rebellion is entered in the Register; therefore discharged of the Commission of Rebellion and contempt, and Thomas Flower one of the Clerks of this Court that made the Commission of Rebellion to pay to the defendant such costs for his vexation, as Doctor Lewis one of the Masters of this Court shall assesse. Hollingworth Plaintiff, Harding Defendant. Anno 24 Eliz. [1581-82].

AVENANT v. KITCHIN.

Husband bound that his wife shall dispose of £500 at her death.—The Bill is as well for certain Legacies given them by the late wife of the said Kitchin, and also to have the said Huet ordered not to release a Recognisance of 2000 marks, wherein the said Kitchin is bound unto him in trust before marriage with his said wife, that she might by her Will dispose of £500 goods besides her Jewels. Kitchin demurred upon the Bill, and sued the said Huet in the Court of Requests to release the said Recognisance, and ordered if cause be not shewed by such a day, then a Subpoena to Kitchin to make a better answer, and to Huet not to release the Recognisance. Avenant & al. Plaintiffs, Kitchin & Huet Defendants. Anno 24 Eliz. [1581–82].

GILES v. BELSON.

Two defendants the one disclaims Subpoena to hear judgment served, but on one the decree binds both.—The Defendant desired to be discharged of a Decree made against him, and one Shepham the last term, because he was not served with Process the last term to hear judgement. But because Belson by his answer disclaimed; Therefore the Decree against him without process [155] served is just. Giles Plaintiff, Belson Defendant. Anno 24 Eliz. [1581–82].

BUNING v. KIPPING.

The plaintiff loseth his suit for copyhold in the Lords Court, and is dismissed.—The Bill was concerning certain copyhold lands, for which the Plaintiff heretofore sued in the Lords Court before M. Golding Steward there, where the same upon hearing went against the plaintiff. Therefore if good cause be not shewed to the contrary by this day sevensnight, then the cause shall be dismissed. Buning Plaintiff, Kipping Defendant. Anno 24 Eliz. [1581–82].

NORTHWOULD (CHURCHWARDENS OF) v. SCOT.

Parishioners sue their Parson at every years end to give a rie loaf and a red Herring.—The suit was on the behalf of the Parishioners, as well rich as poor, for and concerning the yearly Almes or distribution supposed to be due by the Parson of the said Parish, of a Rie loaf and a red herring to every Parishioner on Saint Andrews eve. But that it appears by a Record in the Exchequer, setting down the value of the said Parsonage, that there is 13sh. 4d. yearly to be distributed in victuals at the same time to the poor of that Parish, but not to the Gentlemen and men of ability. And for that the Defendant offereth to give yearly 26sh. 8d. in lieu of the said 13sh. 4d. to the poor of the said Parish who stand in need thereof, Therefore day is given to the plaintiffs to shew cause why they should not accept thereof, or be dismissed. And after assent 40sh. a year was decreed yearly to the poor. Elmer and Smith Church-Wardens of Northwoud in the County of Norfolk Plaintiffs, Scot Parson of the same Town Defendant. Anno 24 Eliz. [1581–82].

LACY v. ANDERSON.

Copyhold lands devised in lieu of dower, though no barre in law.—The suit is to stay a suit at Law in a Writ of Dower made by the Defendant, for that the defendants wife had certain copyhold lands de-[156]vised unto her in lieu of her thirds at Law, which she accepted of and enjoyed twenty years, and yet seeketh now to recover dower of the Freehold lands. The defendants demurre because copyhold lands can be no bar of dower. But the Court thinks it no conscience she should have both; Therefore ordered to answer. Lacy & uxor Plaintiffs, Anderson & uxor Defendants. Anno 24 Eliz. [1581–82].

[Mews' Dig. tit. ELECTION, 4. ELECTION BY WIDOW. See note to Rose v. Reynolds, ante, Ch. Ca. Ch. 147.]

PRAWNCE v. HODILOU.

Jurisdiction of Cambridge not allowed.—The Defendant demurred because he was an University-man of Cambridge, and therefore privileged; yet the plaintiff having his necessary witnesses dwelling farr distant from the University, and no compulsory Process lying there to force them to be examined, nor any Commission to be awarded

from thence ; and also because the plaintiffs witnesses are *singulares testes*, and some of them are kinsfolk, which are not any witnesses by the Civil Law : Therefore ordered that the defendant shall answer. Prawnee, plaintiff, Hodilow defendant. Anno 24 Eliz. [1581-82]. This cause was after ordered, that after answer and witnesses examined, the matter was dismissed, and the plaintiff left to take his remedy before the Chancellour or Commissary of the University of Cambridge.

SWIGO v. HANBURY.

The plaintiffs witnesses being beyond seas, an Injunction to stay proceedings.—The plaintiff supposeth by his Bill, that the defendant knowing that his most principal witness being beyond the Seas, hath brought an action upon the case against him, and will give in evidence a note under the plaintiffs hand, whereas his witness can prove it was made upon the defendants promise to take no more then was due ; therefore an Injunction. Swigo plaintiff, Hanbury defendant. Anno 24 Eliz. [1581-82].

[157] PLEADALL v. GODDARD.

Suites for tithes dismissed.—The Bill was as well for not tithing as for evidence concerning the same tithes ; and for that the matter of tithes hath been in the spiritual Court, and by prohibition brought to the Common Law, where it is most proper to be determined ; Therefore the matter of not tithing is dismissed. Pleadall plaintiff, Goddard defendant. Anno 24 Eliz. [1581-82].

AUNGER v. BETTS.

Witnesses examined in this Court, no Bill here depending dismissed and suppressed.—The Plaintiff caused certain witnesses to be examined in this Court, whereas there is no suit depending here but at the Common Law ; ordered to be suppressed, and never to be given in evidence against the defendant or any claiming by or under him. Augner plaintiff, Betts Defendant. Anno 24 Eliz. [1581-82].

WISE v. WILLIS.

Jurisdiction of Oxford allowed.—The Defendants were dismissed by the priviledge of the University of Oxford, and the Plaintiff left to take his remedy there. Wise plaintiff, Frances Willis President of St. John's Colledge in Oxford, and Robert Kiblewhite Fellow of the same house defendants. Anno 24 Eliz. [1581-82].

MILLINGTON v. CROXTON.

The Jurisdiction of Chester allowed.—The defendants were dismissed, for that the Defendants dwell in the County Palatine of Chester, and the matter of the Bill is for a lease to be had of lands lying in the said County Palatine of Chester. Millington Plaintiff, Croxton and others defendants. Anno 24 Eliz. [1581-82].

HARRISON v. LANE.

Upon a long and frivolous replication, ordered the defendants may go to Commission without rejoyning thereunto.—The plaintiff put in a Replication of two skinnes of parchment of frivolous matter, and not fit to be rejoyned unto, of purpose to put the Defendant to unnecessary charges, and therefore Master Godfrey being of counsel with the defendants, desired his client might not be compelled to put in a rejoinder, but [158] that they may go to Commission with the same, and ordered accordingly. Harrison Plaintiff, Lane & uxor Defendants. Anno 24 Eliz. [1581-82].

KENNET v. HORNOR.

Suit to perform an award without order of this Court decreed.—The Defendant moved to have the Plaintiffs Bill dismissed, for that he sought to have an award performed, which was not made by Warrant or Commission of this Court ; and for that also the plaintiff hath a bond to perform the same award : but for that the defendant had received the money that was awarded by the same award, and the Bond was under the value, therefore ordered to performe the award. Kennet widow Plaintiff, Hornor Defendant. Anno 24 Eliz. [1581-82].

WILLIAMS v. MOONE.

The suit for a lease paroll of a Parsonage.—The suit was concerning a lease paroll, by the Plaintiff claimed to be made unto him of a Parsonage by Robert Moone, Father of the Plaintiff deceased. The parties proceeded to issue, and the Plaintiff desired to have an *Ejectione firmæ* staid, which is brought by the Defendant Ward upon a lease made unto him by the other defendant untill witness be here examined; and ordered that counsel on both sides shall attend upon Wednesday next, and then farther order shall be taken herein. Williams Plaintiff, Moone Defendant. Anno 24 Eliz. [1581–82].

PERRY v. FRY.

Demurrer returned upon a Dedimus potestatem ordered to answer.—The Defendant Fry having a *dedimus potestatem* to take his answer, returned a demurrer, which demurrer being excepted to by the Plaintiffs counsel, and not sufficiently maintained by the Defendants counsel: Therefore the defendant was ordered to make a better answer. Perry Plaintiff, Fry, &c. Defendants. Anno 24 Eliz. [1581–82].

GOODING v. YARD.

The Bill was with an alias and the Subpœna without.—The Bill was Gooding alias Reignolds, but [159] the Subpœna was *ad sectam* Nicholai Gooding only leaving out alias Reignolds. And hereupon the Defendant got costs for want of a Bill as he supposed, and the Court ordered the costs and Attachment for not payment thereof should be discharged. Nicholas Gooding alias Reignolds Plaintiff, Phillip Yard Defendant. Anno 24 Eliz. [1581–82].

FOREMAN & uxor Plaintifs.)
 GEFFORD & uxor Defendants.) An. 24. 25 Eliz. [1582].

Attachment gotten upon a Subpœna returnable a die prox futur. in tres septimanas discharged.—A Subpœna was served on the Defendant to appear *a die prox. futur in tres septimanas*, and tels not when he should appear, and therefore moved by Master Rotheram the Defendants Attorney (and the rather because the Bill is for £8) to be discharged of the Attachment, and ordered if it be true, the Attachment to be discharged, and the matter dismissed, which after was by a Master of the Court certified true; Therefore dismissed, and Attachment discharged.

BRACEBRIDGE v. BRACEBRIDGE.

The plaintiff recovered her dower at Com. Law, but by the potency of the defendant kept from execution, and relieved here.—It was moved by Master Solicitor generall on the Defendants behalf, that the issue joyned between the parties in this Court, is only whether the lands claimed by the Plaintiff be parcell of her dower recovered at the Common Law or no, and therefore meetest to be tryed by the Common Law; But Master Beaumont being for the Plaintiff, alleaged, that albeit the Plaintiff hath recovered her dower at Law, yet the defendant being of great power in the Countrey, keeps her out contrary to the same recovery: Therefore an Injunction of this Court is a-[160]-warded, and the matter by order to be retained. Bracebridge plaintiff, Bracebridge Defendant. Anno 24, 25 Eliz. [1582].

HOVENDON v. CANTERBURY (MAYOR OF).

Jurisdiction of Canterbury over-ruled.—The defendants refused to answer, for that by the Charter of the City of Canterbury they ought not to be impleaded out of the said City, whereupon the answer being referred to the Master of the Rolls, he thought not fit the Defendants should be judges of their own cause: therefore they were appointed to make direct answer. Then they shewed that they held the lands in Fee farme of her Majesty, and therefore prayed her Majesties Council may be called to it. Ordered, if her Majesties Council shall not by such a day shew good cause to the contrary, then the plaintiff may reply and proceed notwithstanding the defendants prayer. Hovendon plaintiff, Major & Communitas Canturbur. Defendants. Anno 24 & 25 Eliz. [1582].

GOODING v. SPURWELL.

Costs discharged upon Certificate of the Major of Lidford, of a compromise to be here affirmed by oath.—The defendant got costs for want of a Bill, and upon the Certificate of the Major and Burgesses of Lidford in Com. Devon. under the common Seal, that one Thomas Glanville Gent. made oath before them that all matters after the serving of the Subpoena were compromitted to him and one John Luggier, and that they appointed divers meetings, but no end was made : Therefore costs discharged, and Process for the same. Gooding plaintiff, Spurwell and others defendants. Anno 24 & 25 Eliz. [1582].

TARLINK v. WENTWORTH.

Grandfather and Father being denizens, Father & grandfather dieth. The question is whether the son shall have the lands?—The cause was, the grandfather and father being strangers were made Denizens, the father had issue a son within the Realme, and then the grandfather purchased lands, and the Father died, and the Grandfather died, and whe [161] ther the son should enjoy the lands, was the question. It was ordered that a Case should be made, and the same should be referred to some of the Judges. Tarlink Plaintiff, Dominus Wentworth Defendant. Anno 24 & 25 Eliz. [1582].

GARDINER v. SKIPKANY.

Attachment against a witness discharged because no charges tendered.—Alice Skipkine was served with a Subpoena *ad testificand.* but no charges tendered unto her, as by Affidavit appears, and yet an attachment was taken against her for not appearing. Therefore ordered a Supersedeas should be granted to discharge the Attachment. William Gardiner Plaintiff, John Skipkany Defendant, Anno 25 Eliz. [1582–83].

HELSHIDE v. WILKINSON.

Husband and wife joynt purchasers, the remainder to the heirs of the husband, he dies before the Queens silver was paid, and the wife sues to be releived against the fine.—The Plaintiffs husband and she purchased lands joyntly, and to the heirs of the husband, and both of them levied a Fine to the defendant. But before the Queens silver was paid, the husband died, and the Plaintiff made suit to the Lord Chief Justice of the Common Pleas to stay the proceedings of the fine, who did so for a time, but after it passed : wherefore the Plaintiff to have releif, exhibited her Bill in this Court, shewing that her husband had a great advancement by her marriage, and left her indebted, and nothing to maintain her self. The Defendant demurred, because the Plaintiff may have remedy by Writ of Error to reverse the fine. But because the Plaintiff is poor, and not able to sue without the quiet possession ; Therefore ordered, if cause be not shewed to the contrary (on such a day), a Subpoena is granted against the defendant to answer ; and an Injunction to continue her in possession. Anna Heshide Plaintiff. Edward Wilkinson Defendant. Anno 25 Eliz. [1582–83].

[162] CLIFTON v. BASSET.

Two cases in Law touching copyhold referred to the Judges.—The questions touching Copyholders are two ; the one, whether the Court, whereat the presentment of a forfeiture in felling of trees upon the premisses by the late husband of the Defendant was made, and whereat the Copy whereby the plaintiff claimes, was granted, being holden and kept ? The second, whether the felling of trees by the Defendants late husband upon the premisses without any direct custome, be a forfeiture or no ? Ordered that two Cases shall be made, and the opinion of the Judges shall be had thereon. Clifton Miles Plaintiff, Basset widow Defendant. Anno 25 Eliz. [1582–83].

MORLAY v. MANNOR OF HORNEBY (TENANTS OF).

Jurisdiction of Lancaster allowed.—The Plaintiff hath brought up 24 of the Defendants by Subpoena, to answer a Bill, surmising that certain writings and Evidences concerning the said Mannor of Horneby, and other the Plaintiffs lands in the County Palatine of Lancaster are come into their hands, whereas they never had any such : and therefore, and because matters arising in the said County Palatine are pleadable

within the said County, or within the Court of her Majesties Dutchy of Lancaster: It is ordered that the Defendants shall shew the same by way of demurrer upon their oaths, and demanded judgement whether this Court will hold plea thereof or not, and thereupon the Defendants may depart for this time. And if the Plaintiff shall not by Wednesday shew good cause, the matter shall be dismiss, Dominus Morlay & uxor Plaintiffs, John Matro and others the tenants customary of the Mannor of Horneby in Com. Lanc. Defendants. Anno 25 Eliz. [1582-83].

[163] PENRUDOCK v. COLES.

Consim.—Penrudoock Plaintiff, Coles and others Defendants. The like to this in all points as is last before touching the County Palatine of Lancaster. Anno 25 Eliz. [1582-83].

PUCKLY v. BRIDGES.

Depositions in the Star-chamber and in London allowed in this Court.—The Plaintiff removed the matter by special *certiorari*. And Master Vernon moved for the Plaintiff, that some Records and depositions in the Star-chamber and the City of London where the matter hath been examined may serve here for proofs of the Plaintiffs surmise: and the rather because some of the witnesses there examined are dead, and some others are beyond the Seas: Therefore it is ordered it shall be so as is desired. Puckly and others Plaintiffs, Bridges and others Defendants. Anno 25 Eliz. [1582-83].

STRELLY v. ALBANY.

A Solicitor not to be examined.—One Robson Solicitor for the Plaintiff in this Case was served with a Subpœna to testifie for the Defendant, and refused the same: ordered that he should not be examined. Strelly Miles Plaintiff, Albany Defendant. Anno 25 Eliz. [1582-83].

BLACKWELL v. SIMPSON.

Upon the hearing of the matter it appeareth, that the lands in question have been in the defendants and their possession, by whom they claime by the space of eighty years: Therefore ordered and decreed the defendants to be dismissed. Blackwell Plaintiff, Simpson and others Defendants. Anno 25 Eliz. [1582-83].

GIFFORD v. TRIPCONNY.

Joynt tenants for years, the one sueth the other for the deed, and ordered to be brought into the Court.—The Defendant in his answer confesseth the haveing the Lease or Deed, whereby the Plaintiff pretendeth to have a joynt-estate with him: therefore ordered a Subpœna *ducens tecum* be awarded against the Defendant to bring the same into the Court, to be seen and perused as this Court shall think fit. Gifford Plaintiff Tripconny Defendant. Anno 25 Eliz. [1582-83].

[164] LOVET v. CHAMBERLEN.

Commissioners appointed to examine witnesses, undertake to arbitrate the cause by the consent of the parties, and such end decreed.—The Commissioners appointed to examine witnesses, certified under their hands, that both parties Submitted themselves to their end, and they both by their consents ordered, &c. A Subpœna is awarded against the defendant to shew why that order or award should not be decreed. Lovet Plaintiff, Chamberlen defend. Anno 25 Eliz. [1582-83].

ELIZ. CUTTS, wid. Plaintiff.)
BASILIUS JOHNSON, Defend.) Anno 25 Eliz. [1582-83].

Suit at Common Law against a priviledged person discharged.—The Plaintiff declared against the Defendant being a priviledged person in an *Ejectione firme*, and day was given to the Defendant to answer preemptorily.

AMERS v. LEGG.

Demurrer in case the plaintiff is excommunicated, ordered to answer shewing an absolution.—The Defendant demurred because the Plaintiff was excommunicated. The Plaintiff after obtained letters of absolution, and shewed the same in Court; therefore ordered the same to be allowed, and that the defendant putting in a perfect answer, and paying the charges of Process of contempt which issued out against him be discharged thereof. Amers Plaintiff, Legg Defendant. Anno 25 Eliz. [1582–83].

[Mews' Dig. tit. ECCLESIASTICAL LAW, XXVIII. PRACTICE AND PROCEDURE IN ECCLESIASTICAL MATTERS. 6. *Writs de Excommunicato Capiendo, &c.*, a. Cf. Tichborne v. Edwards, 1594–95, Toth. 11.]

CONYERS v. SAVILL.

Forreign plea without oath is not allowed.—The Defendant put in a forreigne Plea to a *scire facias* upon a Recognisance of £400, and not answering the same; ordered if the Defendant be not either sworn to the same Plea, or else put in a good Plea by Friday next, a *nihil dicit* shall be entered. Conyers Plaintiff, Savill & Savill Defendants. Anno 25 Eliz. [1582–83].

SLANY v. COOK.

Consim.—Slany Plaintiff, Cook Defendant, is the like Case to the last before. Anno 25 & 26 Eliz. [1583].

[165] KERLE v. LLOID.

The Defendant may not demur having a Ded. potestatem. If upon a 2. dedimus he shall return a dilatory answer, then sequestration is granted.—The Defendant having in his favour a *Ded. potestatem* to take his answer in the Countrey by reason of his great age, yet he returned a demurrer which he ought not to have done, but should have put in a direct answer, whereupon the Plaintiff had a Subpœna against the Defendant to make a perfect answer: And upon oath of the Defendants great age he had a new *Ded. potestatem* to take his answer, which the Plaintiff feared he would use for a delay, and put in another insufficient answer, and keep the possession of the Prebend in question; wherefore it is ordered by this Court, that if the Defendant do not return a perfect answer, a Sequestration shall be granted. Kerle & uxor Plaintiffs, Lloid Defendant. Anno 25 Eliz. [1582–83].

WATTS v. MALBORROW.

Three takers of a copyhold agree, assignment made by any of them shall be good, and ordered accordingly. A copyhold tenement was taken joynly by William Malborne, John Jeffrey and Richard Euers, and agreed amongst them, that if any of them died, yet such as he assigned his part unto the same should be enjoyed. And for performance each entered bond unto the other; according to which agreement William Malborne assigned his part to the Plaintiff and died: And ordered for the Plaintiff and his heirs against the Defendants and their heirs. Watts Plaintiff, Malborrow & Evans Defendants. Anno 25 Eliz. [1582–83].

HIDE v. WELSH.

These words sibi & suis, by custome make an estate of inheretance.—The custome for the Coppyholders of that Mannor was, whether these words, *sibi & suis*, would make an estate of inheritance, and was by order of this Court referred to a triall at the Common Law, and found for the Plaintiff, and the coppyholder to make an Estate of inheritance, and decreed accordingly. Hide and o[166]-ther customary tenants of Abotsley in the County of Worcestor Plaintiffs, William Welsh Defendant. Anno 25 Eliz. [1582–83].

HARRINGTON v. GLASCOCK.

Copyhold severed from the Mannor.—The Plaintiffs Bill was for that the defendant hath severed the copyholds from the Mannor whereof they are holden, would thereby defeat their estates. The defendant demurred; but ordered to answer and stay suit at Law. Harrington and others Plaintiffs, Glascock Defendant. Anno 25 Eliz. [1582–83].

BUTLER v. DENTON.

A reversion thought to be paid at a day, and before the day, received part of the money, and before the day the tenant for life dieth, and then the defendant refused to make assurance, but ordered to do it.—The Plaintiff bargained with the Defendant, to buy of him a reversion of lands wherein one Theodore Chapnes had an estate for his life for £500 to be paid before Hollantide next; which bargain or agreement was set down under the hand-writing of the Plaintiff, and before the day the Plaintiff paid the Defendant £24 parcel of the money. And after and before the day also the tenant for life died and then the defendant refused to perform the bargain; and ordered the Defendants answer should be referred to Doctor Hussey, and if he finde the bargain confessed by the Defendants answer, then the Court will order the lands shall be assured. And after upon Dr. Hussey's Certificate of the Defendants answer to be so; It was ordered the Plaintiff should pay the money, and the Defendant assure the lands according to the bargain. Butler Plaintiff, Denton Defendant. Anno 25 Eliz. [1582-83].

SAVILL v. WOLFALL.

The father sueth to have bonds, &c. Statutes discharged, whereunto his sons were drawn by circumvention, but thought meet the sons being of full age, should be made parties.—The Plaintiffs Bill was, for that the defendant by subtle practises drew the Plaintiffs sonns into divers Statutes and Bonds of £3000 at the least, for Silkes and other stufes of small value: But thought meet by the Court, that the sonnes [167] themselves being both of full age when they entered into the Statutes, and now, shall be parties to the suit. Savill Plaintiff, Wolfall and others Defendants. Anno 25 Eliz. [1582-83].

HARTFORD v. HARTFORD.

A contempt without a Bill cannot be heard upon Affidavit only.—The Plaintiff examined divers witnesses to prove a contempt, but it seemed unto this Court the Plaintiff had not made any full proof of the said contempt, neither if he had, that yet the Plaintiff bringing the matter of contempt onely to be heard upon an *Affidavit*, could not have any order without a Bill exhibited first in that behalf for the interest of the goods and leases in question. Anthony Hartford Plaintiff, Martha Hartford widow Defendant. Anno 25 Eliz. [1582-83].

SEDGWICK v. EVAN.

The plaintiff sought to be relieved against a mortgage made 40 years before but dismissed.—The Plaintiff seeks to be relieved against a mortgage of lands made by their Ancestors for a small summe of money. But for that it seemed to this Court, the Defendants and those by whom they claim have been in possession by the space of 40 years, therefore dismissed. Sedgwick & uxor Plaintiffs, ap Evan and others defendants. Anno 25 Eliz. [1582-83].

WOODWARD v. JOANES.

A Labell hanged on the strangers door, where the defendant is, and an Attachment for not answering.—John Nicholson made oath he hanged the Labell of a Subpœna at the Plaintiffs suit on the dore of the house of Master George in White Friers, wherein as two of the said Master George his servants affirmed, the said Defendant was, who had not appeared; therefore an Attachment is granted. Woodward Plaintiff, Joanes defendant. Anno 25 Eliz. [1582-83].

YATE v. ALLETER.

Jurisdiction of Oxford.—The Defendant shewed a Certificate under the Seale of the University of Oxford, whereby it appeareth that he is a cook of Corpus Christi Colledge, and ought not by the priviledge of the said University to answer any cause out of [168] the same University for any matter of cause, except it be for felony, Mayhem or Franck-tenement; therefore ordered that the Defendant shewing the priviledge by way of demurrer upon his oath be dismissed. But afterwards upon information that the Bill was for Franck-tenement, the matter is retained; but after, because it was under 40s. per annum, it was dismissed. John Yate Plaintiff, Daniel Alleter, alias Christian Defendant. Anno 25 Eliz. [1582-83].

HAWLEY v. BODILEY.

Costs granted to the plaintiff who died, and ordered the Executors should receive the costs.—Motion was made by the Plaintiffs Executors to have costs, which were granted to their Testator being the Plaintiff, and now dead. And ordered accordingly. Hawley Plaintiff, Bodiley and Rosse Defendants. Anno 25 Eliz. [1582-83].

LYDYARD v. BAYLY.

Jurisdiction of Oxford allowed.—The Defendant had the priviledge of Oxford under the Seale of the University, that he is a Fellow of New Colledge in Oxford. Lydyard Plaintiff, Bayly Batchellor of Arts Defendant. Anno 25 Eliz. [1582-83].

BROKE v. STAPLETON.

The defendant brought an action of trespass against the plain. for coming to his house to serve Subpœna and staid by Injunction.—The Plaintiff went to the Defendants house to serve him with a Subpœna out of this Court, for which coming over his ground and entering into his house, the Defendant brought an action of trespass against the Plaintiff, *quare domum & Clausum fregit*. And upon motion of Serjeant Walnesly the action of trespass was staid by Injunction. Broke Plaintiff, Stapleton Defendant. Anno 25 Eliz. [1582-83].

OSBORNE v. TUTHELL.

The defendant appeared gratis upon Attachment for beating the plaintiff when he served a subpœna, the defendant denied the beating, and ordered the defendant shall be examined.—An Attachment went forth against the defendant upon *Affidavit* made by the said Plaintiff, that the Defendant strook him and brake his head when he served the Subpœna upon him. The Defendant hearing of the Attachment, appeared *gratis*, and utterly denied that he strook [169] the plaintiff, or that he was served with any Subpœna, but only with a billet in paper, and desired the Plaintiff might exhibit his Interrogatories whereupon he might be examined; and ordered he should do so before wednesday, or else the Defendant is discharged. Osborne plaintiff, Tuthell Defendant. Anno 25 Eliz. [1582-83].

WOODWARD v. LANGLEY.

The defendant goes about to avoid a lease which the plaintiff assigned to one, and is bound to warrant it, and therefore sues the defendant, but is dismissed.—The Plaintiff by his Bill endeavourth to prevent the Defendant to avoid a lease assigned by Joanes one of the Plaintiffs, to one Dawkes, which the Plaintiffs are bound by Covenant and Bond to the said Dawkes for enjoying, but because the Defendant is no wayes privy to the Bond nor Covenant, it is ordered to be dismissed, if the plaintiff do not shew some other cause sufficient to divert the Court. Woodward and Joanes Plaintiffs, Langley Defendant. Anno 25 Eliz. [1582-83].

SAMMS v. STRUDHAUGH.

The Bill was for arrearages of six pounds rent for two years reserved upon a Lease for years, of certain lands, the reversion whereof the Plaintiff purchased by Fine, but had never seizen of the rent, and therefore no remedy by Law. And ordered the Defendant should pay the arrearages, and continue the payment of the rent after, if he showed not good cause to the contrary. But the Plaintiff was allowed no recompence for waste before the defendant atturn; and untill Atturment he is ordered to do no waste. Samms Plaintiff, Strudhaugh Defendant. Anno 25 Eliz. [1582-83].

JOHNSON v. GLEMHAM.

A suit for a proportionment of a rent.—The Plaintiff sueth to have a rent of three pounds seventeen shillings two pence reserved upon a lease for years of certain lands whereof the Plaintiff hath 47 acres, and the Defendant, [170] or some others by his assignment 67 acres apportioned. The Defendant now having gotten the reversion of the whole, and also to be relieved of a Condition of not payment of the said rent, and upon

the defendants affirmation that the interest of the lease of the 67 acres was in one Tracey; therefore ordered the plaintiff should exhibit a new Bill against the said Tracey and the Defendant, And untill that matter should be heard, the plaintiff should pay only the moiety of the rent to the defendant, which if he did, he is to be discharged of the Condition. Johnson Plaintiff, Glemham Defendant. Anno 25 Eliz. [1582-83].

MARKES v. SULIARD.

A Fine taken for a copyhold, the Lord would avoid it, because granted at a Leet out of the Mannor, ordered for the plaintiff.—The Plaintiff took up copyhold lands of the Defendant, and paid Fine unto him for the same, which the defendant would avoid, because the same was granted at the Leet holden out of the Mannor, whereof the Copyholds are parcels; but ordered the Copyholders should enjoy the lands. Markes & Markes Plaintiffs, Suliard Defendant. Anno 25 Eliz. [1582-83].

FORDHAM v. FORDHAM.

Land passed to the wife for life, after to his three sons equally, the one to be heir to the others.—The matter was reduced to a Case in Law, viz. Thomas Fordam to his use in Fee before the Statute of 27 H. 8. ch. 10, of certain houses deviseth his houses to his wife for life, and after her decease to remain to John, Thomas and Robert his sonnes, to be divided equally, and each one to be others heir if any deceaseth and dieth before 27 H. 8. ch. 10. The wife entereth and dieth, and after Thomas and Robert dye. Resolved by Justice Meade and Periam, that John should have the whole. John Fordham Plaintiff, William Fordham Defendant. Anno 25 Eliz. [1582-83].

RONE v. BOURNE.

Commission of Rebellion against husband and wife, the wife alone is taken and carried to prison, but discharged with costs till her husband be taken first.—The wife was apprehended by a Commission of Rebellion, for that her husband and she have [171] not answered the Plaintiffs Bill, and being taken, was carried bound to prison, and kept there in very strict sort; although her husband is not brought in to answer, without whom she is not compelled to answer: Therefore it is ordered that the wife be discharged untill she and her husband may be brought together to answer. And in respect the wife was unorderly brought in without her husband, and so hardly dealt with, the Plaintiff shall pay unto her costs as the Court shall award. Rone widow Plaintiff, Bourne & uxor Defendants. Anno 25 & 26 Eliz. [1583].

BOOTH v. ———.

A warrant of the peace to bring the parties before the Barons of the Exchequer, discharged, by Supersedeas.—Upon a Warrant from the Sheriff of Derby, three of the persons being poor persons, were brought up before the Barons of the Exchequer for the Peace, which seemeth to be very unorderly done and procured, but to trouble the Plaintiffs; It is therefore ordered that the Cursitor for that County shall make a Supersedeas for the Peace. Booth and others Plaintiffs, John Defendants. Anno 25, 26 Eliz. [1583].

WEBB v. WEBB.

The defendant taken upon commission of rebellion is committed to the Fleet.—The Defendant was taken upon a Commission, and brought in and committed to the Fleet, because he had sate out all the proceedings and ordinary processes of contempt. Thomas Webb Plaintiff, Edmond Webb Defendant. Anno 25, 26 Eliz. [1583].

NICHOLS v. LONELL.

A lease paroll claimed and denied by the defendant, answer for want of proof dismissed.—The Plaintiff had a lease of lands which ended at Michaelmas, and by his Bill doth surmise he had another lease by paroll made by the Defendant in reversion, whereof he hath no witnesses. The defendant denied it in his answer, therefore ordered to be dismissed. Ni-[172]-chols Plaintiff, Lonell Defendant. Anno 25 & 26 Eliz. [1583].

CLARK v. COLIBERE.

An Inholder sued for money taken out of a Carriers pak in his house, hath an Injunction. The defendant sent money into the Countrey by a Carrier, who trusted the same in a pack and came with one Wood another Carrier into the Plaintiffs house being an Inholder, Wood the other Carrier did rise in the night and took out the Money, and the next morning both the Carriers departed together, and after Wood was apprehended and sent to New-gate, and there died. And the Defendant sueth the Plaintiff, being an Inholder, at the Common Law, for that Inholders by the Custome of England ought safely to keep their Guests goods, yet an Injunction is granted to stay the suit at the Common Law. Clark Plaintiff, Colibere Defendant. Anno 25, 26 Eliz. [1583].

KING v. STAMPER.

Costs granted to a witness to testifie after publication.—The Plaintiff is adjudged to pay the Defendant thirty shillings costs, a witness being called into the Court on the behalf of the plaintiff, to testifie after publication is granted. King Plaintiff, Stamper Defendant. Anno 25 & 26 Eliz. [1583].

FRENCH v. COUCH.

Costs against a Clerk that mistook a Subpœna.—A Subpœna *ad rejungendum* was bespoken of one Lomley a Clerk in the Subpœna office, who made the same *ad respond.* whereupon the Defendant got 26sh. 8d. costs, which the Plaintiff paid, and ordered Lomley to pay it him again. French Plaintiff, Couch Defendant.

LEA v. STANBURY.

Oath taken before a Major, and by him certified for serving a Subpœna, rejected.—Forasmuch as the Court was this day informed on the defendants behalf that the plaintiff hath upon a Majors Certificate of the serving of a Subpœna, procured out an Attachment against the Defendant without oath taken in this Court for serving of Process as it ought [173] to be; therefore ordered the Defendant be discharged of Attachment, and bound for his appearance. Lea Plaintiff, Stanbury Defendant. An. 26 Eliz. [1583–84].

LANE v. PRANNELL.

The defendant served with a Subpœna to testifie for the plaintiff, which is contrary to the order of this Court.—Prannell Defendant made oath he was served with a Subpœna to testifie for the Plaintiff contrary to an order of this Court; therefore an Attachment is awarded against the Plaintiff. Lane Plaintiff, Prannell and others Defendants. Anno 26 Eliz. [1583–84].

CARTER v. CUPPER.

A Legatee sueth the Executor to consent to the legacy.—The Bill was against the Defendants as executors to have them assent to the Plaintiff to enter into a lease devised unto him by the Testator. The Defendants took a Commission to take their answers in the Countrey, and ordered the defendants shall not alien, commit, waste; nor leave the rent unpaid during the suit. Carter Plaintiff, Cupper and others Defendants. Anno 26 Eliz. [1583–84].

BLAKE v. BIRDE.

Upon the sons confession the father was served with a Subpœna, Attachment granted.—Thomas Llood made oath the defendants son confessed his Father was served with a Subpœna, who hath not appeared; therefore an Attachment is granted. Blake Plain. Birde Def. An. 26 Eliz. [1583–84].

WALLER v. BACON.

A Recognisance knowledged to preserve the inheritance of land in the blood, ordered to stay proceeding at the Common Law.—The matter of a Bill was to stay the suit of a Recognisance of £2000 knowledged to the Lord Keeper Bacon, The Defendant confessed the said Recognisance was acknowledged but in trust to the Lord Keeper Bacon for the preservation of the inheritance of the land in the blood of one William Waller who acknowledged the Recognisance, whereof a recovery is had to perfect a lease

lately made, the first lease being made by the Lord Bacon's privity, and the inheritance settled as before by a limitation of use, and the defendant Waller is in reversion, and [174] not prejudiced. It is therefore ordered to stay proceedings upon the Recognisance, and the said Sir Nicholas Bacon and Nathaniel Bacon, although named as Defendants to treat of the matter. William Waller and Thomas Waller Plaintiffs, Nicholas Bacon miles, Nathaniel Bacon ar. executors of Nicholas Bacon *militis nuper custodis magni Sigilli*, and John Waller Defendants. Anno 26 Eliz. [1583-84].

RAMSEY v. BRABSON.

A protection from the Queen wherein is desired an Injunction to be granted to stay such suits as will concur with the rest of the creditors which is granted accordingly.—The Queen granted a Protection to Woodcock, Napton and Sewell to the end they might be better able to pay their debts to all their creditors. By which Protection her Majesty further willett that an Injunction be granted out of this Court against all such as should implead the said Woodcock, Napton and Sewell, and not content themselves with the aforesaid rate. And because the defendants do commence suit at the Common Law, and do not content themselves with the aforesaid agreement, therefore an Injunction is granted if cause be not shewed to the contrary. Ramsey miles and others creditors of Woodcock, Napton and Sewell Plaintiffs, Brabson and others Defendants. Anno 26 Eliz. [1583-84].

COLLINS v. MEADE.

Upon an insufficient answer a Subpœna to make a better, and to pay the charge of the copy of the first answer.—The Bill was for certain Coppyhold and Free-hold land leased by paroll, the Defendant made an insufficient answer, which by order is referred to Doctor Carewe, and if he certifie the answer insufficient, then a Subpœna is awarded to make better answer, and to pay the charges of the Copy of the first answer. Collins Plaintiff, Meade and Whiddon Defendants. Anno 26 Eliz. [1583-84].

HOULBOURNE v. ARMORER.

Two named in a Subpœna, the one served, the one gets costs, but discharged.—Both the Defendants were named in a Subpœna, but one only served; and yet the other [175] got the Subpœna, and thereupon got costs, which upon oath of this matter is discharged. Houlbourne Plaintiff, Armorer and Lilbourne defendants. Anno 26 Eliz. [1583-84].

STILL v. GREVES.

Injunction for not paying the Kings Fine.—An Injunction is granted to stay the Defendants proceedings in the Kings Bench for a debt of £200 for not paying the Kings Fine. Still Plaintiff, Greves Defendant. Anno 26 Eliz. [1583-84].

CHETWYNE v. WALKER.

A suit for a pair of gloves as a rent-service.—Upon hearing the matter this present day, it appeareth to this Court, that the cause of the suit was for a pair of gloves which the Plaintiff claimes for a rent; and the Plaintiff made proof the same had been long time paid, but could not know for what lands the gloves were to be paid. And ordered by consent to a triall at Law, where it shall be admitted the gloves are to be paid, as a rent-service for a tenement whereon Thrusfeild dwelleth. And as it shall fall upon triall, this Court will take order. Chetwyne Plaintiff, Walker widow, and Walker Defendants. Anno 29 Eliz. [1586-87].

WILSON v. LOWGHER.

A Master of the Chancery served with Subpœna without his addition is content to answer, so he may have a ded. potestatem.—The Defendant was served with a Subpœna by the name of Langell without addition, and yet was contented to answer so he might have a *dedimus potestatem* to take his answer in the Countrey, dwelling at York, where he is Chancellor to the Arch-Bishop; therefore ordered he should have a Commission to take his answer. Wilson Plaintiff, Lowgher Doctor of the Law, and one of the Masters of this Court, defendant. Anno 26 Eliz. [1583-84].

RUFFIN v. HEYWARD.

Upon Attachment that the defendant did beat the plaintiff upon serving Subpoena. Attachment is granted. Upon oath made that Tash did strike the Plaintiff when he served the Subpoena upon him: It is ordered that an Attachment be awarded a-[176]gainst him to appear and to be examined upon Interrogatories touching the contempt, and not to depart after his examination untill he be licensed. Ruffin Plaintiff, Heyward & uxor & Tash Defendants. Anno 26 Eliz. [1583-84].

ANGROME v. ANGROME.

Ejectione firmæ brought against a witness to take away his testimony, stayed.—Thomas Angrome as lessee of Lawrence Angrome brought an *Ejectione firmæ* against one Thomas Donwell and others, which Thomas Donwell is one of the principal witnesses for the plaintiff to produce, to take away his testimony; therefore ordered, if the suit at the Common Law against the said Donwell be not stayed or withdrawn, that then this Court will order an Injunction for stay of the Defendants suit at Common Law. William Angrome plaintiff, Lawrence Angrome and Thomas Angrome Defendants. Anno 26 Eliz. [1583-84].

OSBURNE v. BARTER.

Nusance complained of for stopping the water-course to a Mill.—The Bill was to be relieved of a Nusance committed by the defendant to the plaintiffs Mill by erecting a new Mill, & turning or letting the water-course from serving the plaintiffs Mill; but for that the plaintiff since the Bill exhibited had brought an Assize of Nusance at Law: Therefore the cause is dismissed, if cause be not shewed. Osburne plaintiff, Barter and Goddins Defendants. Anno 26 Eliz. [1583-84].

CROFT v. ACTON.

Jurisdiction of Wales not allowed.—The plaintiff exhibited his Bill into this Court touching lands in the County of Worcester, the defendant upon complaint made to the Council of the Marches of Wales, called the plaintiff before them, and there he was enjoined not to proceed in this Court, And ordered upon Affidavit made upon serving of Process, that an Attachment go out against him. And if the plaintiff shall be at any time molested for suing in this Court, [177] then an Attachment against the Defendant for that contempt. Croft Plaintiff, Acton and others Defendants. Anno 26 Eliz. [1583-84].

CLIFTON v. CLIFTON.

A woman copyholder take a husband who commits waste, this a forfeiture of the wifes estate.—It was resolved upon a Case referred to the Judges, that if a woman copyholder take a husband who commits waste, this is a forfeiture of the wifes estate, after the death of the husband. And that a copyhold tenement being parcell of the Mannor granted by copy at a Court holden for another Mannor, is void. Sir Jervis Clifton Knight, and George Clifton Plaintiffs, Elizabeth Basset widow defendant. Anno 26 Eliz. [1583-84].

ENGLISH v. CHAMBERLAINE.

Witnesses examined in Star-chamber between other parties used in this Court.—Upon Master Rotherams motion witnesses examined in the Star-Chamber between Sir Thomas Chamberlain and William Bubb, were allowed to be used in this Court. English, Plaintiff, Chamberlaine and English Defendants. Anno 26 Eliz. [1583-84].

SPARKS v. HORDEN.

One that served a Subpoena in the Court at White-hall committed to the Marshalsey, therefore a corpus cum causa is granted.—One Robert Barker coming into the Queens Maj. house of White hal to serve the defendant, being an officer there, with a Subpoena at the Plaintiffs suit; the Defendant caused one of the Knight Marshals men to carry the said Barker to the Marshalsey where he remaineth in prison, and cannot be relieved unless the Plaintiff will be bound to proceed no farther in this suit. Therefore a *Corpus cum causa* awarded. Sparks and others Plaintiffs, Horden Defendant. Anno 26 Eliz. [1583-84].

GILES v. LACKINGTON.

He that served the Subpoena was beaten.—John Guest made oath that he served a Subpoena on the Defendant, and two of his men or tenants, and the Defendant did beat him with a staffe, and strooke out two of his teeth, and hurt him in the face in divers places. Therefore [178] an Attachment is awarded against the Defendant. Giles plaintiff, Lackington Defendant. Anno 26 Eliz. [1583–84].

VAVASOR v. MAUDE.

Suit against a Sheriff for an escape dismissed and retained again, because the defendant may claim Conusance of Plea.—The matter of the Bill was to be relieved for an escape, for that the defendants being Sheriffs of Yorke had arrested one Newby at the Plaintiffs suit, and let him go before any judgement given upon the same arrest, or upon the action thereupon commenced. And because a matter of escape is meerly determinable at the Common Law, and the rather being before judgement, because no certainty appears, but the damages ought to be assessed by the Jury, therefore dismissed. Vavasor Plaintiff, Maude and Belt Defendants. Anno 26 Eliz. [1583–84].

FISHER v. FOXE.

Conusee upon an extent, sueth the Lessees for years, to know the certainty of their Rents, days of payment, and tearme.—Motion was made that the Defendants might make a better answer, for that they being Lessees of certain lands, whereof the Plaintiff hath an extent by a Recognisance after their leases; the Defendants shew not by their answers what the rents, times of payments and certainty of their tearmes are without the knowledge whereof the Plaintiff is remediless. And ordered that counsel on both sides should be present on Saturday, and then order shall be taken touching the answer. Fisher Plaintiff, Foxe and others Defendants.

BULLOCK v. WOOD.

Surmises upon a Prohibition to be proved within sixe moneths.—It was informed on the Defendants behalf, that the Plaintiff about six moneths past obtained a Prohibition out of this Court for stay of the Defendants proceedings in the Spiritual Court for tithes, upon surmise that part of the land out of which the tithes were demanded, were Chauntry lands and discharged of tithes in the Chauntries hands, and so by the Statute ought to be in his. And that some other part of the [179] lands is barren heath and waste grounds. And the plaintiff hath not made proof of his surmises, therefore the defendant desired a consultation, with his charges according to the Statute, and referred to Doctor Barkely to consider whether the plaintiff had proved his surmises within six moneths. Bullock plaintiff, Wood defendant. Anno 26 Eliz. [1583–84].

SOUTHALL v. PERYN.

In a Bill to examine witnesses in perpetual memory, one may not demur.—The Defendant demurred to a Bill exhibited to examin witnesses in perpetuall memory, whereas the Defendant should not have demurred to such a Bill, but either assented by his answer to examine, or shewed thereby sufficient cause why witnesses should not be examined, and leave it to the consideration of the Court to judge whether the cause be sufficient or no; Therefore ordered the Defendant shall withdraw his demurrer, and put in an answer, and thereby either assent to such examination, or thereby shew cause to the contrary. Southall Plaintiff, Peryn Defendant. Anno 26 Eliz. [1583–84].

TURNER v. RANDALL.

The plaintiff serving the defendant to appear, and then arresting him, a Supersedeas to discharge him, and a Warrant to the Warden of the Fleet to take the plaintiff.—The Plaintiff served the Defendant to appear, and then arrested the defendant into the Marshalsey contrary to the ancient Jurisdiction of this Court, for the free coming and returning. Therefore it is ordered a Supersedeas be awarded to discharge the Defendant of his arrest, and the Warden of the Fleet is to apprehend the plaintiff, and to bring him into the Court to answer his contempt. Turner Plaintiff, Randall Defendant. Anno 26 Eliz. [1583–84].

WARR v. MIDLETON.

Forma pauperis.—The Plaintiff was sworn in Court that he was not assessed in Subsidy the last Subsidy, nor is of hability to follow this suit ; therefore he is admitted in *forma pauperis*. Warr & uxor [180] Plaintiffs, Middleton Defendant. Anno 26 Eliz. [1583–84].

MARKHAM v. MARKHAM.

No examination allowed in a cross suit after publication in the first.—After witnesses examined and published in another suit wherein the now Defendant was Plaintiff against the now Plaintiff, then Defendant upon the same title for the lands in question. The now Plaintiff was not allowed to examine witnesses. Markham Plaintiffs, Markham Defendant. Anno 26 Eliz. [1583–84].

HARPER v. MIDLETON.

Tenant-right in York shire maintained.—The Plaintiffs exhibited their Bill to be relieved for certain lands parcell of her Majesties Mannor of Dent in the County of York, which the plaintiffs hold of the nature and kind of tenant-right ; and the defendants go about to raise new customes of tenant-right, and do disturb the plaintiff's possession. Forasmuch as it is well known to the Court that the tenant-right is a great number of mens Cases, and much to be favoured in respect of their good and necessary service upon the borders upon any occasion ; therefore an Injunction is awarded for the Plaintiffs quiet possession. Harper and Greenwood Plaintiffs, Middleton and Bainbridge Defendants. Anno 26 Eliz. [1583–84].

THE TRANSACTIONS of the HIGH COURT OF CHANCERY, both by Practice and Precedent. Collected by William Tothill, Esq., Late one of The Six Clerks [1559–1646].

1. ACTIONS.

Domina Chandois contra Chandois, the Court ordered that an action of trespass shall be tried in any foreign county, in July, 37 Eliz. Regiⁿ*æ* [1595].

Barlow contra Wogan, in 8 Jac. li. A. fo. 186 [1610–11].

The like between *Tigh and Tigh*, in Hil. 15 Jac. Regis [1618].

Page contra Page, li. A. fo. 74. Eliz. 44 & 45 [1602].

Barreston contra , li. B. 40 Eliz. fo. 724 [1597–98].

Mulcaster contra Mulcaster, Pasch. 44 Eliz. [1602–3].

Gregson contra Everard, in Trin. 21 Jac. Regis [1623].

Comes Bedford contra Russell, further [2] part of the county, in 3 Car. Regis [1627–28].

Dominus Windsor contra Wright, in Pasch. 2 Car. Regis [1626].

Flood contra Tracie, in Mich. or Hil. 5 Car. [1629–30].

Ilisley contra Dom. Parham, in 32 Eliz. li. B. fo. 839 [1589–90].

Kirkham contra Saunders, circuitry of action, the defendant not prohibited to plead several leases for defence of his title, in 34 Eliz. li. A. [1591–92].

Owen contra Lort, an action of traverse tried in a foreign county, in 10 Car. Regis [1634–35].

2. ACT OF PARLIAMENT.

Bowes contra Comitum Northumbrie, concerning the relation of an Act of Parliament.

3. ACCOMPT.

Lumley contra Garret, when merchants and co-traders have made on accompt, shall not be compelled here to make a new accompt, 12 Car. [1636–37].

Sands contra Bladwell, merchants accompts. Whether an accompt perfected shall be within the compass of the statute of limitation of accompt, 13 Car. [1637–38].

4. ADMISSION.

Lunsford contra Popham, a lord to admit a tenant, 23d January, 14 Jac. [1617].

[3] *Newby contra Chamberlaine*, the Court compels a lord to admit a tenant, in Mich. or Hil. 5 Car. [1629–30].

March contra Gage eod' to admit a tenant.

Gravenor contra Rake, the Court compels the lord to admit a tenant copyholder to sue at law, without any forfeiture of his copyhold, in Mich. 31 & 32 Eliz. fo. 21 [1588].

5. ADVANTAGE.

Comes Pembroke contra Hacket, no advantage to be taken at law, notwithstanding the Statute of Limitation, 10 Car. [1634–35].

6. ADVOWSON.

Magister Coll' Emanueli contra Ewens, concerning an advowson which passed ut by general words, decreed in equity, in Hil. 21 Jac. li. A. fo. 572 [1624].

7. AFFIDAVIT.

Hill *contra* Tiller, upon a certificate from the mayor of a town under the common seal, that an affidavit was made before him for serving of process, an attachment was awarded, in 19 Eliz. fo. 63. li. A. [1576-77].

8. AGREEMENT.

A draft of an agreement before the commissioners decreed, notwithstanding the defendant refused, Inter Pope and Mason, 11 & 12 Eliz. fo. 321 [1569].

[4] Smith *contra* Gouch, a man that marries the executrix of one that makes an agreement, shall be as far bound as he himself that made the agreement. Trin. 40 Eliz. li. B. fo. 118 [1598].

Bates *contra* Heard, there was agreement between the said parties, that lands should be conveyed in tail, that the same being taken away, was confirmed by decree to be performed according to the said articles, in May, 11 Jac. li. A. fo. 864 [1613]. [S. C. Dick. 4.]

Throckmorton *contra* Dom. Throckmorton, articles of agreement decreed by the judge's advice in November, 7 Jac. li. B. fo. 301 [1609].

Wadbroke *contra* Cheeke, an agreement for surrendering of a copyhold (though made when the party was in prison) upon bonds for performance thereof, in 3 Car. [1627-28].

Foster *contra* Eltonhead, an agreement decreed, and Beuther *contra* Denton, 25 Eliz. [1582-83].

Kinnersley *contra* Waller, concerning examination of some parties to a joint stock, after an agreement made by some other parties, 3 Car [1627-28].

Erby *contra* Evans, concerning a promise or bare agreement, in Mich. or Hil. 5 Car. [1629-30].

Penniston *contra* Com' Downe, concerning articles of agreement, that would avoid an [5] estate upon pretence of no delivery, decreed in Mich. or Hil. 5 Car. [1629-30].

Pollington *contra* Pollington, about 6 Car. [1630-31].

Owen *contra* Deane, the defendant got an assurance of lands of one in remainder of an estate by fine, contrary to an agreement made to him that had the remainder, and the plaintiff decreed notwithstanding that the defendant should reassure it to the plaintiff, in Nov. 4 Jac. [1607].

Spicer *contra* Dockwray, an agreement for a custom shall bind a purchaser or heir, 12 Car. [1636-37].

Plowden *contra* Marsham, if agreement be compelled by threats, it shall not bind, in Hil. 3 Car. [1628], look 10th of June 1602, the contrary between lord and tenant.

Moyles' case *contra* Horne and others, by reason two hundred pounds was deposited towards payment, decreed.

Wilkinson *contra* Deane, Mich. 2 Car. [1602], which afterwards passed away against the buyer, because notice of agreement.

Fithing *contra* Portman, 43 Eliz. [1600-1].

Aubery *contra* , concerning an agreement made by a joint-tenement, in 6 Car. li. B. [1630-31].

Page *contra* Bishop, concerning an agreement, in 8 Car. [1632-33].

[6] 9. ALIEN.

Proud *contra* Proud, a demurrer because an alien cannot sue, and because a legacy given one in *entre sa mere*, look the judge's certificate, in 14 Car. [1638-39].

10. ALLOWANCE.

Bright *contra* Chappell, children allowed seven or eight pounds *per centum* for their education, where there is no allowance by the will, in 5 Car. [1629-30].

Fisher *contra* Valence, the defendant to allow damages for profits received in Mich. 3 Car. [1627].

Dorington *contra* Skinner, in 8 Car. [1632-33].

Charlish *contra* Iliffe, eight pounds *per centum*, look whether the mortgage was before the statute of 21, or since, it was for a portion. Ju. 3 Car. fo. 263 [1627].

11. ANNUITIES.

Fage *contra* Waller, a lease devised to one, out of that there is by will annuities given, one of the annuities died, one other of them claims that annuity by administration, decreed against the executors, 20th October, 1631.

Baynham and Newland *contra* Goche, an annuity devised out of lands holden in capite to charitable uses, holden good, notwithstanding the statute of 44 Eliz. li. A. fo. 520 [1601-2].

[7] Jesus College case, in court of wards, in 13 Jac. [1615-16].

Gardiani de Eltham, in June, 15 Jac. [1617].

Aldsey *contra* Place, a case made in Mich. 2^d Car. [1626].

Mayor de Reading *contra* Lane, gift to poor, because no corporation, void; yet relieved in 42 Eliz. li. A. fo. 706 [1599-1600].

Pavier *contra* Pavier, an annuity granted, but because the lands are not chargeable at law, this Court will not in equity, but decreed to be paid in 14 Car. fo. 213 [1638-39].

Wiard *contra* Mosse, an annuity intailed though not good, in Hil. 15 Car. [1640].

12. ANSWERS.

Toy enforced at the suit of Kirke, to set down upon his oath, whether his lease was expired or not, 25 Eliz. [1582-83].

Mildmay was not enforced by answer to the bill of Cary and Cottington, to discover a forfeiture to his own hurt, 32 and 33 Eliz. [1590].

Persons of a corporation charged as private persons, answered upon oath.

Warr' *contra* Societatem Feltmakers, in 20 or 21 Jac. [1622-24].

Gowen *contra* Taylor, 38 & 39 Eliz. [1596] the defendant being in prison would not answer, therefore the plaintiff was admitted to proceed to proofs.

[8] Becket *contra* Waller, 28th November, 40 Eliz. [1597], the defendant being in prison, and not in the Fleet, would not make a better answer, though two subpoenas were served, my Lord Keeper said, Let that be deposed, and he should be shut up close prisoner in what prison soever he was.

Butt *contra* Ward, the defendant enforced to answer without his wife, 28 Eliz. [1585-86].

Elizabeth Brereton *contra* Hart, Mich. 1587, the like.

Kirkham *contra* Saunderson. Saunderson having two leases, was allowed to stand by answer upon them both, and not restrained to one at his peril. Hil. 35 Eliz. [1593].

Burgony *contra* Machell, the defendant divided his title by a lease and assignment, which was before his knowledge, and therefore pleaded that he heard say, that such a lease and assignment was made; the Master of the Rolls was of opinion, because it was another's act, the oath is, that he thinks it to be true; the defendant might have pleaded directly, that they were made as he thinketh, 37 Eliz. [1594-95].

Rotheram *contra* Saunders, the defendant answered, that he had no evidence belonging to the plaintiff, that answer was disallowed, because the defendant therein will be his own judge whether they belonged [9] to the plaintiff or not. And therefore he was ordered to answer what he had, and to bring them to be viewed to whom they belonged, Pasche 37 Eliz. [1595].

A man's own acts must be answered directly upon oath, in the affirmative or negative, without traverse, as Master Justice Beaumont held in the case of Williams and Leighton, 38 Eliz. [1595-96].

Stauden *contra* Bullock, the defendant forced to set down to whom he assigned his lease, because otherwise the lessor would have no action of waste; and to set down the names of the persons whom he had caused to fell trees, whereby the lessor might have his action against them, 38 & 39 Eliz. [1596].

Wilcox and Yates *contra* Fisher, after republication, a better answer ordered, 38 & 39 Eliz. [1596].

Whether a licence to assign a lease were granted or not, being but three years past, the defendant ordered by my lord to answer directly, and not to his remembrance. Oswald *contra* Pennant, 38 & 39 Eliz. [1596].

Part of the title omitted out of the answer, and the defendant would have put in a second answer with the full title, and my lord said, not for all he is worth. Ward and Colmer, 1597, and 40 Eliz. [1597-98], and Dacres and Stanhop, *concl.*

[10] Harbert *contra* Morgan, 1597, the defendant ordered to set down his term certain.

The defendant could not answer certainly what consideration he had a lease for twenty years past, and not confessed it directly, but my lord said it was a crafty answer, for he said directly that it was not upon trust, and it was of good value. Randall was plaintiff in 1597.

Willoughby *contra* Dom. Wharton, she appointed to answer upon oath, and not upon her honor, and so they ought to be sworn as witnesses (as my lord held) or else no attaint lieth, if the jury do not according to evidences, 1597.

Mitchell' *contra* Webb, 1st November, 4 Eliz. [1562].

The defendant by answer accuseth himself and fellow-defendant, and is believed against himself, but not against his fellow.

Whether a joint-tenant should be enforced by law to disclose a partition in the life of his fellow. Best *contra* did, two orders in 22 or 23 Eliz. [1579-81].

Cromer *contra* Penniston, in 39 & 40 Eliz. [1597], doubted.

Infants to answer upon oath, and bound by decree.—Warberton *contra* Fanshaw, Mich. 39 Eliz. li. B. fo. 289 [1597].

[11] Infants to answer by guardian, Com' Dorset *contra* Puckle, in Hil. li. B. fo. 683, 1361.

Westerne *contra* Talpit, 12th May, 37 Eliz. li. B. fo. 106 [1595].

Lungley *contra* Marke, primo Eliz. li. B. fo. 71 [1558-59]. [S. C. Cary, 38.]

Arch *contra* Collins, 6th May, primo Eliz. fo. 113, 121 [1559].

Phillips *contra* Owen-ap-Howell, 2 Eliz. li. A. fo. 121 [1559-60].

Posthumus Hobbie *contra* Smith, 18 Jac. 229 [1620-21].

Rivell *contra* Com' Salop, the defendant to answer upon oath, Mich. 10 Jac. [1612].

Comes Pembroke *contra* Wainman, an infant of 12 years, but not upon oath, 5 Jac. li. A. fo. 1051 [1607-8].

Tichborne *contra* Edmonds, the defendant to answer the bill though excommunicated, 37 Eliz. li. A. fo. 376 [1594-95]. Plumpton *contra* Belloes.

Philips *contra* Benson, the defendant ordered to answer a bill of perjury, 19 Eliz. li. B. fo. 165 [1578-79]. [S. C. Cary, 68.]

Wolley *contra* Long, Pasche 10 Jac. [1612].

Gargrave *contra* Gargrave, in 1597, the defendant answered voluntarily.

Jervace and Baxter, Trin. 22 Eliz. [1580].

[12] A report in 39 Eliz. [1596-97] between Rumney and Wentworth.

Trentham *contra* Kinnersey and *Uxor*, the wife's answer, admitted without the husband's, he pretending pleading jurisdiction of Court, 4 Jac. li. B. fo. 90 [1606-7].

Matthew *contra* Matthew, two defendants, one having answered, the other refused, but shall be bound by the other's answer, if the cause pass against them, 7 Jac. fo. 702 [1609-10].

Chester *contra* Hicks, Hil. 1633, to amend an answer in the mistaking.

Eland *contra* Cottington, ordered to answer, though it be to his prejudice by statute laws, in Trin. or Mich. 4 Car. [1606].

Wakeman *contra* Smith, although criminal causes are not here to be tried directly for the punishing of them, yet incidently for so much as concerneth the equity of the cause, they are to be answered.

Sir Matthew Carew's report in 27 Eliz. [1584-85].

Winn *contra* Swayne, a commissioner to answer bribery and corruption, Trin. 6 Car. [1630].

Mayor Sarum *contra* Episc' Sarum, a bishop to answer upon oath, 3 Car. [1627-28].

[13] Eyre *contra* Wortley, one defendant's answer shall not prejudice the other defendant, about 3 Car. [1627-28].

Chettle *contra* Chettle, a rejoinder and a commission, the defendant to amend her answer, but my lord saith not to amend an answer after issue joined, Mich. 9 Car. [1633]. Quere further what was determined.

East *contra* Bettison, Pasche 21 Eliz. [1579], li. A. fo. 176, an exchequer man to answer. [S. C. Cary, 67.]

Menell *contra* Fenton, *eod.* fo. 231.

Reader *contra* Cebile, after a *dedimus* to answer, liberty to demur, 9 Car. li. B. fo. 333 [1633-34].

Pridgeon *contra* Lambe, or Thornhurst *contra* Lambe, 7 Car. [1631-32].

Perry *contra* Gunter, in Pasch. 2 Car. li. A. fo. 546 [1627].

Acton *contra* Decanum Elye, the defendant to answer as a politic body, 9 Car. [1633-34]. Quere whether upon oath.

Portman *contra* Popham, a wife to answer without her husband, he being beyond sea, in 11 Car. [1635-36].

13. ARREARAGES.

Saris *contra* Strudhay, the plaintiff to have arrearages before attornment, 25 Eliz. [1582-83].

[14] Drury *contra* Drury, concerning how far a joint-tenant shall allow arrearages before partition, 6 Car. [1630-31].

[Mews' Dig. tit. INFANT, C. PROPERTY, 6. Account. S. C. Chan. Rep. 49.]

14. ASSIGNMENT.

Yardley *contra* Knight, a debt, assigned before a commission of bankrupt sued out, good, 7 Car. [1631-32].

Knight and Chambers *contra* Gregorie, *eodem.*

15. ASSURANCE.

Kempe *contra* Palmer, in 1594, further assurance not demanded within the time, yet in equity ordered to make further assurance afterwards.

Inter Carrington and *Uxor quer'*, and Humphrey defendant. It is ordered, that the defendant and his wife shall make an absolute assurance for the extinguishment of her right in the lands, in primo Edw. 6. fo. 306 [1547-48], and in li. C. fo. 3019.

Beeston *contra* Langford, further assurance compelled, 41 Eliz. li. B. fo. 222 [1598-99].

16. ATTACHMENTS.

An attachment against the Lord Cromwell against Tavernor, about 14 Eliz. [1571-72].

The like against the Lord Dacres, 32 Eliz. li. A. fo. 65 [1589-90].

An attachment, about June, 37 Eliz. [1595], against the Lord Barkley, at the motion of the Countess of Warr'.

[15] Keies *contra* Macher, an attachment against the wife alone, and not the husband, for that she would not answer the bill, Mich. 4 Jac. [1606].

Farmer *contra* Fox, because the defendant maketh oath, that he cannot answer without sight of writings in the country, and then puts in a demurrer, therefore an attachment is awarded against him, Pasche 21 Eliz. [1579]. [S. C. Cary, 119.]

Savill *contra* Slingsby, an attachment against an infant, to make him to choose a guardian, Hil. 7 Car. [1632].

Witham *contra* Roberts, an attachment awarded against the plaintiff for arresting the defendant, upon an attachment in the Court of Requests, against the privilege of this Court, the defendant being formerly a privileged man, and an injunction to stay proceedings there, 9 Car. [1633-34].

17. ATTORNEY.

Might, an attorney, sued at law upon an action of the case, for confessing an action without warrant for one Hargate, for whom he had been an attorney, wherefore Might sought relief in this Court, and could not have it, in 1595.

18. ATTORNMENT.

Huish and Blond and Fowler, 39 Eliz. [1596-97]. Trin. and Pasch. 36 Eliz. li. A. fo. 19 [1594].

[16] Dannett *contra* Blackall, an attornment ordered notwithstanding a dissent, and it was for a lease, 11 Car. vel Jac. [1635-36 or 1613-14].

Pie contra Bevill, the defendant ordered to show evidences, to direct what tenants ought to attorn, and to discover who is tenant, 11 Car. [1635-36].

Sands contra Lewes, an attornment ordered, and arrearages and damages since rent became due, 11 Car. [1635-36].

Vivian contra Tresayer, notwithstanding no attornment before *Quid juris clamat*, ordered to go to law directing a special trial in it, 14 Car. [1638-39].

19. AWARD.

Daie contra Wood, Trin. 24 Eliz. [1582]. An award made, the defendant recovered money thereby, the plaintiff would have had it decreed, could not, because it was not made by any warrant of this Court.

Twyn contra Twinn, the Court ordereth an award or agreement to be performed concerning a lease and other things, 40 Eliz. li. B. fo. 463 [1597-98].

Sands contra Carvil, in 9 Car. [1633-34].

Car contra Heron, an award decreed with the advice of the Lord Chief Justice, in 22 & 23 Eliz. li. A. fo. 596 [1580].

Hall contra Hocks, in Nov. 38 & 39 Eliz., it is a voluntary award [1596].

[17] *Godderick contra* Swansell, an award decreed by this Court, and a man bound, though no party to the exchange, 9 Jac. li. B. fo. 1456 [1611-12].

Bishop contra Bishop, a voluntary award decreed, but some part being to bind tenant in tail not to alien, the Court would not decree that, but gives relief against the award, being to make a perpetuity, and a man not bound to answer, as to cause him to be subject to the penalty of a bond, and the Statute of Limitation (as this case stands) is overruled, Mich. 15 Car. [1639].

Colt contra Smith, an award made by Cordall and the bishop forty years since, decreed against the successor for the manner of tithing, Mich. 21 Car. [1645].

20. BAIL.

A bail in this Court, or in the civil law, is discharged upon bringing in the principal, as he may at the common law.

Archboll contra Barrell, 23 & 24 Eliz. [1581]. [S. C. Ch. Ca. Ch. 143.]

21. BARGAIN.

Rogers contra Smith, the suit is touching two horses, for which the defendant was to pay by doubling an oat, demurred because but an action of the case, overruled in 15 Car. [1639-40].

Fage contra Browne, concerning the [18] buying of a lute by the strings, in 1 or 2 Car. [1625-27].

22. BARRISTER.

Swallow contra Man, a barrister of the Temple, being free of a company, and by his will disposeth of profits of lands, how far shall it trench upon the custom, Pasch. 25 Car. [1649].

23. BILL.

One which had a covenant to deliver evidences, exhibited his bill, supposing certain deeds to remain in the covenantor's hand, the opinion of the Court was, the defendant needed not to answer, because he should thereby disclose cause of forfeiture of the bond. *Wolgrave contra* Coe, Mich. 1595, 38 Eliz.

A bill to examine witnesses in perpetual memory touching common not thought fit, but a bill upon the title, and to examine witnesses and publication thereupon, and then to go to law. *Throckmorton contra* Griffin, 38 & 39 Eliz. [1595].

The father complaineth for a lease, which is in the son to the father's use. *Pomeroy contra* Ford, Pasch. 1597.

A bill upon a penal statute, claiming one-half to the queen, and another to the party, disallowed by my lord's opinion. *Coward and West*, Trin. 39 Eliz. [1597], though [19] not mentioned in the order.

Clifford contra Adams, 11 & 12 Eliz. [1569] li. A. fo. 294, the plaintiff having put in his bill being misconceived, notwithstanding answers put in, and proceedings had thereupon, was taken off the file and new put in.

Stanley *contra* Young, Hil. 1590, the Lord Chancellor's opinion was, that the old and new proofs should be read upon a new bill, to prove better matter.

Cromer exhibited a bill against Champney, to be relieved of a bond made for money won at dice, the defendant would have been dismissed, but ordered to answer it, 22d May, 38 Eliz. [1596].

And the like case between Hubbard and the Lord Compton, about 44 Eliz. [1601-2].

Piggot *contra* Parson, 44 Eliz. [1601-2] because the ground of the bill is for a legacy, thought fit to be dismissed.

Pennington *contra* Cooke, a bill to prevent dower, being her husband was past memory at time of marriage, but it was dismissed to law, 3 Jac. li. B. fo. 6 [1605-6].

Hare *contra* Hide, a bill preferred against an infant, and he ordered to answer, Hil. 3 Jac. and Pasch. Prox' [1606].

Scoble *contra* Holman, if the plaintiff's bill were exhibited before judgment, the [20] defendant's proceedings to stay, or else not, 38 Eliz. fo. 79 [1595-96].

Vaux *contra* Dowell, 39 Eliz. [1596-97] lib. B. fo. 132, no bill or revivor after marriage.

Dale *contra* Dale, the like.

In 25 Eliz. [1582-83] Sloper *contra* Bacon.

Creswell *contra* Luther, 19 & 20 Eliz. li. A. fo. 210 [1577], a bill to find who is tenant of land whereby to ground an action.

No bill of review admitted upon new matter, Lovegraie *contra* Webb, 3 Jac. 259 [1605-6]; Mudget *contra* Davies, 15 Jac. li. B. [1617-18].

Carnsew *contra* Coad, a sheriff preferred his bill, to have relief upon an escape of one that was in execution, Mich. 20 Jac. li. B. fo. 306 [1622].

Reynell *contra* Quintin, li. A. 7 Jac. fo. 933, contrary [1609-10].

Reynell *contra* Longcastle, Hil. 19 Jac. [1621]; Boll and Farrington, 10 Jac. li. B. fo. 178 [1612-13].

Cæsar *contra* Cater, Pasch. 9 Car. [1633], a bill in the nature of an avowry for rent, and service, the defendant ordered to set out a place, and stand upon right, or go to hearing.

Askwith *contra* Turnor, Mich. 1633, a decree at York, a bill preferred in this Court to reverse it, the matter was heard at large, notwithstanding any pleading of the defendant.

[21] Preston *contra* Proctar, 2 Car. [1626-27].

Boucher *contra* Barwicke, Pasch. *vel* Trin. 10 Car. [1634].

Alexander *contra* Cresheld, a general and voluntary promise (and no consideration) of the son, to disengage and pay the father's debts, where no advancement by his father, dismissed, 28th October, 7 Car. [1631].

Cowley *contra* Anderson, 20 Jac. [1622-23] li. B. fo. 77, the defendant conveyed land to the use of his daughters, the plaintiff married one, and had children by her who are dead, the plaintiff prefers his bill to be tenant by curtesy, but held not so, because the daughters had joint estates, and so goes to the survivor.

Clifford *contra* Laughton, the plaintiff prefers a bill in this Court against the defendant, supposing that more lands passed than was intended, but because the defendant was a purchaser upon valuable consideration, would give no relief, 4 Jac. li. B. fo. 340 [1606-7].

Kingsmill *contra* Etheridge, the defendant sueth for contribution after judgment, which was assigned for that purpose in June, 20 Jac. [1622-23].

Newman *contra* Lloyd, a demurrer overruled about 20 Jac. [1622-23].

Hill Mil'. *contra* Pentv. Walsh and al'. [22] about 17 Jac. [1619-20]; another in the queen's time between Agar and Curson.

Hide *contra* Burges, upon a bond, 3 Car. [1627-28], a bill preferred to be relieved upon point of escape, but dismissed.

Brackin *contra* Dom. Perpoint, 25th November, 21 Jac. [1623].

Reynell *contra* Darling, 6th October, 19 Jac. [1621].

Reynell *contra* Whiting, 14th May, 19 Jac. [1621].

Dom' Kempe *contra* Risbie, a bill to find a tenant to an estate whereby to ground an action of dower, in Mich. 2 Car. [1626].

Lello *contra* Lamplugh, concerning an escape, Mich. 5 Car. [1629].

Hemming *contra* Leigh, tenant *pur auter vie*, exhibited a bill, or an executor sues

for title of land, whether this shall hold in li. B. Car. 6 [1630-31], about two years after referred to Master Justice Jones.

Harding *contra* Tedwell, a bill for fees was dismissed, and Moore *contra* Rowe, 5 Car. [1629-30].

Yelverton *contra* Rolfe, 6 Car. [1630-31].

Tipping *contra* Chamberlaine, a suit to set out boundaries, Mich. 2 Car. [1626].

Samuel *contra* Samuel, a bill first preferred in the Court of Requests, and the same being mistaken there, prefers another [23] bill here, the defendant pleads the proceedings in that Court, notwithstanding overruled, 9 Car. [1633-34].

Sucklyn *contra* Morley, the bill being to discover what money the defendant won at dice or play of the plaintiff, overruled, and an injunction, to stay suit upon a bond entered into for the money, 11 Car. [1635-36].

Dayrell *contra* Pollard, a bill to assist a covenant, 11 Car. [1635-36].

Potts *contra* Scarborough, the bill being to examine witnesses in perpetual memory concerning common retained, 11 Car. [1635-36].

Walker *contra* Lipecombe, for that the plaintiff showed by his bill, that he hath no witnesses to prove the same, and the defendant denied upon oath, therefore dismissed, Mich. 12 Car. li. B. [1636].

Read *contra* Gilbert, a demurrer put into a bill for fees for soliciting to discharge a tenure done accordingly yet demurred to stand, 12 Car. [1636-37].

Savill *contra* Timperley, a bill to be relieved for a way which hath been abolished, a commission to set it out in 8 Jac. fo. 855 [1610-11].

Rembolt *contra* James, in Mich. 15 Car. [1639].

[24] Miller *contra* Blandist, to be relieved concerning a promise to assure land of inheritance, but because there was no execution thereof, but only 55 shillings paid in hand, dismissed in 30 Jac. li. B. fo. 234 [?].

Towne *contra* Traherne, a bill preferred here to stay a suit, brought upon false imprisonment, in 10 Jac. lib. A. fo. 477 [1612-13].

Arundell *contra* Drew, a bill entered into to procure a marriage, cancelled. A case between Cosvenors and Comes Suff. 10 Jac. [1612-13].

Ireland *contra* Jeffrey.

Delabarr *contra* Cox, the bill to be relieved upon articles of agreement, but (because the bargain at dice) would not decree it, in Mich. 14 Car. [1638].

Price *contra* Palmer, a suit to reverse a decree made against a wife, she consenting to a feme covert's answer, shall bind, in Mich. 9 Car. [1633].

Hire *contra* Wardall, the bill is to have a man's will performed, 9th July, 4 Car. [1628].

Aprice *contra* Aprice, a bill preferred for a personal estate, because he makes an estate, title, or interest to himself, dismissed in Mich. 13 Car. [1637].

Gerrard *contra* Deering, because a prohibition to stay suit in the Court of Requests, prefers a bill, and desires depositi-[25]-ons in that Court to be used, Pasch. 1 Car. [1625].

Bateman *contra* Wells, a bill to dissolve a contract of marriage, and to have bond delivered up, because the woman denies to have him. Hil. 8 Car. [1633].

Cotton *contra* Foster, the plaintiff prefers his bill to have the defendant answer, whether the contract was to receive more monies for interest than warranted, demurred into, but overruled, and if found that the defendant lent it without consideration, then to take the forfeiture in, 25 Eliz. fo. 15 [1582-83].

Walsh *contra* Marshall, a bill upon a recognizance, the defendant pleads the Statute of Usury, and the same is insufficient. Ordered to put in such a plea as he will stand unto, 25 Eliz. li. B. fo. 28 [1582-83].

Mallery *contra* Vintner, a bill to be relieved upon an action of the case upon an accompt, after a verdict, judgment, and execution at law, referred again to law, because a verdict passed upon the oath of one Vintner, who was thought not to have dealt fairly at the trial, and after, the cause referred to this Court for equity, Hil. 15 Car. [1640].

Mullet *contra* Crackplace, the defendant and two more, ordered to conform themselves to an agreement of other [26] creditors, 11 Jac. li. A. fo. 104 [1613-14].

Many plaintiffs in one bill for several causes, and much disliked. Bristow and Parker, in 1590.

24. BONDS.

Garford *contra* Humble, ancient bonds put in suit, ordered to be cancelled, about Mich. 16 Jac. 169 [1618].

Monson *contra* Bettison, simile in 5 Car. [1629-30].

Hubberstie *contra* Dumethalls, bonds entered into for tobacco here cancelled, Mich. 11 Jac. [1613].

Pearcy *contra* Bardolfe, the defendant seeks to put a bond in suit against the plaintiff, having married she that promised not to marry without the consent of friends. Ordered not to proceed in 32 Eliz. li. A. fo. 213 [1589-90].

Simonds *contra* Lomley, bonds released by the father, which he had taken in the names of his sons being infants, thought good and allowed in Hil. 20 Jac. [1623].

Watts *contra* Lock, 4 Car. [1628-29], bonds cancelled which have been entered into *per* menaces, threats, and imprisonments.

Othy *contra* Daniel, point of cozenage, bonds cancelled, and concerning wares, in 5 Car. li. B. [1629-30].

Wood *contra* Berry, concerning bonds given for resigning a benefice, my Lord Keeper's distinction concerning simony, in Trin. Car. 6 li. B. fo. 653 [1630].

[27] Snell *contra* Still, concerning bonds to present to a benefice, M. 3 Car. [1627].

Topp *contra* Roberts, Mich. 12 Car. li. A. fo. 66 [1636] the defendant would avoid the payment of money upon a bond, because the plaintiff made a release the same day after the bond entered into, relieved here.

Wynne *contra* Swayn, and Man *contra* Ham, bonds entered into for performance of an award, upon non-performance sued, yet stayed by injunction, 6 Car. li. B. [1630-31].

Lever *contra* Arsents, 6 Car. li. B. [1630-31] bonds entered into for fees, and lord's favours cancelled.

Colston *contra* Carr, a misnomer in a bond no advantage to be taken, 11 May, 33 Eliz. [1591].

Wright *contra* Moore, 7 Car. [1631-32] a voluntary bond of £1000 entered into for no consideration, cancelled in the presence of Judges.

Arlston *contra* Kent, bonds entered into for procuring a marriage, cancelled, February, 17 Jac. [1620].

Gotts *contra* Gibson, February, 10 Jac. [1613], an injunction awarded.

Wiseman *contra* Pascell, the bond brought into Court, 3 Car. [1627-28].

Trobridge's case, 9 Car. [1633-34] two bonds for first fruits entered into, the first must be delivered up.

Malton *contra* Pennell, 12 Car. [1636-37] though a bond be forfeited, and money tendered after-[28]-wards, shall be allowed no use after the tender.

Dom. Cavendish *contra* Forth, bonds entered into in 22 Eliz. [1579-80], because it was not inventoried, and some money proved to be paid to the testator, it was conceived the money was all paid, and the bonds decreed to be delivered up.

Tisdal *contra* Danvers, a covenant that a meadow was haineable at May day, and a bond for performance of covenants, that the meadow was haineable at April, the bond was put in suit upon that covenant, decreed to be cancelled, in 10 Jac. li. A. fo. 231 [1612-13].

Archer *contra* Bartlet, in 10 Car. [1634-35] where the bond is made without use by the father, the son shall be concluded.

Bridges *contra* Wimbleton, concerning a voluntary bond entered into, 10 Car. [1634-35].

Mainwayring *contra* James and Moie, concerning bonds entered into, to procure a pardon, the bill and answer expreseth the bonds to be without any consideration, and no personal estate to satisfy, and how far the pardon shall take away the civil action of another, and the Lord Keeper's declaration, if a man enters into a bond for payment of a sum certain, at a day certain, the obligee shall not be put to prove the bond, in November, 1629.

[29] 25. BROCCAGE.

Sands *contra* Greshall, the great cause concerning young gentlemen being brought in by Londoners, Hil. 31 or 32 Eliz. [1589 or 1590].

26. CATTLE TITHEABLE.

Southby *contra* Meere, 5 or 6 Car. [1629-31] concerning what manner of cattle are titheable.

27. CHARITABLE USES.

Seymour *contra* Pauperes de Twiford, money long since given to a charitable use, decreed with interest, Trin. 1634.

Woolrich *contra* Inhabitant de Frempton, charitable uses upon the statute of 43 Eliz.

Burford *contra* Pauperes de Sudbury, Trin. 5 Car. [1629].

Slater *contra* Phillips, concerning a charitable use, and the judge's certificate upon the statute of 43 Eliz. 5 Car. [1629-30] and Mich. 2 Car. [1626].

Pauperes de East-Greenstead *contra* Howard, my lord declared, that when he had altered or confirmed the decree made upon the statute 43 Eliz., the decree is to be perpetual, and then to remain in the petty-bag, and it is in his power to make decree good, which is defective, in 8 Car. [1632-33] and 10 [1634-35], how far a purchaser shall be bound.

Hungate *ex parte* Inhabitant de Sherborne, [30] 3 Car. [1627-28], a debt which is a charitable use in action, was given for the erection of a school, and this was a good appointment within this law.

Steward *contra* Jernyn, 41 Eliz. [1598-99], when a donor appoints lands or goods to be sold to maintain a charitable use, and doth not appoint by whom, the sale shall be made by such as the commissioners shall appoint.

Hellams, Trin. 5 Car. [1629], a devise to the company of leather-sellers, London, for a charitable use, was holden a good devise.

2 Jac. [1604-5], lands in Grey's Inn Lane, given to build a school at Rugby in Com' Warr', the commissioners did sit at Rugby to inquire, and held not good.

Wingfield, 4 Car. [1606-7], money was given for the good of the church of Dale, and this was ruled good upon these general words.

Kensham, 41 Eliz. [1598-99], that a copyhold may be charged with a charitable use.

Goff *contra* Webb, 44 Eliz. [1601-2], upon the will of one Hunt, of the lease of the rectory of Haines in the county of Wilts, it was resolved by Egerton and Popham, that a devise of money be distributed to twenty of the poorest of his kindred, shall be a good devise, notwithstanding it doth not appear that he had any poor kindred.

Champion *contra* Smith, 3 Jacobi [1605-6], one [31] Ridley being seised of copyhold lands in Barking in Essex, did devise that the parson and churchwardens in Thames street, London, and four honest men of that parish, should sell the land, and employ the money for the poor and charitable uses in that parish. And it was objected that the devise was void, because the parson and churchwardens were not a corporation to take land out of London, nor to sell it for such uses, but it was decreed that the devise was good, and that they had a good authority to sell the same.

Stoddard, 20 Jacobi [1622-23], who devised by parol a yearly rent of ten pounds per annum for ever, out of his house called the Swan with Two Necks, in the Old Jewry, London, for the maintenance of two scholars in Oxford and Cambridge, and willed that Hugh le Scrivenor should put it into writing, which he did accordingly; and this was found by inquisition, and decreed.

And it was objected, that the devise was not good, for that a rent could not be devised by a will nuncupative, but the decree was confirmed to be good, for a rent may be created and granted without deed in case of a petition, much more for a charitable use.

Hire *contra* Cordall, Pasch. 4 Jac. [1606-7], upon the [32] will of one Thompson, who being seised of lands in London, did devise that it should be sold after the death of his wife, for daughters' portions, and made his wife his executrix; and it was ruled, that the executors of his wife might sell, for land in London devisable by custom before the Statute of Wills, but it was doubted that it had been of lands not devisable by custom.

Mayor and Burgesses of Reading *contra* Lane, in 43 Eliz. [1600-1], a devise to the poor people maintained in the hospital in the parish of Saint Laurence, in Reading, for ever; exception was taken that the poor were not capable by that name for no corporation, yet because the plaintiff was capable to take lands in mortmain, and did govern the hospital, it was decreed the defendant should assure the lands to the mayor and burgesses for the maintenance of the said hospital.

Sir Thomas Middleton, Hil. 15 Jac. [1618]. The master and mariners in a voyage to sea, agreed that a rateable proportion should be deducted out of their wages, for relief of such seafaring men as should be maimed at sea, and Sir Thomas Middleton (being treasurer for the navy, anno 1590) had paid their wages, and detained this money [33] for the maimed seafaring men, and not paid it, and although no certain particular men could claim it, yet he was adjudged to account for it by this law.

Mayor of Bristol *contra* Whitton, 9 Car. [1633-34], a man deviseth by his will, monies to a charitable use, to be bestowed for poor people, and the residue of his goods to be employed to such uses as his feoffees shall think meet, devise is good, though it be devised to a corporation, &c., in 8 & 9 Car. [1633]. Two judges' certificate afterwards.

Fisher *contra* Hill, when no use is mentioned or directed in a deed, it shall be decreed to the use of the poor, and the feoffment being made to gentlemen out of the town, sought to be avoided, because it ought to be the townsmen only, decreed in 10 Jac. li. B. fo. 238 [1612-13].

Pie *contra* , in 14 Car. [1638-39].

Estcot *contra* Cooke and Mannington, in Mich. 15 Car. [1639].

Allen *contra* Cooke, Mich. 14 Car. [1638.]

Peacocke *contra* Thewer, M. 14 Car. [1638], if lands be given to a charitable use, to dispose an overplus, if the purchaser had no notice, cannot bind him, but if rent issue out of land, the purchaser must pay it, but will not charge him to pay arrearages before purchase, nor lay it upon one, nor excuse the other.

[34] Mansell *contra* Middleton, in Mich. 14 Car. [1638].

Penniman *contra* Jennings, lands given to churchwardens, void in law, decreed hereabout, 2 Car. [1626-27].

Pember *contra* Inhabitant de Kington, whether money given to maintain a preaching minister be a charitable use, the Lord Keeper and the judges did decree (notwithstanding it is not warranted by the statute to be a charitable use) that the same shall be paid by the executor to such maintenance, in Trin. 15 Car. [1639].

Pensterd *contra* Pavier, A. deviseth twenty pounds per annum, to a preaching minister, dies, leaving lands and assets, the defendant will not pay it accordingly, the Court with the judges chargeth her out of the assets, to buy lands to perpetuate it, in Trin. 15 Car. [1639], she having but a third part of the lands, and so ought not to be chargeable with any more.

Bramble *contra* Pauperes de Havering, feme covert makes a will of thirty shillings per annum to a charitable use, out of some of her own lands, and (though an award) it shall be paid, and bonds given to perform the same, yet the heir is not bound to perform the same in Trin. 15 Car. [1639].

Windsor *contra* Pauperes de Farnham, whether [35] after appearance upon exceptions, the decree may be revived, in Pasch. 2 Car. [1626].

28. CHOSE IN ACTION.

Burrell *contra* Siday, a devise out of a chose in action, good in this Court, in 3 Car. li. B. fo. 792 [1627-28].

Roch *contra* Guntur, assignee of chose in action, in Mich. 15 Car. [1639].

Greenville *contra* Com' Suff. concerning assigning of chose in action, and disposition of things by a feme covert, in li. A. fo. 5 Car. [1629-30].

Georges *contra* Chancey, Mich. 15 Car. [1639].

Greenville *contra* Cutteford, in Hill. 1632.

Seaten *contra* Ferrers, concerning the assigning of money decreed in li. B. 22 Jac. [1624-25] and a second purchaser ordered to pay the money, although but chose in action, and not privy to the assignment.

29. COLLUDER.

Forth, to bring in Mary Dick, with whom he colluded, the Lord Audley and 32 & 33 Eliz. [1590].

30. COMMON.

Magister et Societas Christchurch, in Cambridge, *contra* Martin, the bill concerning title of common, and the Court awards a commission for the distinguishing [36] the metes and bounds, in 32 Eliz. li. A. fo. 207 [1589-90].

Sands *contra* Beale, in Pasch. 20 Jac. fo. 866 [1622].

Tenants of Dosthorpe *contra* Loveday, point of common determined here, in 33 Eliz. fo. 400, li. B. [1590-91].

Raremeadow *contra* Beale, and stinting of cattle, in Nov. 7 Jac. [1609].

French *contra* Eyer, in 33 Eliz. [1590-91], concerning commons, wastes, and customs.

Cockaine *contra* Dom. Howard, for apportionment of common, 9 Car. [1633-34].

Goodman *contra* Wood, this Court determines the liberty of foldage and pasture, and what number of sheep shall be kept, 21 Jac. [1623-24].

Hartley *contra* Dively, a bill here for common of pasture for him and his tenants, and common of turbary in the waste grounds in a manor allowed here, in 33 Eliz. fo. 192 [1590-91].

Lamott *contra* Hitch, whether a common for sheep lies now in the parish of Melborne or Folmer, though sent to law, yet reserving equity, to the end a commission may be awarded to set it out, in 14 Car. [1638-39].

Sewell *contra* Finch, finds that the town hath had always common, and many deeds speak of use and trust, the Court [37] adjudgeth the common to be according to the plough-land, and cottages not to be excepted, but to have a proportionable rate in 2 Car. [1626-27].

Tucker *contra* Coppleston, because the plaintiff could not prescribe any title of commoning in the wastes, no relief, in Pasch. 15 Car. [1639].

Mole *contra* Mole, an agreement between townsmen concerning stinting and restraining cattle, and other orders in the fields, dismissed, in 15 Car. [1639-40].

31. COMMISSIONS.

Cage *contra* Elrington, a special commission to private persons to apprehend one in contempt, and to bring him to the Fleet, Trin. 3 Jac. [1605].

The parties shall be bailed if good sureties be offered, or else they shall be sued, about 37 & 38 Eliz. [1595].

Because the defendant had set out all process of contempt, 1 Ed. 6, fo. 144, or 244 [1546-47].

Another for Lawson, 37 H. 8 [1545-46].

Evans *contra* Bingham, 30 Eliz. [1587-88].

Lovis *contra* Lovis, *eod.*

Brereton *contra* Young, about 33 Eliz. [1590-91], commission to take possession, and apprehend the contemnners.

[38] Brocas *contra* Savage, to put the defendant in possession.

Wildgosse *contra* Ragland, 36 Eliz. [1593-94] because the defendant stood out all process of contempt for not answering, the bill was taken *pro confesso*, Denton Mill. was plaintiff *contra* Brown, in Pasch. 11 Jac. li. A. fo. 736 [1613].

Another between Comes Oxon *contra* Gouch, about 13 Jac. fo. 104 [1615-16].

Comes Hertford *contra* Gerrard, because the defendant would not answer the plaintiff's bill, it was taken *pro confesso*, 10 Jac. li. A. fo. 371 [1612-13].

Devoreux *contra* Stephens, May, 11 Jac. fo. 632 [1613].

Peshal *contra* Reresby, a commission to examine wastes, in 12 Jac. li. B. fo. 74 [1614-15].

Sacheverell *contra* Sacheverell, one of the commissioners letting the defendant escape, being taken upon a commission of rebellion, was to stand committed to prison, till he brings in the defendant, in Hil. 18 Jac. [1621].

A commission out of this Court, to prove whether a child be legitimate, Cressey *contra* Hull, Pasch. 11 & 12 Eliz. li. A. fo. 130 [1570]. The contrary in 22 Jac. [1624-25] *inter* Hobby and Smith.

[39] *Townley contra Clench*, or *Clench contra Townley*, about 40 Eliz. [1597-98]. [S. C. Cary, 23.]

Mullineux *contra* Mullineux, the Court orders that a commission shall go forth to set out lands that lie promiscuously to be liable for payment of debts, in February or January, 14 Jac. li. B. fo. 427 [1617].

Peckering *contra* Kimpton, a commission to set out copyhold land from free land which lie obscured, if the commissioners cannot sever it, then to set out so much in lieu thereof, in Mich. or Hil. 5 Car [1629 or 1630].

Lovelace *contra* Coffin, whether a commission to answer and examine witnesses, may in one be concluded, 9 Car. [1633-34].

Hopton *contra* Higgins, a commission awarded to prove customs, but parties interested shall not be examined as witnesses, in 10 Jac. li. B. fo. 309 [1612-13].

Bartley *contra* Eyre, where a commission is awarded to commissioners to examine witnesses, and they cannot agree, or where there is an undue carriage, or the commissioners great, or witnesses odd, the Court awards an examiner to go down into the country, in 1st August, 41 Eliz. [1599].

Maton *contra* Culpepper, 25th April, 15 Eliz. [1573].

Stampe *contra* Clarke, in June, 32 Eliz. [1590].

32. COMMISSIONERS.

Nelson *contra* Yelverton, commissioners upon a commission of rebellion, letting [40] the party in contempt go where he listed, ordered to be committed till they pay the debt, in Trin. 18 Jac. [1620].

The like between Sacheverell and Sacheverell.

Morgan *contra* Bowdler, commissioners to be examined upon occasion of partiality and practice, 9 Car. [1633-34].

Norton *contra* Hodgetts, Trin. 5 Car. [1629].

33. COMMITMENT.

Brasier and Crosse, in 39 & 46 Eliz. [1596-97 & 1603].

Wheatley *contra* St. John, the husband and wife committed, in 35 Eliz. li. A. fo. 63 [1595-96].

Scroope and Steward, the defendant shut up close in the King's Bench, and not to have *habeas corpus*.

Pope *contra* Newmon, *aut aliter*, in Mich. 23 Jac. [1625], committed to Bridewell.

Cutler *contra* Barber, the defendant to stand committed till his wife be examined upon interrogatories, 9 Jac. li. A. fo. 787 [1611-12].

Walker *contra* Arderne, it was decreed that if the personal estate of the parties would not pay all debts, that a lease should be sold for the payment thereof, and that the defendant and his wife were committed, because they refused, in 13 & 14 Eliz. li. B. fo. 70 [1571].

Partridge *contra* Partridge, a man com-[41]-mitted for terrifying a witness, which is to be examined at a commission, in Trin. 15 Car. [1639].

34. CONTRIBUTION.

Parkhurst *contra* Bathurst, contribution of a bond, in Mich. or Hil. 5 Car. [1629 or 1630].

Peter *contra* Davis, in Hil. 5 Car. [1630].

Fleetwood *contra* Charnock, sureties compelled to contribute for payment of debt upon a joint bond, in Pasch. 5 Car. [1629].

Wilcox *contra* Dom. Dunsmore, a demurrer put in upon point of contribution, overruled, 12 Car. [1636-37].

Hall *contra* Otley, how far the Court will restrain a lord to distrain for rent where he pleaseth, in Mich. 3 Car. [1627]. But for the present thinks fit that there should be a contribution.

35. CONTEMPT.

A defendant at contempt and pardoned, the plaintiff was enforced to serve a new subpoena, to do that which was first ordered. Young *contra* Chamberlaine, Trin. 37 Eliz. [1595].

Sands *contra* Knighton, one witness sufficient to prove a contempt, in Mich. or Hil. 13 Car. [1637 or 1638].

36. CONVEYANCE.

The plaintiff (depending the suit) conveys over his interest but in trust, and yet [42] the Court would hold no longer in his name, Hill *contra* Portman, 1584.

Rushloy *contra* Mansfield, lands conveyed away by an idiot, by fine holpen for him in remainder, being in fee against a purchaser, and concerning notice also, Trin. 10 Jac. fo. 119, or 1190, li. B. [1612].

Ayloff *contra* Ayloff, the Court restrains the defendant from making any conveyance to his children by a second wife, to disinherit the plaintiff being his grandchild and heir, and concerning a promise, in Trin. 12 Jac. li. B. fo. 1040 [1614].

Conquest *contra* Newdigate, the defendant seeks to avoid a conveyance for want of livery, yet holpen, and common and farms, whether parcel of the manor, was sought to be avoided by unity of possession, yet decreed here in Mich. or Hil. 9 Jac. li. B. fo. 604 [1611 or 1612].

Finche's case, in Trin. 41 Eliz. [1599].

Grant *contra* Edes, the plaintiff made a conveyance to feoffees in trust, to the use of his sons being infants, with several remainders over, the plaintiff being after indebted, the Court enables him to convey and sell those lands, in Hil. 18 Jac. li. B. fo. 758 [1621].

Lewis *contra* Vaughan, the plaintiff being simple, the defendant got a conveyance [43] from him of his lands, and although the land was sold to purchasers, and a descent, yet the plaintiff had the land re-assured to him, in 4 Jac. li. B. fo. 835 [1606-7].

Plasted *contra* Algood, whether (a conveyance in trust) a man may dispose of the same by will, or otherwise, in 4 Car. [1628-29].

Dom. Buck *contra* Paul, in Mich. 5 Car. [1629]. This is concerning an office.

Moreton *contra* Briggs, a conveyance sought to be avoided for want of livery, relieved, Hil. 16 Jac. [1619].

Fitzjames *contra* Hirsley, a widow, before marriage, makes a conveyance to the use of herself to friends, because her husband shall not have benefit; the trustees assign this lease to one for valuable consideration, and though the husband join, shall not prejudice her; but because the assignee came in upon a valuable consideration, shall keep it till he receive all disbursements, and the wife to have benefit of the same, 32 & 33 Eliz. li. A. fo. 464 [1590].

Thomas *contra* Powell, a conveyance in trust to uses, needs no delivery, and concerning tenants in common, in li. B. 6 Car. [1630-31].

Episcopus Heref. *contra* Bright and Barkley, a conveyance made to avoid a wardship, decreed not to be given in evidence in Mich. 6 Car. [1630].

[44] Dominus Roberts *contra* Lea, the defendant makes a conveyance in trust, and after sells the inheritance, the trust shall go in equity to the purchaser, in 8 Car. [1632-33].

Lamplugh's case.

Paul *contra* Wilkins, three copartners, one for a valuable consideration sells this land, but before deed executed dies, decreed against the defendant, in Mich. 14 Car. [1638].

Cooke *contra* Cleere, though a conveyance be defective, yet because there was a full intention to make better assurance, decreed in 2 Car. [1626-27].

37. CORPUS CUM CAUSA.

Subpena Compl' quia Def't. prosecutus est per Billam Midd'. Ward *contra* Marston, 36 H. 8, fo. 125 [1544-45].

38. COPYHOLD.

Severance from the manor hurts not, Gunn *contra* Buckmaster, 21 & 22 Eliz. li. A. fo. 360 [1579].

Lands which had gone fifty years, allowed, till recovered by law, Trin. 27 Eliz. [1585], fo. 630, li. A. Baspoole *contra* Roberts.

The like 21 Eliz. [1578-79] between Wrayford and Carew, for lands enjoyed sixty years as copyhold, li. A. fo. 232.

Lands which had gone but five years as [45] copyhold of inheritance, allowed.

Trin. 26 Eliz. li. B. fo. 757 [1584], between Radcliffe and Raunce, (though a

manor) some copyholds were but for life, and some of inheritance; and in 22 & 23 Eliz. [1580] fifty years' possession allowed, between Freeman and Penny.

A copyhold granted at a court kept out of the manor, confirmed against the lord which made it, Marke *contra* Sulyard, 25 Eliz. [1582-83]. [S. C. Ch. Ca. Ch. 170.]

The father commits a forfeiture and dieth, the son is admitted as heir by descent, this purgeth not the forfeiture, because the father dying seised of no estate, the son cannot be admitted to any, Smith *contra* , 30 Eliz. [1587-88].

An admission by the lord, dispenseth with a former forfeiture, as it was held between Clerke and Wentworth, about 25 Eliz. [1582-83]. The father committed a forfeiture, the lord nevertheless seised a heriot upon his death, and yet would avoid the heir's estate for that forfeiture, which he could not, because the taking of a heriot alloweth of a dying seised. Bacon *contra* Thurley, Hil. 1592.

A suit to compel a lord to grant a licence to let a copyhold, but because the defendant said by this answer that the [46] copyhold was forfeited, this Court would not enforce him to grant a licence, till the forfeiture was examined, Bullard *contra* Agard, about 1592.

Justice Clench *fuit D'opinion en case inter Commin and Kingsmell and se Copiholder prist marisme sives lycence, &c. ce' imploy sur son Customary allow ei' Dee' relieve in equitie, payant un competent fine, in 1591.*

A copyholder can have no assize of common against his lord, but is to be relieved in equity. The Tenants of Petworth and The Earl of Northumberland, in 38 & 39 Eliz. [1596].

Common for copyholders and terminors is to be relieved here, Coleot *contra* Lea, 43 Eliz. [1600-1] and 38 & 30 [? 39] Eliz. [1596].

Rich *contra* Erth, judges of opinion, that a tenant out of the Court cannot take a surrender of a woman covert, for that she is secretly to be examined by the steward, in 38 Eliz. li. A. fo. 420 [1595-96].

39. COSTS.

No costs for a contempt discharged by the general pardon, 27 Eliz. Fulwood *contra* Fulwood [1584-85].

The defendant not being served with process, found the cause set down for hearing, and attended, and was dismissed with costs, because the plaintiff was not re-[47]-ady, Clayton *contra* Leigh, 15 Eliz. [1572-73].

Brothers *contra* Ringrosse, Pasch. 25 Eliz. [1583].

Brown and North *contra* Grove, in 36 & 37 Eliz. [1594].

A matter put to compromise, to be ended by, &c., before the return of the subpoena, it was not ended, the defendant got costs for want of a bill, and yet not discharged, Slater *contra* Finch, 1596.

Coles *contra* Champneys, the plaintiff is allowed costs, in 7 Car. [1631-32].

40. CREDITORS.

Creditors are ordered to compound with their debtors, for to take a small rate in the hundred. Mildmay *contra* Wentworth, Mich. 11 Jac. [1613], committed for suing a surety.

Bret *contra* Shurley, in Pasch. 2 Car. [1626], for good of creditors.

41. COURT ROLLS.

Corbet *contra* Peshall, ordered that Court rolls shall be brought and shewed to counsel, to shew which is copyhold, and which is freehold, in 12 Jac. li. A. [1614-15].

42. COVENANT.

B. covenants to levy a fine to F. of lands given in marriage with his daughter at a day, by negligence of payment, the daughter being dead, P. passed away the lands to purchasers, but B. ordered to an [48] estate of 100 marks, Hil. 15 Jac. li. A. [1618].

Tunstall *contra* Lassells, one covenants and enters into bond for discharging of incumbrances within a time, none stirred within that time, until afterwards, how far shall bind. A case to be made, 2 Car. [1626-27].

Vanlore contra Bartlet, a bill to be relieved of a covenant ill penned, demurred unto, but in regard of some precedent agreement, overruled to answer, Mich. 3 Car. [1627].

43. COUNSELLOR'S CLERK.

Breame contra Breame, the counsellor's clerk not to be examined in the cause, 13 & 14 Eliz. fo. 93 [1571].

Lee contra Markham, the counsel of the parties cause, not to be examined in the same cause, 11 Eliz. li. A. fo. 17 [1568-69].

Thimblethorpe contra Thimblethorpe, the like in li. B. 6 Car. [1630-31].

44. CUSTOMS.

Custom referred to law.

Astill contra Danvers, Novemb. 30 Eliz. fo. 236 [1587-88].

Lort contra Hutchin, May, 18 Eliz. li. B. fo. 1344 [1576].

Maning & al' tenen' de, *contra Ep' Worr' sibi d' suis*, made an estate of inheritance, and *contra Fines*, 34 Eliz. li. A. fo. 826 [1591-92].

Michelborne contra Fines, 27th June, 33 Eliz. [1591].

[49] *Binxie contra Smith*, two years and a half value, in Hil. 12 Jac. [1615].

Weedon contra Stepney, in 23 Eliz. li. A. fo. 327 [1580-81], if any tenant should go about to defraud the lord of the manor, then he to pay a year and a half more.

Tenants de *contra Armstrong*, one year's value and not above, to be paid, in 40 Eliz. li. B. fo. 595 [1597-98].

Corbet contra Tenants de Beannister, in Mich. term, 21 Jac. half a year's value [1623].

Stafford contra Pasch. in Mich. and Hil. 15 Jac. [1639-40].

Parker contra Ten' de Eatmister, in Mich. 21 Jac. [1623].

Sterling contra Tenants of Burton, a composition formerly made between lords and tenants, ought to bind a purchaser or an heir, so decreed in October, 40 Eliz. li. A. fo. 434 [1598].

Pincheon contra Keeling, whether fines be arbitrable or not, determined here, and how to ascertain them, in 9 Car. [1633-34].

Wingfield contra Bedford, in 38 Eliz. [1595-96] custom proved of 16 pence an acre for tithe of wood, and no wood in kind, yet the Court would not decree a custom.

The opinion of the Court is of advice contrary to the custom of London.

Nicholas contra Dutton, 32 Eliz. li. A. [50] fo. 677 [1589-90]. The plaintiff had two sons and two daughters, if the one daughter died before twenty-one, or marriage, devised by will, the other should have her full part, after the defendant marrying the survivor, was promised to have both portions, and made jointure accordingly, now the sons were preferred in the father's life, the will is void in that point, because by custom they should have a part.

A decree in Bacon's case of the like.

Hall contra Lumley, a verbal promise in London will not hold, and therefore to answer here to that in 11 Car. [1635-36] and in Nov. 13 Car. [1637] decreed to be good here between those parties, and concerning a child preferred in marriage, shall come afterwards into the orphan's court.

Geborne contra Dutton, the custom of London, whether a child preferred in lifetime of his father, shall after decease go into hotchpot, an order in it, 41 Eliz. li. A. [1598-99].

Knivet contra Freeman, because the bill is for the manner and custom of tithing, dismissed, in 10 Jac. li. B. fo. 322 [1612-13].

Carter contra Bateman, Trin. 6 Car. [1630], concerning the custom of London, how [51] far a mortgage shall be put into the state.

Greleaves contra Pope, the question is, whether the lord of a manor can, by the custom of a manor, grant a reversion for lives, decreed here upon view of the Court rolls, 31st January, 9 Jac. [1612].

Topp contra Topp, deeds of gift made to defraud the plaintiff of her customary estate of London, adjudged void, in 40 Eliz. li. A. fo. 522 [1597-98].

Page contra Page, a decree concerning the custom of the province of York, in 13 Car. li. B. fo. 51 [1637-38].

Morris contra Evans, about 5 Car. [1629-30].

Boice *contra* Wilkinson, and concerning other customs, in Mich. 10 Car. [1634].

Carter *contra* Maund, a citizen of London deviseth £3000 to his wife, and £3000 to orphans, and legacies to divers others, presuming his estate to be greater than it was, *quere* who shall sustain the loss, either the legatees, or the orphans shall abate, a certificate in September, 1626.

Hopton *contra* Simcotts, in Hil. 14 Car. [1639].

45. DAMAGES.

Browne *contra* Dom' Bridges, damages given to the plaintiff for wastes committed by the defendant upon the plaintiff's [52] woods, as much as he was damaged, in 31 Eliz. li. B. fo. 838 [1588-89].

Blackenden *contra* Hidem, 6 Jac. li. A. fo. 915 [1608-9].

The like, Hastings *contra* Cooper, in Pasche 4 Jac. [1606]. And ordered that no ancient pasture or meadow ground shall be ploughed, 3 Jac. li. B. fo. 652 [1605-6].

Horton *contra* Long, where there is no provision by a will for maintenance, because the legacies to be paid after the debts, yet the defendant allowed maintenance, and to accompt for the profits of the state as long as it is in his custody, in 2 Jac. li. B. fo. 807 [1604-5].

Barwick *contra* Barwick, executors ordered to put in good security to allow five pounds *per centum* for education, and to make good their portions, 44 Eliz. li. A. [1601-2].

Farrington *contra* Throckmorton, in Trin. 15 Jac. fo. 987, Mich. following, 99 and 144 [1617].

Coriton in Mich. 21 Jac. fo. 37 [1623].

Birch *contra* Chambers, in May, 11 Jac. fo. 686 [1613].

Argentie *contra* Young, in November, 37 Eliz. [1594-95].

Rolt *contra* May, 1 Car. [1625-26], not to put in sureties.

Moulson *contra* Moulson, Trin. 16 Car. [1640].

[53] 46. DEBT.

Cole *contra* Ferrand, the plaintiff was satisfied of a debt upon word by order of Court, before others upon specialty, 3 Jac. li. B. fo. 238 & 241 [1605-6].

Skeggs *contra* Smith, whether a debt upon a recognisance may be attached in London, or whether an attachment made of a debt in London may be pleaded in bar of a *scire facias*, upon a recognisance in this Court, it hath been overruled, in law it cannot, in 38 Eliz. li. A. fo. 431 [1595-96].

Halsted *contra* Little, debts though beyond the Statute of Limitations, ordered to be paid, because directed to be paid by will, Hil. 1632.

Askwith *contra* Chamberlaine, a man makes a debtor executor, there shall be no extinguishment, but it shall go to the estate, Hil. 15 Car. [1640].

Englefield *contra* Nicholas, Lord Keeper's declaration of the Chancery and Exchequer concerning the mediate debt of a customer, and receiver to the king, and other matters, in Hil. 15 Car. [1640].

47. DEEDS.

Saltonstall *contra* Wilbore, the Court would not order the plaintiff to see what covenants, and ending of a lease or deed, Mich. Jac. li. B.

[54] Dominus Darcy *contra* Allerton, a second assignment made without consideration being in force, decreed, 31st June, 1631.

Byden *contra* Loveden, the defendant would avoid an estate for want of livery and seisin, but because the plaintiff enjoyed twenty-five years, it was decreed he should enjoy it quietly, 14th June, 11 Jac. li. A. [1613].

Barrow *contra* Barrow, Mich. 2 Car. [1626], upon a deed for want of livery or attachment.

Dom. Darcie *contra* Allerton, two voluntary deeds, the first shall take place unless the last be for payment of debts, Hil. 7 Car. [1632].

Dominus Rex ordered, that a deed shall be inrolled, though it concerns lands in Scotland or Ireland, 7 Car. [1632-33].

Pountney *contra* Pilkington, where the father conceives his land to be freehold,

gives part thereof to a younger son, although an old sleeping intail be set on foot, shall not prejudice the younger son, 18 Car. [1642-43].

Singer *contra* Bennet, concerning two deeds made in trust, which shall take place, in 8 Car. [1632-33].

[55] Row *contra* Chessick, a deed for want of livery, in Mich. 13 Car. [1637].

Paul *contra* Michell, a deed not inrolled, decreed against the heir, but if any other estate challenged by survivorship, or other precedent estate, will not bind, in 14 Car. [1638-39].

Franck *contra* Reepe, how far a defendant shall be compelled to shew a deed of intail, and to be examined upon interrogatories where the same is, Mich. 14 Car. [1638].

Pollard *contra* Hall, in 13 Car. [1637-38], and Morgan *contra* Morgan.

Vicecomes Rochford *contra* Lovell, the plaintiff's wife had a deed of gift or grant made to her of sheep, and other personal estate, but kept the same still in his own hands, and alters the property and dies, and makes the defendant executor, and the testator's goods which came to his hands far more than the debt, though the goods were altered by the testator, yet the goods which came to the testator's plaintiff's hands shall be liable, in 3 Car. li. A. fo. 223 [1627-28].

Barkley *contra* Barkley, my Lord's declaration of a voluntary deed, how far to hold or not, in Hil. 15 Car. [1640].

[56] 48. DECREE.

In the judgment roll of 36, 37, and 38 H. 8 [1544-47], there is a decree to be seen to the effect hereafter mentioned, where Daniel and the rest of the inhabitants of Crudworth, in the county of Warwick, exhibited a bill against Thomas Arderne for title of common, and to have certain inclosed lands open. It was decreed that Arderne and his heirs should hold the same lands so inclosed, discharged of the common, because it seemed that the inhabitants had common enough besides, and that the laying open the lands called Martinmas Leyse would be a great decay of husbandry. Rotul' Judicial' Edw. 6, 2 pars, there is a decree between Dudley and his wife, pretending to be executors of one Morgan, who supposeth himself to be administrator to that Morgan. And because the plaintiff had not sufficiently proved such will, and for that the defendant sued forth his letters of administration, therefore all the goods of the intestate were decreed to the defendant, allowing debts, legacies, and funeral charges.

A decree between Turner and Cooke, plaintiffs, and Goddard, defendant, whereby it appears that the controversy was [57] touching the messuages or farm houses, and three hundred acres of land in Haughton, in the county of Southampton, which the plaintiff supposed to have been demised to Robert Tanner, and which the defendant claims as executor unto Thomas Goddard, and that because the plaintiffs proved not the contents of their bill, and the defendant made proof of his answer, therefore the premises and the lease thereof made to the defendant's testator, were decreed to the defendant against the plaintiff, and that the defendant, after Midsummer then next, should enter and hold the premises (without entry to be made by the plaintiff) till he should recover the same by action at the common law, and furthermore it was ordered that the defendant should be dismissed.

The like decree in the same roll, between _____, plaintiff, and Gittins, defendant, whereby it appears that the plaintiff had purchased certain lands of the king's, whereof he supposed John Brown, clerk (to whom the plaintiff was executor), had an abbot's lease, and the defendant pretended that the two messuages, and one yard-land was letten unto him by lease, under covenant and seal, for fourscore and one years, and traversed the plaintiff's title, and the plaintiff [58] proved not his bill, and therefore the premises were decreed to the defendant according to his lease, for all the years then to come therein, and the plaintiff adjudged to pay him sixteen shillings and eightpence.

Note, that it is decreed to him without any *quonsq.* that it should be recovered at law, and without any liberty, to shew better matter in this Court.

The like decree in that roll, between William Messenger Quer', and the mayor and burgesses of Gloucester, touching divers manors. Forasmuch as upon the hearing of the matter, the defendant shewed a tripartite feoffment of the premises, from John Cooke to the mayor and burgesses, to the use of a free-school and other purposes, and because the plaintiff proved not the matter of his bill and replication, therefore the said manors and lands, &c., were decreed to the defendants and their successors, to

their uses, and that the plaintiff should by Christmas next deliver them all the evidences concerning the same.

The like decree in that roll, between Thomas Stowell and Anthony Capps, reciting that where the Lord William Pawlet, Lord President of the Council, and Lord Keeper of the Great Seal, 22d Oct. Anno 5 Eliz. 6 [1563], because the plaintiff had not proved his title to the manors, &c., decreed the said manors to the defendant and his heirs, till the plaintiff should recover the same at the common law, and that the defendant should also have the arrearages, and twenty shillings costs: the plaintiff being grieved with that decree, and exhibiting a new bill to the Lord Rich. having at the plaintiff's instance heard the cause, and given divers days to the plaintiff, to shew what he could to reverse that decree, did afterwards, because no just cause was shewed, to frustrate or alter that decree, dismiss the defendant.

Also a like decree in that roll, between Richard Lewknor, and dame Elizabeth his wife, plaintiffs, and Robert Barwick, defendant, because the plaintiffs proved not the matter of their bill and replication, and because the defendant proved a lease to be made to him six years since of the farm of Elleston, by one Sir Roger Lewknor, therefore the defendant was dismissed. And it was further by the authority aforesaid decreed, that the defendant should enjoy his lease, without interruption of the plaintiffs, or either of them, and the plaintiffs should pay him forty shillings costs.

Rotulo Judicial, E. 6, 4 pars. A decree between Fotheringall and Edsington defendant, the question was touching certain lands which the plaintiff claimed by lease, and which the defendant claimed as copyhold: and forasmuch as he failed in the proof, and the defendant shewed his copy and ancient court rolls, proving it to be ancient copyhold, therefore the lands were decreed to the defendant according to his copy, against the plaintiff his executors and assigns, till the plaintiff should prove a better title before the council at York, and yet if the plaintiff did trouble the defendant or his wife at York, or any other the king's courts, then he should pay five pounds costs, and the defendant was then dismissed with twenty shillings costs presently.

Another decree in the same roll between Gervas and Gawen, to the same effect aforesaid.

The like decree in the same roll between Westwood and Westwood.

Rotulo Judicial, E. 6, 8 pars. A decree between ap-Edward and Trevor whereby it appears that the plaintiff, having first a decree by default, did counterfeit an absolute decree, and put the Lord Chancellor's name to it, and therefore it was then ordered that the defendant and his assignees should enjoy the lands, and take the profits thereof against the plaintiff and his heirs, till he or they should [61] prove a better title in this Court.

Brocas *contra* Savage, a decree made for the defendant, notwithstanding it was alleged by the plaintiff in respect the possession of the premises was in question, in 31 Eliz. li. B. fo. 295 [1558-59].

A decree against the lessee and all claiming under him, he surrenders to him in reversion, and he was adjudged to be bound by the decree for so long time as the lease should have endured.

Chapman *contra* Bisow, 23 & 24 Eliz. [1581] the tenant in possession wasted the houses because dispunishable, by reason of a mesne estate for life, yet decreed that he should repair two parts in judgment roll, Edw. 6, Vaneerant and Eyre.

Strelley *contra* Throckmorton, and Foliamb and Fitzwilliams, two parts of judgment roll, Edw. 6, and Woodley and Read.

Goodman *contra* Kinnerley, Jennings *contra* Blunt, Read *contra* Rawlins, Nicholas Scot in the second part of judgment roll, H. 8, and in the same roll, two decrees for divorces. Terrell and his wife, Jeffery and Jenny.

Moore and Taylor, 29 Eliz. [1586-87].

Some and Poyntell, } 26 Eliz. [1583-84].

Hoskins and Perry, }

A decree made for an heir at the common law against certain feoffees who had lands conveyed unto them to maintain scholars, who should use holy orders, Cretts and Evetts, Mich. 3 Jac. [1605]. Another, 4 Jac. 4 [1606-7], Witering *contra* Peshall, 18 Jac. [1620-21].

A decree made to relieve one which had double taken from him as a concealer, by virtue of the Statute of Bankrupts, upon indirect dealing by commissioners, in the execution of the commission, Wood *contra* Hayes, 4 Jac. [1606-7].

Allen *contra* Edwards, 2 Jac. [1604-5]; Et Edwards, Smith and Wood *contra* in 8 Jac. [1610-11].

The Court decrees that the husband and wife shall make, seal, and deliver, or suffer livery of a lease of the lands to be made to the plaintiff by the said husband and his wife. Hungerford *contra* Hutton, 12 Eliz. li. A. fo. 91 [1569-70].

Dom. Culpepper *contra* Parslow, the Court decrees the thing promised, and the husband is bound by the wife's promise. The question is, whether the wife was married at the time of the promise made or not, Mich. Jac. li. A. fo. 138.

Frankland *contra* Graie, the plaintiff bought land of the defendant, which the defendant had conveyed before, to the use of himself, his wife and son; it was decreed that the plaintiff should have the [63] land against all, in 13 and 14 Eliz. li. B. fo. 81 [1571]. The defendant refused, a writ of execution went out, and he could not be found, served upon his wife who refused, all process of contempt went out against him in *lib. eod.* fo. 159, 264, 350. Whereupon in respect he could not be found a commission was directed to take possession of the said lands, and the tenants to pay their rents to the plaintiff, or else attachments to be awarded against them.

Bull *contra* Huddleston, decree without a bill in Mich. 9 Jac. li. B. fo. 27 [1611]. or thereabouts.

West *contra* West, and a sequestration, 12 Car. [1636-37].

Harris *contra* Smith, a decree to resign a benefice, in Mich. 8 Car. [1632].

Reyner *contra* Reyner, in Mich. 22 Jac. [1624].

Dom. Eftingham *contra* , a decree without proof for quieting of possession.

Denis *contra* Carew, in 16 Jac. [1618-19], an injunction or decree here without any proof to quiet possession had at law, and to avoid multiplicity of suits, in 3 vel 4 Jac. [1605-7].

Durham *contra* Dearing, in 4 vel 5 Jac. [1606-8].

Sawyer *contra* Pomery, li. B. fo. 786, in *libro novo*.

Standen *contra* Bullock, 41 Eliz. li. B. fo. 284 [1598-99].

[64] Manwaring *contra* Peck, a decree for establishing of a lease which is supposed to be void, and against a statute law, being prior's land, in 11 Jac. li. A. fo. 342 [1613-14].

Francis *contra* Jarvace, the Court doth decree and confirm the decree in the Court of Requests, without any proof of the substance of the matter, notwithstanding the prohibition out of the Court of Common Pleas, or King's Bench, li. B. 9 Jac. fo. 277 [1611-12].

Decanus Windsor *contra* Kinnersley, the point being parcel or no parcel, decreed, and being uncertain, the lands lying intermixed, ordered to be set out, notwithstanding the defendant by general words in a bargain and sale, have enjoyed the same long, yet ordered in Michaelmas, 9 Jac. li. A. fo. 321 [1611-12].

Decanus Windsor *contra* Boulant, the like in Mich. 8 Jac. li. A. fo. 390 [1610].

Sinoton *contra* Greene, upon point of reputation, in Nov. 7 Jac. [1609]. Decreed in Pasch. 9 Car. [1633].

Eland *contra* Wright, a decree upon one witness appeareth by a judge's certificate, in Hil. 9 Car. vel Jac. or Pasche, following [1634 or 1612].

Swan *contra* Atkins, a decree upon one witness which proves his pedigree, from whence he claims, in 16 & 17 Eliz. li. A. fo. 213 [1574].

[65] Fawkner *contra* Winchcombe, in Pasche, 10 Jac. vel Car. li. B. fo. 788 [1612 or 1634].

Hunt *contra* Cheeseman, a decree made upon a verbal promise in Pasche, 10 Jac. vel Car. li. B. fo. 813 [1612 or 1634].

A decree pronounced in the testator's lifetime, not to be passed under seal by the executor. Ewer *contra* Frere, Pasche, 1634.

Dominus Peter *contra* Elimozinarius de Westm., a decree to avoid a decree made according to the statute of 43 Eliz. in Trin. 3 Jac. li. B. [1605].

This cause was, where the lands came into the king's hand, but not by the statute of Chantries, and the king being so seised *de facto et non jure*, grants these lands to a common person, whether the grant be good, yea or no in equity.

Noxon *contra* Browning, in 3 Jac. li. B. fo. 515 [1605-6], and afterwards if there be a decree made in this Court, upon the decree of the commissioners upon the statute; as shall not be maintainable by the said statute, fo. 864.

Pauperes de Trinbury *contra* Chapman, in Mich. or Hil. 4 or 5 Car. [1628-30].

Ewderby *contra* Huddleston, examined a decree in the Court of Requests in October, 9 Jac. [1611].

Kitson *contra* Cropley, May, 37 Eliz., a [66] decree to prohibit a man from sowing of ridges which lie in sheepcourse in May, 37 Eliz. [1595].

Jervace *contra* Bullen, 12 Jac. [1614-15].

Villa de Yarmouth *contra* Decanum Norwich, a decree to prohibit a parson from preaching, and the town to pay costs, in Hil. 5 Car. [1630].

Holme *contra* Wild, the defendant entered into a bond to leave his fellowship, and after takes away his bond, the Court doth displace him, and decreed him to leave it. Pasche, 15 Car. [1639].

Shipwaie *contra* Pilkington, concerning the decreeing of by laws for the good of a town, a decree in 5 Car. [1629-30], and a decree in 25 Eliz. [1582-83].

Dodford *contra* Sessions, the contrary in 14 Car. [1638-39].

King *contra* Burrell, a decree in the Court of Requests upon a verbal promise, a prohibition thereupon, this Court confirms that decree, because the plaintiff is ancient tenant, and been at costs in building, Hil. 2 Car. [1627].

Episcopus Dunelmen' *contra* Martin, a decree reversed though no new matter, in Trin. 5 Car. [1629], the case upon which the decree was mistaken, and notwithstanding his translation, sues as for the right of the Bishop of Oxon'.

[67] Comes Devon *contra* Leake, some mistaking in a decree amended, &c., in Hil. 14 Car. [1639].

South *contra* Gardiner, irons to be laid upon a man in the Fleet, because he will not perform a decree, in 6 Car. li. B. [1630-31].

Barker *contra* Shepherd, about 3 Car. [1627-28].

Swan *contra* Turberville, concerning a patent of concealment, decreed, and other patents, in Car. li. B.

Comes Pembroke *contra* Zouch, a legacy decreed, in Mich. 7 Car. [1631].

Monke *contra* Winch, decree against an infant, and one bound in £500 to perform when he comes to age, Hil. 2 Car. [1627].

Portington *contra* Beaumont, a decree here, to confirm a decree at York, to prevent prohibition, Trin. 2 Car. [1626].

Lashbrooke *contra* Tiler, alimony decreed here, 8 Car. [1632-33].

Gresham *contra* Dee, and Dee *contra* Woodhouse, in 4 Car. [1628-29], a man may affirm a decree though not in possession.

Mayor of Norwich *contra* Decanum Norwich, decree for precincts and parcels, 8 Car. [1632-33].

Wright *contra* Middleton, this Court examines a decree made at York, 8 Car. [1632-33].

Coventry *contra* Mayor of London and West., 6 Car. [1630-31].

[68] Paine *contra* Pattison, a decree for damages for a lessee for years, in Mich. 7 Car. [1631].

Hill *contra* Michell, Mich. 9 Car. [1633].

Richman *contra* Gislinham, look Justice Croke's certificate, 9 Car. [1633-34].

Askwith *contra* Turner, the Court will not reverse a decree made at York, unless it was unduly obtained, or error therein, 9 Car. [1633-34].

Devisteed *contra* Englested, 38 Eliz. li. B. fo. 426 [1595-96]. Notwithstanding a decree in the Court of Requests, this Court refers as well matters decreed there, as here, to referees, to cast up account.

Farmour *contra* Trost, tithes in kind decreed, notwithstanding a decree in Lord Bacon's time, 12 Car. [1636-37], and what is a yardland, and how to set it out.

Episcopus Heref. *contra* Awbrey, Hil. 14 Car. [1639].

Kenrick *contra* Temple, 15 Car. [1639-40].

Magister Trin. Coll. *contra* Brooke, 12 Car. [1636-37].

Comitissa Cumbries *contra* Com. Cumbrie, birch trees are decreed to be timber trees, in 8 Jac. fo. 349 [1610-11].

Sere and Eland *contra* Colley, the plaintiffs being creditors of Colley, preferred their bill against the defendant, being all [69] foreigners, but the goods were passed over into England, into merchants' hands, by Colley, and this Court taking notice in respect of the different computation of the realm, first to be paid at the feast of the three kings' heads; secondly, because the bill was not sealed; thirdly, because the debts grew in France, and he came over hither to keep his body from arrests, the Court decreed the debts, and caused a decree to be drawn up *pro confesso*, because the defendant

would not answer, and sequestered monies in other men's hands to pay the debts, although they were passed over to others to the use of an infant, 8 Jac. li. A. fo. 1184 [1610-11].

Cooke *contra* Trewman, a decree upon a verbal agreement, in Trin. 4 Jac. [1606].

Shires *contra* Burgaine, a decree for tithe conies and wood, 12 Car. [1636-37].

Holme *contra* Fletcher, concerning a legacy, in Mich. 2 Car. [1626].

Poole *contra* Coxwell, Trin. 4 Car. [1628], the father entered into articles for land, the son no party, yet having consented, decreed.

Redman *contra* Torrell, for that the plaintiff's father did fully intend and resolve that the plaintiff should have the lease, and did give the same accordingly, and that she at divers times declared that [70] she had given him the said lease, and for that Christopher Torrell himself protested, as he was a Christian man, did promise that the plaintiff should, and for that the said Torrell did purpose to send to the plaintiff for some agreement, and made offer of £200 for the said lease, therefore decreed, in 28 Eliz. fo. 682 [1575-76].

Wotton *contra* Wotton, a highway decreed, in 10 Car. [1634-35].

Powell *contra* Parsons, a piece of ground sold, but no reservation of a highway, but decreed that a way should be continued as formerly, Mich. 3 Car. [1627].

Roberts *contra* Harecourts, a decree in the Court of Wards decreed here, notwithstanding the decree there, Hil. 14 Car. [1639].

Attorat. Dom. Regis *contra* Episc. Oxon. a bill here to unite a parsonage to the bishop's see, about 12 Car. [1636-37].

Dom. Scroope *contra* Lazenby, a decree at York being for lands, is adjudged to be *coram non judice*, Pasche, 2 Car. [1626].

Cromwell *contra* Carey, Mich. 7 Car. [1631], a bill of review, because the decree was against an infant, my Lord's declaration; it shall bind an infant as well as at full age.

Turner *contra* Williams, whether plate doth pass by the name of goods, decreed to be goods, in Mich. 15 Car. [1639].

[71] Pope *contra* Courtney, the Court decreeth that allowance shall be given to a daughter that was in *centre sa mere prominent enseint* at the time of devise, although void in law, decreed in Mich. 3 Jac. li. A. fo. 306 [1605].

49. DEFENDANT.

A defendant examined touching a contempt, and discharged thereof, shall have costs of course, if a commission be not presently taken out to prove it, and if he prove it not, then increase of costs, Atkinson *contra* Ailoff, 37 Eliz. [1594-95].

Pike *contra* Higgons *uxor & al.*, the defendants ordered to assure lands according to a devise, 12 & 13 Eliz. li. A. fo. 182 [1570].

Gwynn *contra* Petty, to examine the defendant upon interrogatories at the hearing, Pasche, 6 Car. [1630].

Bradshaw *contra* Bradshaw, a defendant ordered to be examined upon oath at the hearing, Hil. 8 Car. [1633].

Lainer *contra* Smith, the defendant delivered out of execution upon security, in 3 Car. [1627-28].

Pollixfen *contra* Short, the defendant examined upon interrogatories, after a hearing, in 5 Car. [1629-30].

Drewry *contra* Watson, to examine a defendant after hearing, in 7 Car. [1631-32].

[72] Fenton *contra* Blomer, a defendant not compelled to disclose matter of usury, 22 Eliz. li. A. fo. 66 [1579-80].

Symmes *contra* Plowden, this Court directs a trial, the defendant, to avoid the order of this Court, procures an injunction out of the Exchequer, the defendant committed, in Trin. 14 Car. [1638].

Wood *contra* Wageman, the Court, upon view of the body, and upon examination of several witnesses, and upon view of the church-book, adjudgeth the defendant to be under the age of twenty-one years, in 28 Eliz. fo. 262 [1585-86].

Pollard *contra* Evelin, if a defendant cannot be found, or hath no house, then to give notice to the clerk in Court, which is sufficient, in Hil. 15 Car. [1640].

50. DEMURRERS.

A bill laying a promise to assure lands for ten shillings in hand, and £2100 at days, demurred and allowed, because it was but a preparation for action upon the case, *William and Nevill*, Trin. 38 Eliz. [1596].

Wright contra Fitch, 13 Jac. li. B. fo. 42 [1615-16], the matter being concerning serjeants for arrest in London, demurred because of their places, yet overruled and paid good costs.

The general pardon pleaded to discharge [73] an outlawry after judgment, and not allowed till the parties be agreed, *Weekes contra Newborow*, Trin. 1599.

Harris contra Beadle, Hil. 18 Jac. li. A. fo. 823 [1621]; *Fitton contra Proctor*, 36 Eliz. li. A. fo. 499 [1593-94].

A demurrer for outlawry must be upon oath shewed under seal, *Hulst contra Hulst*, 36 Eliz. li. A. fo. 652 [1593-94].

Paschall contra Points, 1597.

A demurrer because of a former dismissal must be upon oath, *Brooke contra Smith*, 36 & 37 Eliz. [1594].

A demurrer by *deponentem* allowed, *Mollineux contra Stanhope*, 23 Eliz. [1580-81].

Demurrer because the matter was dismissed in the Court of Requests, overruled, in 30 Eliz. li. B. fo. 206, and 493 [1587-88]. *Haddon contra Salter*.

The husband alone cannot demur for his wife, by the opinion of the Court, *Sturling and Green*, 36 Eliz. [1593-94].

A demurrer, because *ce q'vy* not shewed to be in life, and overruled the demurrer not to be good. *Victor and Read*, 37 Eliz. [1594-95].

A demurrer, because it concerns the Queen's title proper for the Exchequer, yet overruled, Mich. 33 Eliz. li. A. fo. 33 [1591].

Billar contra Elliot, demurrer, because the matter was depending in the Exchequer [74] before the bill overruled, Jan. 35 Eliz. [1593].

Plumpton contra Headlam, demurrer because excommunicated, overruled, about 4 Car. [1628-29].

Two executors are plaintiffs, one is excommunicated, the other shall be severed, and the defendant shall answer him, *Tomes contra Vaughan*, Hil. 39 Eliz. [1597].

Hamblin contra Dom. Sherringham, the defendant demurred, because she promised to pay money when she was covert baron, overruled, 25 Eliz. li. B. fo. 103 [1582-83].

Crocker contra Hamden, demurrer, pretending one executor cannot sue another, overruled, because the matter is mere testamentary, 20 Eliz. li. A. fo. 131 [1577-78]. [S. C. Ch. Ca. Ch. 118.]

Gotts contra Hicks, a demurrer at the defendant's suit overruled, in Hil. 16 Jac. li. A. fo. 674 [1619].

Skies contra Rawson, the defendant put in a demurrer to the plaintiff's bill, because the plaintiff was outlawed at the suit of strangers, yet ordered to answer, in Mich. 9 Jac. li. A. fo. 234 [1611].

Audley contra Harris, Hil. 1633, a defendant lies in the Fleet for breach of a decree, the plaintiff nevertheless prefers a bill to discover an estate, demurred, because a double execution, yet overruled.

Brookes contra , about 5 Car. [1629-30]. [75] a demurrer, because excommunicated, overruled.

Dom. Plummer contra , Hil. 6 Car. [1631].

Donn contra Donn, in Mich. 7 Car. [1631].

Leighton contra , a demurrer put in after execution, replication disallowed, in 5 Car. [1629-30].

Evans contra Leasure, a demurrer upon a replication, although answered, being upon a promise sixteen years, dismissed notwithstanding the answer, and Sir Richard Moore's report, but in respect the promise is annexed to a trust retained, 6 Car. [1630-31] notwithstanding the Statute of Limitation.

Comes Kingston contra Wakeman, in Hil. 8 Car. [1633].

St. John contra Dom. Thornburgh, a demurrer to a second bill of revivor overruled, Hil. 7 Car. [1632].

Wild contra Middleton, a demurrer, because Moore, a bankrupt, and the creditors

dwelt out of England in Galicia, overruled, in Trin. 8 or 9 Car. [1632 or 1633], or June 2 Car. [1626].

Leake *contra* , a demurrer, because the lands lie in Ireland, and there to be determined, overruled, in 8 Car. [1632-33].

By *contra* Forth, a demurrer, because a dismission in the Court of Requests, if [76] any new matter, overruled here, 26th June 1606.

Artson *contra* Wolverston, a demurrer, because the defendant had execution at law overruled, 10 Jac. li. B. fo. 291 [1612-13].

Morris *contra* Owen, a demurrer, because the plaintiff was outlawed, the defendant ordered to answer, 10 Jac. fo. 457 [1612-13].

Bland *contra* Comitum Cambrie, a demurrer pleaded, because remedy at law overruled, Pasche, 7 Car. [1631].

Arnold *contra* Arnold, if a man be outlawed, and sues as executor to another, the plea to the same is overruled, 12 Jac. li. A. fo. 353 [1614-15].

Ratcliffe *contra* Tolston, common of pasture in waste grounds lying in the North, a bill here demurred to, but because it concerneth lands, and the lands be tenant right, and some dwell out of the parish, cannot so well maintain their condition by reason of unity of possession, overruled, in 33 Eliz. fo. 191 [1590-91].

Salter *contra* Bennet, a demurrer, because a decree in the Exchequer, overruled and decreed here in presence of the Barons of the Exchequer, Mich. 14 Car. fo. 38 [1638].

Osborne *contra* Pagett, because the defendant did not put in his demurrer according to the rule of Court, moved to have it entered, but denied, in 14 Car. [1638-39].

[77] Thynn *contra* Westrop, a demurrer, because the plaintiff's wife outlawed and pleads a release, overruled to answer, in 25 Eliz. li. B. fo. 134 [1582-83].

51. DEPOSITIONS.

Chamberlaine and Pope, 39 & 40 Eliz. [1597], after publication, the Court would not amend a deposition mistaken.

Wynn *contra* , a man after examination supplies his deposition *ad informand' conscientiam*, about 5 Car. [1629-30].

Kinnaston *contra* Com' Bridgewater, recording copies of depositions to be allowed, in Hil. 2 Car. [1627].

52. DEVISE.

Serjeant and Serjeant, 8th Nov. 39 Eliz. [1597], a breach of a condition of a devise holpen against the heir.

Cornwallis *contra* Penruddock, concerning the devise of an intailed term, Hil. 1 Car. [1626].

Webb *contra* Smith, in 4 Car. [1628-29].

Holditch *contra* Phillips, in Pasche, or Trin. 4 Car. [1628].

Palmer *contra* Turnor, 41 Eliz. fo. 540 [1598-99].

Watts *contra* Kancie, a man possessed of a lease for fourscore years devised out thereof ten pounds per annum without clause of distress, and made his wife his [78] executrix, and she thereby had the said lease, and afterwards the executrix and husband, and assigns in trust, sold away the same lease, discharged of all incumbrances, the executrix shall be charged, and not the land, 31st Jan. 9 Jac. [1612].

Tennant *contra* Braie, 8th Nov. 6 Jac. [1608]. Carewe's Report, a devise made to the daughter to pay her a sum of money if she will be divorced from her husband, the gift made good, though the condition void.

Kirrington *contra* Astie, the grandfather deviseth lands to his son to pay ten pounds per annum to the son's three daughters, the father gives two hundred pounds in marriage with one, whether the ten pounds per annum shall be included in the two hundred pounds or not, decreed it shall be included, in Mich. 13 Car. [1637].

Phillipps *contra* Springett, notwithstanding a release of a portion relieved, in 10 Car. [1634-35].

Grimston *contra* Willington, 2 Car. [1626-27].

Higate *contra* Higiate, a mortgagor of a copyhold, and a surrender to that purpose, and after deviseth this land to a second son, but no surrender, in Mich. 14 Car. [1638].

Poford *contra* Pavier, Pasche, 15 Car. [1639], the Court will see the will in the same [79] case, but difference is upon some matter of fact.

Davenport *contra* Dom. Robinson, the husband by will gives goods which the defendant pretends belongs to her as *parafamula*, the devise good, in 5 Car. [1629-30].

Crowther *contra* Lucie, the plaintiff being heir to lands in tail, and likewise devised unto him by his mother's father, the lands being in mortgage, and redeemed by a stranger, having sold it again with the consent of his father and mother, could not be relieved here, in 39 and 40 Eliz. li. B. fo. 435 [1597].

Mather *contra* Godbold, two joint purchasers, one deviseth his part for payment of debts, ordered in Chancery, Mich. 7 Car. [1631].

Lowen *contra* Lowen, 41 Eliz. li. A. fo. 230 and 683 [1598-99], lands devised to two, to be equally divided betwixt them, and to their heirs, are tenants in common, and not joint-tenants, and so decreed, that the survivors shall receive no profit by survivorship.

Bacon *contra* Bull, a devise void in law by reason of a mistrical of a grant, and by reason of an attornment, yet helpen in equity, 38 Eliz. li. A. fo. 698 [1595-96].

[80] 53. DIRECTIONS.

Williams *contra* Fawcett, directions by this Court, how the defendant or his tenant shall libel in the spiritual Court, 13 Jac. fo. 292 [1615-16].

54. DISMISSIONS.

Hawyard *contra* Timber, 4 Jac. li. B. fo. 602 [1606-7], the matter heard there after a dismission in the Exchequer upon hearing, but there appearing no matter to relieve the plaintiff, the matter was dismissed, the rather, because there was a former dismission in the Exchequer.

Roe as heir, exhibited a bill against Wasorer, to prove a condition, perpetuity, and conditions broken and dismissed, in 1594.

Reynolds *contra* Davy, 12 & 13 Eliz. [1570], li. A. fo. 87, because the matter in question is under the value of forty shillings per annum, therefore the Court dismissed it.

Botely *contra* Savile, in 13 & 14 Eliz. [1571], li. B. fo. 95 and 104, because the defendant and the lands in question lie within the county palatine, the matter was dismissed.

Brereton *contra* Jarmin, 23 Eliz. li. A. fo. 428 [1580-81].

[*Anonymous*] Because the lands in question lie within the limits of the commons of the North, the cause was dismissed, *primo et secundo*, Edw. 6, li. A. fo. 72 [1548].

[81] East *contra* Fish, 12 Eliz. fo. 100 [1569-70], because the lands in question is parcel of the Queen's, therefore the matter was dismissed into the Exchequer.

Jay *contra* Simcox, dismissed to law, but shall not plead the statute, 12 Car. [1636-37].

55. DISINHERISON.

Harrington *contra* Markham, the Court was assisted with bishops and noblemen, at the hearing of a cause in Chancery, in July, 5 or 8 Jac. [1607 or 1610], upon point of disinherison.

Woodley *contra* Woodley, a disinherison, and a decree for confirmation, yet after twenty years the decree reversed, and disinherison avoided, in 8 Car. [1632-33].

56. DISTRINGAS.

Parker *contra* Bowlesse, a distringas awarded where cannot have benefit of extent, 7 Car. [1631-32].

57. DISTRESS.

Possession and rents ordered to Molineux *contra* Molineux, Hil. 1599, the tenants would not pay the rents, therefore a distress ordered.

58. DIVORCE.

A divorce *causa frigilitatis*, the woman sued for her marriage portion, yet her father was alive who gave it, to which exception was taken, yet the Master of the Bench said, he would be no formalist. Barrow [82] *contra* Bitten, in 1594, and 37 Eliz. fo. 126 [1594-95].

59. DOWER.

Wild *contra* Wells, bill to be relieved for dower, and a commission to set out the lands, in 25 Eliz. li. B. fo. 112 [1582-83].

[Mews' Dig. tit. HUSBAND AND WIFE, VII. DOWER AND FREEBENCH, 3. Arrears. S. C. Dick. 3.]

60. DUCHY.

Hulse *contra* Daniel, Mich. 5 & 6 Car. [1629-30].

Duchy Court where lands are granted of the crown in fee farm, reserving rent, are pleadable and determinable in this Court.

Levingston *contra* Wife and al', about 8 Car. [1632-33].

Tenants of Barwick *contra* Cæsar, 8 Car. [1632-33].

Hampden *contra* Ferrers, in 14 Car. [1638-39].

Demurrer by a clerk in the Duchy Court, overruled, 30th May 1606. Jordan *contra* Pawson.

61. ELEGIT.

Palmer *contra* Bolls, an elegit returned and filed, being out, and thereby without remedy, renewed by this Court, to be executed, 2 Car. [1626-27].

62. ENTAIL.

Baile *contra* Read, 38 Eliz. li. A. fo. 728 [1595-96], an entail cut off contrary to a proviso, to the intent only to make a jointure, and then the remainders were settled in tail as [83] before, wherefore the forfeiture dispensed with in Equity.

Tatton *contra* Molineux, a lease made to feoffees in trust, to the use of the plaintiff for life, and after, to the heirs males of his body, the said plaintiff hath full power to dispose of his lease, so long as he hath an heir, and that an entail of a trust of, or out of, a chattel is not good, nor any such perpetuity, precedents being produced to that purpose, and the Judge's opinion between a remainder of a chattel, and the issue in tail of a chattel, in 7 Jac. li. A. fo. 1183 [1609-10], the lands lie in the county palatine.

63. EQUITY.

Lock *contra* Hunt, 7 Car. [1631-32], no advantage by unity, descent, fine, or discontinuance.

64. ESTATES.

King *contra* Blundavile, the defendant having an estate for life without impeachment of waste, was ordered not to do waste both upon woods and houses, 5 Jac. li. A. fo. 327 [1629-30].

Piggott *contra* Piggott, in 8 Jac. li. A. fo. 766 [1610-11].

Banister *contra* Banister, an occupant's estate maintained, in Pasch. 12 Jac. li. B. [1614].

Marchio Winton *contra* Bushon, an estate reserved without impeachment of waste, this coming to a lessee, he would [84] have it in the like manner, but restrained here, Jan. 11 Jac. [1614].

Prince *contra* Greene, although an estate cannot be created, by covenant by law, yet made good in Chancery, in June, 40 Eliz. [1598].

Reynell *contra* Peacocke, concerning an estate in fee, depending upon an estate tail, his Lordship would not alter the estates, in li. B. 6 Car. [1630-31].

Merrifield *contra* Merrifield, about 1634.

Rousewell *contra* Knight, in 10 Car. [1634-35], raising of an estate by an agreement.

Barrow *contra* Smith, in 10 Car. [1634-35], a man makes a grant to friends of an estate, to the use of three daughters and their heirs, this is joint-tenancy, and the survivor carries it.

Lister *contra* Yelverton, an estate is made to friends in trust to the use of the woman, to commence after her husband's death, she joins in a fine with her husband of the lands leased in trust, this fine shall cut off the trust, and there being an extent upon the lands leased, this trust shall not prevent the extent by reason of the fine, Trin. 15 Car. [1639].

65. EXCHANGE.

Cottington *contra* Leversage, an indenture of exchange decreed, 13 Jac. li. A. fo. 229 [1615-16].

[85] 66. EXAMINATION.

Examinations of plaintiffs and defendants, and witnesses after a hearing.

Throckmorton *contra* Cromwell, 10 Jac. li. A. fo. 18 [1612-13].

Touck *contra* Thomas, 19 Jac. li. A. fo. 829 [1621-22].

Lea *contra* Band, 1591, and 32 Eliz. [1589-90], the defendant was examined upon interrogatories, and yet the plaintiff was left to his proof.

And in Mich. 36 & 37 Eliz. li. A. fo. 422, Dom. Burleigh *contra* Shute [1591].

The Court would not examine the defendant unless he would absent, 38 Eliz. Bowser *contra* Savage [1595-96].

A defendant upon a hearing where the plaintiff's proof served not, appointed to be examined. Bellamy *contra* Radcliff, 38 & 39 Eliz. [1596].

Waterman *contra* Pope, Pasch. 37 Eliz. [1595].

York *contra* Haidon, the plaintiff was ordered to be examined, or process to be had against him, 11 & 12 Eliz. li. A. fo. 71 [1569].

Lady Ancotts, being a defendant, was to be examined upon interrogatories, 11 & 12 Eliz. fo. 328 [1569], Mayor of Feversham *contra* Ance.

Cotton *contra* Paget, the defendant not to be examined upon all interrogatories, *eodem*, fo. 367.

[86] Preston *contra* Powell, the wife to be examined as a witness, 41 Eliz. li. B. fo. 10 [1598-99].

Glaster's case, concerning an examination, about 6 Car. [1630-31].

67. EXCEPTIONS.

If a man except against an answer and hath it referred, if thereupon it fall out to be good, the defendant shall have costs for that trouble upon motion, Beswick *contra* Fox, Hil. 39 Eliz. [1597].

68. EXECUTORS.

Executors not in equity compelled to put in bond to perform the will or answer legacies, unless it appear they have either broken the trust in them reposed by the testator, or be decayed since his death, for at his death it seemed he trusted them without bond, Browne *contra* Purton, 32 Eliz. li. B. fo. 641 [1589-90].

One executor may sue another in this Court, though not at law, Allen *contra* Story, in 1585, and Okely and Barnard, 39 Eliz. [1596-97].

Two executors, one of them is made defendant, he shall be charged no further than for the goods come to his own hands, Herbage *contra* Backskaw, 35 Eliz. [1592-93].

Englefield *contra* Inhabitant de Rotherstrop, executors, to pay costs adjudged against the testator, because he had assets, 28th Nov. 1631.

[87] Brereton *contra* Roberts, the surviving executors, sues the executor of his executor, and likewise where there is a great state come to the executor, which was not disposed of by the testator, the executor shall not have it, but shall be disposed of to the testator's kinsfolk, and to charitable uses; an executor of an executor ordered to account upon oath, and to be examined upon interrogatories to discover the estate, in 6 Jac. li. A. fo. 638 [1608-9].

Bacon *contra* Bell, two executors, the one dissents, yet the act of the other shall be good, in Feb. 39 Eliz. [1597].

Holland *contra* Owen, an executor shall not be charged with a trespass committed by the testator, in 3 or 4 Car. [1627-29].

Warmstrey *contra* Dom' Tanfield, a subpoena against an executor to shew cause why he should not be bound by decree made against the testator, in Hil. 5 Car. [1630], and concludes accordingly.

How far a judge's or an officer's executor shall be bound for a neglect done in his office, in Mich. or Hil. 8 Car. or Jac. [1632 or 1633, or 1610 or 1611].

Moore *contra* , in Mich. 8 Car. [1632], two executors and joint in the bill, shall be severed upon hearing.

John *contra* Kingston, co-executors shall [88] not be charged for more than comes to his hands, in 8 Car. [1632-33].

Downes, Jux, and Wiseman, concerning an agreement, and if one executor do waste, the other shall not be charged, Trin. or Mich. 7 Car. [1631].

Townley *contra* Shurborne, two trustees of a lease or two executors, one wasteth the goods, the other shall not be charged, unless he was a coactor, in Trin. 9 Car. [1633].

Deane *contra* Ward, two executors, two answers for mean profits before partition, in 11 Car. [1635-36].

Allen *contra* Burton, an executor sues the executor of his co-executor towards payment out of an estate which came to the defendant, who is not chargeable in law with the legacies, but the plaintiff is (as surviving executor) decreed to be liable, in 10 Jac. li. B. fo. 243 [1612-13].

Hankinson *contra* Pell, an executor, called in question after question demurred, yet overruled, in 12 Car. [1636-37].

Capell *contra* Gostow, two executors, the one trusteth the other to receive all rents and dies, the plaintiff calls his executor to an account being the executor of a trustee, ordered to make satisfaction, in 12 Jac. li. A. fo. 421 [1614-15].

Terrey *contra* Fowler, an executor ma-[89]keth doubt whether he shall pay debts before a decree in Chancery, decreed they shall be protected.

Dominus Craven and Comes Dorset, creditors, about 6 Car. [1630-31].

Wolverston *contra* Amherst, 13 Car. [1637-38].

Kemp *contra* Lamplugh, 14 Car. [1638-39].

Rowe *contra* Billing, two executors being decreed to pay legacies and debts, the one paying it, the other shall upon a bill be compelled to pay the moiety and costs, in 10 Car. [1634-35].

Martin *contra* Knowles, concerning two co-partners executors, the estate being not divided before death, 28 Eliz. fo. 257 [1585-86].

Houghton *contra* Hampden, *et e contra*, one executor receives money for interest, it shall be accounted as principal for five per centum, in Mich. 9 Car. [1633].

Viccomes Conway *contra* Croke, a bill preferred against the executor of one that committed wastes, demurred unto, and good, in 15 Car. [1639-40].

But an account for an estate which came to the defendant's hands called in question, pleaded the Statute of Limitation, overruled, in 15 Car. [1639-40].

69. EXEMPLIFICATION.

Fisher *contra* Hawkes and Smith, in 1590, the plaintiff allowed without shewing a [90] deed enrolled, to plead the exemplification of it.

If a demise of lands want sufficient words to carry that which was meant to pass, it shall not be helpen in equity, Kent *contra* Kent, in 1591.

Fisher *contra* Smith, the Court orders an exemplification of a deed to be pleaded at law, where the deed cannot be brought, in 33 Eliz. li. A. fo. 26 [1590-91].

70. EXTENT.

Trion *contra* Michell, the plaintiff sued out an elegit, being not well laid, and the extent not good, sues here in equity for the money, decreed 12 Car. [1636-37].

To account for profits upon extent according to true valuation, and not to the extended value, but not use for those profits, in 5 Car. li. B. [1629-30].

Houghton *contra* , 4 Car. [1628-29], or thereabouts.

Aldred *contra* Wilkinson, 5 Car. [1629-30].

Dom. Deancourt *contra* Hampson, according to the receipt, and not to the extended rate, in 2 Car. [1626-27].

Chivers *contra* Bampton, Trin. 5 Car. [1629], a re-extent awarded upon a statute, the lands being not known upon the former extent.

71. EVIDENCE.

Bourn *contra* Debest, shop-books read [91] as an evidence at the hearing, Mich. 15 Car. [1639].

Harrison *contra* Bludder, the same term, and concerning the Statute of Limitation by great advice.

72. FEME COVERT.

Bacon alias Prior, *le feme vend le use q. le feme advec les Denvers avecqz le mort le Baron quel clayme le use mere, & nient remedié in equité*, 7 E. 4, *vouch un case de* Tasborough & Danvers, are in question, Hil. 1590.

The husband sold lands and debts due to the wife before coverture, and took wares for it, he dying she surviving released the debts, and decreed she should not, 36 H. 6, 134 and 142 [1457-58].

Waterhouse, defendant, was grantee of a lease in trust, to the use of the wife of Witham: she died, and made Waterhouse administrator: Witham complained, and would have had the lease in equity, the order and opinion of the Court was, he should not, but the grantee and administrator should, 38 Eliz. [1595-96].

Ireland *contra* Pavie, in Mich. 13 Car. [1637], the plaintiff held two tenements of the husband and wife, and surrendered both in consideration that the husband and [92] wife should make a lease for one of them for three lives: the husband died, the wife being but tenant for life, and so by the statute would have avoided the lease for three lives, but the Court thought good it should be holpen in equity. Donnelly and Weston, 36 & 37 Eliz. [1594].

Feme ad estate dispaushable del wast une, wast en measons prohibet & pais a mare sine auxi. Morgan and Peury, 37 Eliz. [1594-95].

Feme covert party by articles, and to a decree, but she assented not, the effect of it was, to forego the jointure for other recompense, after that the husband died, she took a new husband, and they left to the law to recover her jointure. Slater *contra* Foliambe, 37 Eliz. [1594-95].

Stayward *contra* Jarmy, and Jarmy *contra* Stayward. Jarmy was enforced to make assurance, Mich. or thereabouts, decreed in 39 & 40 Eliz. li. A. fo. 660, li. B. fo. 41 [1597], and 42 Eliz. fo. 220 and 551 [1599-1600], and because she refused to perform, was committed till she did agree.

The like between Twyn and Box, in li. A. fo. 487, 22 & 23 Eliz. [1580].

Egerton *contra* Townsend, li. B. fo. 954, 11 Jac. [1613-14].

Voux and *Vxor contra* Gleas and *Vxor*, 4 [93] & 5 Edw. 6, fo. 35 [1551], the Court doth order that the husband shall become bound in a recognizance, that his wife shall release her right.

Barty *contra* Herenden, 2 & 3 Eliz. li. A. fo. 62 [1560], the Court compels the husband and wife to levy a fine.

Wiat *contra* Wiat, in Mich. 16 Jac. li. B. fo. 476 [1618], the wife being no party to the bill.

Hausly *contra* Hausly, Trin. 17 Jac. and Hil. prox. [1619-1620].

Westdeane *contra* Frizell and *Vxor*, the defendant and his wife committed to prison for not performing the order, in May, 10 Jac. [1612]. The decree and their commitments, in 12, 13, & 14 Jac. Regis [1614-17], in 14 Jac. li. B. fo. 14 [1616-17]. She was committed to Newgate.

Sands *contra* Tomlinson, Mich. Jac. li. A. fo. 679, a wife compelled to levy a fine and perfect assurances.

Pope *contra* Moore, the defendant's wife being *præsent* enscint at her husband's death, the child could not be provided for by law, but the Court ordered that the child should have sufficient allowance, li. A. fo. 367, 3 Car. vel Jac. [1627-28 or 1605-6].

Rivet *contra* Lancaster, the wife sueth her husband, in 39 Eliz. li. A. fo. 201 [1596-97].

West *contra* West, 12 Car. [1636-37].

[94] And *feme covert* sueth others, 17 Jac. li. A. fo. 940 [1619-20].

Kiffin *contra* Kiffin, 17 Jac. li. A. [1619-20].

Dom. Crispe in Pasche or Trin. 18 Jac. li. A. fo. 1088 [1620].

Comitissa Dorset *contra* Comitem Dorset, about 7 Jac. [1609-10].

Fleshward *contra* Jackson, money given to a *feme covert* for her maintenance because her husband is an unthrift, the husband pretends the money to be his, but the Court ordered that the money should be at her disposing, 21 Jac. li. B. fo. 719 [1623-24].

Rust *contra* Whittle and *al.* Pasch. 8 Jac. li. B. [1610]. The Court doth decree a report wherein it was thought fit that the defendant should compel his wife, and another man's wife, being the other defendant, to levy a fine and join in assurance.

Dom. St. John *contra* Englefield, in Mich. 14 Jac. [1616], a bill preferred without the privity of her husband, allowed.

Gaseoigne *contra* Francklyne, a *feme covert* sues others, 42 Eliz. li. A. about fo. 593 [1599-1600].

Haynes *contra* Duncombe, in Trin. 21 Jac. [1623].

Milward *contra* Bradborne, 5 or 6 Car. [1629-31].

Lake *contra* Deane, 38 Eliz. li. A. fo. 157 [1595-96], a wife examined to discover her husband's deceit.

[95] Carey *contra* Ley, in Mich. 12 Jac. [1614].

Land charged with a parol trust, though made by a *feme covert*.

Sambroke *contra* Ramsey, in Mich. 13 Car. [1637].

Baskerville *contra* Sinthome, the plaintiff conveyed a lease to feoffees in trust, to the use of his daughters, and to his children lineally; the daughter married and had issue, which dies; marries again, the feoffees convey the lease to the wife and husband, and discharge the trust; the woman gives this trust to the husband, and dies; the heir sues the husband for this land, but ordered that the land should go to the husband, notwithstanding the conveyance, 12 Jac. li. B. [1614-15].

Palmer *contra* Shonck, a *feme covert* to answer, Mich. 5 Car. [1629].

Stiles *contra* Stiles, an agreement binds a *feme* and an infant, in Hil. 2 Car. [1627].

Sankey *contra* Golding, 21 Eliz. li. , fo. [1578-79], a *feme covert* sues without her husband.

Farewell *contra* Curson, *feme covert* sues in Chancery *sa Baron in vic ouster la mare*, 31 & 32 Eliz. fo. 8 [1589].

Baker *contra* Newbery, about 5 Car. [1629-30], though the husband released.

Moore *contra* Dom'. Greenville, will not [96] answer, because a *feme covert* and within age, compelled, 11 Car. [1635-36].

Throckmorton *contra* Calver, a woman returning her answer, being married after the commission awarded, ordered, 11 Car. [1635-36].

Randall *contra* Tynny, a single woman did agree to have a moiety of land, and after marriage, subscribed her name with her husband, to a latter agreement, though *feme covert*, decreed, in 10 Jac. li. B. 25, or 250 [1612-13].

Holman *contra* Awdley, 10 Jac. li. B. fo. 309 [1612-13], a wife not to be examined against her husband.

Court *contra* Popham, the wife demurs without her husband, because charged with conspiracy and combination, ordered to answer upon oath, about June, 6 Car. [1630].

Comes Danby *contra* Peele, a release by the husband shall not prejudice the wife, to sue for her jewels, in 13 Car. [1637-38], and a wife sues another in a friend's name.

Keeling *contra* Bodley, Mich. 14 Car. [1638].

Rowe *contra* Comitum Newburgh, 14 Car. [1638-39], look in it otherwise, because separate.

Comes Exon' *contra* Dom. Morley, how far it binds an heir more than common law, for payment of debts, 13 Car. [1637-38].

Portman *contra* Popham, a wife to answer without her husband being beyond the sea, in 11 Car. [1635-36].

[97] Batson *contra* Conney, the defendant demurs that at the time of the agreement the defendant was an infant at sixteen years old, and now married, and so not bound, ordered to answer, in Mich. 14 Car. [1638] and in Hil. 15 or 16 Car. [1640 or 1641].

Poole *contra* Harrington, or *e con'*, a wife hath a stock for her own use, and dies, who is buried by a friend without direction of her husband, he that buries her must be at the charge, and not the husband, in Mich. 14 Car. [1638].

Roe *contra* Dom. Newburah, a *feme covert* cannot sue, unless there be a severance, this suit is for a promise in marriage, after twenty years, the matter was dismissed, because the plaintiff could not find precedents suiting this case, in Trin. 15 Car. [1639].

Georges *contra* Chancie, a *feme covert* being separated, having an allowance of two hundred pounds, she improved it, and disposed of it by her will, Mich. 15 Car. [1639].

Clarke *contra* West, how far a man *non compos mentis* shall be concluded by a *feme covert's* disposing of his estate, in Mich. 15 Car. [1639], a case made and referred to judges.

Simpson *contra* Simpson, a man cannot sue his wife, nor a wife her husband, in 3 Car. fo. 394 [1627-28].

[98] Dockwray *contra* Poole, a man having three daughters, entails his land upon them; after one of them married, and being a *feme covert*, with the consent of her husband, was contented and agreed to take one thousand pounds, in consideration and extinguishment of her right as co-heir; the judges hold it to be no good bar to her, in Trin. 7 Jac. [1609], the Judge's certificate.

73. FEME SOLE.

Povy *contra* Peart, the plaintiff's wife, before marriage, conveyed away her estate to the defendant being her son, and after the defendant conveyed the same to his children being infants, because (as the Court conceived) it was passed without any consideration, it was decreed for the plaintiff against the defendant, and the infants, in 32 & 33 Eliz. li. B. fo. 430, 454, and 484 [1590].

Atwood *contra* Stubbs, one Amy Pym did cause one Lightfoot and the defendant to enter into covenants, and a bond for performance to leave one hundred pounds to pay to such persons as she should appoint, and if she did nominate none, then the same hundred pounds was to be paid to two grandchildren, after she caused the said Stubbs and Lightfoot to cancel these covenants and bond, to make void this her intention, yet decreed to be made good to [99] the plaintiff, in 10 Jac. or Car. li. B. fo. 442 [1612-13 or 1634-35].

Thomas *contra* Thomas, sues to set forth her dower, 13 & 14 Eliz. [1571].

Winter *contra* Dancie, *feme sole* only, takes a commission to examine witnesses, marries before witnesses be examined, and after examined, whether the dispositions should stand, ordered to stand, 10 Car. [1634-35].

Webb *contra* Wise, a marriage before an injunction, the Court declares that it shall go and be revived, notwithstanding no bill of revivor, 10 Car. [1634-35].

Kempe *contra* Dom. Reresby, or *e con*, the Lord Keeper declares, that a woman cannot have dower of a trust, in Mich. 2 Car. [1626], but compelleth the defendant to answer, who is tenant to the land, to enable her to bring her writ of dower.

A farm with the lands usually set therewith to be let, and the scrivener put in the farm with the appurtenance, and then got a lease himself to avoid it. Harbin and Straw.

74. FINES.

A fine and recovery got by circumvention, the party which got it may be compelled in equity to recompense the party circumvented, as the Master of the Rolls was of opinion, at the hearing of the cause [100] between Welby and Welby, primo May 1595.

FINES ARBITRABLE FOR COPYHOLDERS—TENANT RIGHT.

Middleton *contra* Jackson, in Hil. 5 Car. [1630], one year's moderate value.

Popham *contra* Larcasse, Trin. 13 Car. [1637].

Monsier *contra* Ducket, Mich. 14 Car. [1638], these after a decree at York.

Cooper alias Staynning *contra* Blunt, a fine arbitrable rated under value, 29 Eliz. li. B. or li. A. fo. 515 [1586-87].

Stoner *contra* Smith, a fine arbitrable rated at two years and a half rent, which was the higher, in respect of the multiplicity of plaintiffs, 31 Eliz. li. A. fo. 484 [1588-89].

Tenants de Accledon *contra* Kinnesley, 21 & 22 Eliz. li. B. fo. 86 [1578-79].

Gittings *contra* Browe, 11 Eliz. li. B. fo. 486 [1598-99], two years' reasonable value.

Lake *contra* Jetherell, Nov. 9 Jac., two years' value [1611].

Atwood *contra* Apsley, 41 Eliz. [1598-99].

Tenants de Gaddesden *contra* Carey, a year's value, and back upon change of tenant, and half a year's value upon change of lord, 4 Jac. li. B. fo. 435 [1606-7].

Fox *contra* Huddleston, 4 Jac. li. B. fo. 204 [1606-7], a year's value.

Tenant's Right.

[101] Watson *contra* Mainne, Mich. 15 Jac. li. B. fo. 328 [1617-18], one year's value.

Nevill *contra* Albany, 12 Jac. li. fo. 768 [1614-15].

Beare *contra* Seymour, Mich. 9 Jac. li. A. fo. 343, and Pasche, li. A. fo. 797 [1611].

Dom. Gerrard *contra* Parker, 12 Jac. li. A. fo. 1404 [1614-15].

Elrington *contra* Whetstone, in 39 & 40 Eliz. [1597].

Eaton *contra* Gwyn, 11 & 12 Eliz. fo. 206 [1569], the defendant not to be released out of prison, till he hath paid the fine to the Queen.

Farmer *contra* Smith, that a fine levied by the practice and fraud of a tenant at will, copyholder, or a terminor for years upon covin, to bar the lord of his inheritance (though the proclamation and five years past without claim) doth bar the reversion of his inheritance or freehold, 43 Eliz. li. B. fo. 367 [1600-1].

Milward *contra* Welden, the plaintiff for putting in a long replication was fined ten pounds, and imprisoned, and a hole to be made through the replication, and hanged about his neck, and he to go from bar to bar, in 8 Eliz. li. B. fo. 678 [1565-66].

Thorold *contra* Thorold, 17 Jac. [1619-20].

Wright *contra* Booth, the plaintiff (he [102]ing simple) was drawn to levy a fine of his lands, yet ordered that the lands should be reassured, if the defendant did not pay a valuable consideration, or if he failed of payment thereof, then the said lands should be re-assured, 3 Jac. li. B. fo. 508 [1605-6].

Lewis *contra* Vaughan, 4 Jac. li. A. fo. 835 [1606-7].

Seambler *contra* , in May, 13 Car. [1637], because a fine was not levied according to covenant, a power became void to make leases, but decreed, but the last order, in 15 Car. [1639-40].

Longman *contra* Hopgood, a fine imposed for breach of a decree, Trin. 6 Car. li. B. [1630].

Russell *contra* Read, 11 Car. [1635-36], a warrant to the Serjeant at Arms to go into the Fleet, and to take the defendant's money and goods to satisfy a fine.

Barker *contra* Shephard, about Mich. 9 Car. [1633], a fine imposed, and parties pillored and imprisoned, and laid in irons for abusing a man for serving a subpoena in the King's Bench.

Long *contra* Snagg, this Court doth rate and moderate a fine, 12 Jac. fo. 157 [1614-15].

Hopton *contra* Higgins, a fine is not to be decided by witnesses, but by Court rolls, and ordered to go to hearing upon them, in 10 Jac. li. B. fo. 176 [1612-13].

[103] Thynn *contra* Carey, how far a fine at common law, after five years, shall bar a title in equity, 10 Car. [1634-35].

Birrastron *contra* Walsh, whether fines be certain or not, to regulate the same, the most number of Court rolls to determine the same, and the time, 14 Car. [1638-39], and Mich. 15 Car. [1639].

Clarkeson *contra* Vigerons, half a year's full value.

Sacheverell *contra* Brimington, the defendant pleads a fine levied by a lunatic, overruled in Trin. 15 Car. [1639], and an order too for a commission to examine whether a lunatic or not.

Ashfield *contra* Crispe, a fine *sur concessit* after five years upon a mortgage in Mich. 13 Car. [1637].

75. FORGERY.

Barker *contra* Ireland and Morris, a person sentenced in this Court for forgery, in 8 Jac. li. A. fo. 1172 [1610-11].

76. FEOFFEEES.

Billingsley *contra* Mathew, the Court orders the surviving joint feoffee to make sale of lands for payment of debts as well as if the other had been living, in Mich. 12 Jac. [1614], and before.

Mildmay *contra* Com. Warwick, feoffees in trust to be examined as witnesses, in Hil. 1 Car. [1626].

[104] Ayre *contra* Jennings, feoffees trusted for the good of a wife, compelled to join in sale of lands, in Hil. 2 & 3 Car. [1627].

Clotworthy *contra* Hunt, feoffees for a town, nor recorder, to be examined, but for matter of fact, Trin. 2 Car. [1626].

77. FEOFFMENT.

Liddalls *contra* Vanlore, about an occupant to uses, or a feoffment in trust, 2 or 3 Car. [1626-28].

Dux Buckingham *contra* Paul, in Mich. or Hil. 5 Car. [1629 or 1630].

Lilley *contra* Gilbie, Mich. or Hil. 5 Car. [1629 or 1630], to compel a man to execute a feoffment.

78. FORFEITURE.

Poore *contra* Oxenbridge, although a tenant hath forfeited her copyhold, yet relieved here, in 9th Nov. 44 Eliz. [1602].

Whistler *contra* Cage, Pasche vel. Trin. 7 Car. [1631].

79. GOODS.

Popham *contra* Hinton, to go into the personal, and whether a statute be goods, and betwixt goods inventoried and a *parapocrenalia*, how far shall go into estate, after it was in Orphans' Court.

Haynes *contra* Child, concerning the contingency or goods, 9 Car. [1633-34].

[105] Leate *contra* Turkey, Company of Merchants, if a consul beyond sea hath power, and do levy goods upon a private merchant, the company must bear it, if the factor could not prevent the act of the consul, Hil. 1630.

80. HEIR.

The heir is not in equity bound to assure lands, which his father bargained and took money for. Weston *contra* Danvers, 1584.

Michill *contra* Chamberlaine, in 7 Car. [1631-32], an heir of mortgagee not to be relieved after several dismissions and decrees, unless can prove an extraordinary value of the land.

Porter *contra* , in 11 Car. [1635-36], one Brett provides, that his heirs, executors, or administrators, shall have power to redeem lands, the plaintiff is neither, but as an assignee from Brett, yet shall have power.

Salmon *contra* Vaux, an heir at law seeks to take advantage upon breach of condition, because legacies were not paid according to the will, but because there was an intention to pay it, and an agreement between the sisters, decreed against the heir, in 11 Car. [1635-36].

Archer *contra* Partridge, 9 Car. [1633-34].

[106] Cooke *contra* Tookey, Pasche 15 Car. [1639], by great advice.

Poole *contra* Poole, the defendant coming in by grant, and not by descent from his father, it is pretended he ought to be bound by the father's covenants, and as executor hath no assets, yet ordered to be liable, in Mich. 14 Car. [1638].

81. HUSBAND.

The master of King's College, in Cambridge *contra* Ragland, the defendant's wife would not bring in evidences according to an order, the husband was bound that she should do it, 4 Eliz. li. A. fo. 73 [1561-62].

Ackland *contra* Dom' Perriam, the plaintiff marrying one Mallett, widow, who made a conveyance to the defendant's husband in trust, and received the profits of the land accordingly, but died before any satisfaction made, the wife being sued demurs, because the plaintiff doth not sue as administrator, and that the profits were received before she was married to the defendant, nor hath made any title to himself to the goods of the said Mallett, which notwithstanding was overruled, in Jac. li. A. fo. 78.

Dom. Griffin *contra* Tailor, 3 and 4 Car. [1628], the Court ordered a man to procure his wife to acknowledge a fine of mortgaged lands.

[107] 82. INDUCTION.

Webb *contra* Smart, 5 Jac. li. A. fo. 302 [1607-8], the plaintiff being inducted to a parsonage, the defendant notwithstanding keeps the possession by force; where upon the plaintiff was enforced to prefer his bill in this Court, but the defendant

demurred, because the vicarage is as his freehold and inheritance, and so properly determinable at law, yet the demurrer overruled.

Bird contra Smith, 3 Jac. li. A. fo. 819 [1605-6].

83. INFANTS.

Copyhold surrendered to the use of an infant, to the intent he should pay an annuity to another at full age, which he refused to do, and it was decreed he should pay it, and the arrearages. *Sawyer contra Gillett*, 9 Eliz. [1566-67].

In a cause between the Lady Russell and the Earl of Lincoln, the plaintiff's counsel moved the Court to give order against the younger Earl of Bedford being an infant, vouched a case, 11th Nov. 6 Eliz. li. B. fo. 426 [1564]. Between Altham and the Lord Morley, where between the date and sealing of a conveyance, the Lord Morley conveyed the land to an infant, wherefore Altham had order against the Lord Morley [108] and infant, an infant concluded 6th Jan. 36 Eliz. [1591]. *Preston*, Trin. College, and Wood, in li. A. fo. 330, and a bad lease in _____ and Wester and Tulpitt, 37 Eliz. li. B. fo. 206 [1594-95]. Infants bound till they come to age and undo it by a bill. *Burch contra Morris*, land conveyed to feoffees to the use of an infant bound, in 5 Jac. li. A. fo. 323 [1607-8].

Oliver and King contra Challinor, the plaintiff being an infant was committed to the prison of the Fleet, for not obeying a decree, 11 & 12 Eliz. li. A. fo. 213 [1569].

Digman contra Hamond, 12 Eliz. fo. 356 [1569-70], the defendant made secret conveyances (depending the suit) to defraud the plaintiff being an infant, the defendant bound by recognizance to discharge all estates so made.

Dom. Leppington contra Barnes, the plaintiff's husband made an infant executor to prevent payment of debts not fit to undertake it, but another administrator for him during his nonage, yet liable for payment of debts, in Mich. 9 Jac. fo. 362 and 1092 [1611].

Hare contra Hide, a bill preferred against an infant, and he ordered to answer, Hil. 3. Jac. and Pasche prox' [1606].

Wadham contra Moore, an infant bound by decree, albeit he was but twelve years, 37 Eliz. li. A. fo. 489 [1594-95].

[109] *Wood contra Norton*, a demurrer, because sues not as guardian, but because as *prochein Amy*, ordered to answer, in Hil. 2 Car. [1627].

Hill contra Hill, in 7 Car. [1631-32], to examine a guardian as a witness.

Young contra Stowell, concerning the granting of an office in reversion to an infant, 8 Car. [1632-33].

Rayner contra Rayner, in 13 Car. [1637-38], how far an infant shall be bound to give a legal discharge of money due to them.

Rivers contra Comit' Dorset, how far this Court shall bind an infant by consent of parentage, in 6 Car. [1630-31].

Lyde contra Somister, the manor of Panington, an infant of twelve years may surrender, Trin. 15 Car. [1639].

Hartwell contra Ford, a lawful age of infant shall be intended twenty-one years, unless in a particular case of guardian in socage, 11 Car. fo. 341 [1635-36.]

84. INCLOSURES.

Piggot contra Kniverton, 4 Jac. li. B. fo. 401 [1606-7], because lands had been inclosed thirty years by consent of most of the parishioners, therefore they should continue inclosed.

Comes Huntingdon contra _____, in Hil. 8 Jac. [1611].

[110] *Cartwright contra Drope*, the Court compels certain men that would not agree to inclosures to yield unto the same, and binds a college that would not consent, having lands within the said manor so inclosed, Mich. 17 Jac. li. A. fo. 549 [1619].

Another between The Prebends and Scholars of Magdalen College, in Oxon, *contra Hide*, compelled to an agreement, Pasch. 10 Jac. li. B. fo. 826 [1612], and 10 Jac. li. A. fo. 426 [1612-13].

Danvers contra Dodford, concerning inclosures, June. 7 Jac. vel. Car. fo. 995 [1609 or 1631].

Eaton contra Hill, 16 Jac. li. A. fo. 981 [1618-19].

Morgan *contra* Clarke, 5 Car. li. B. [1629-30].

Cripps *contra* Clamer, 17 Jac. [1619-20].

Tirwhit *contra* , 15 Jac. li. B. fo. 480 [1617-18]. inclosures.

Freake *contra* Loveden, inclosure of wastes and common decreed, being for the common good, 12 Jac. li. A. fo. 372 [1614-15].

Decanus and Capit Westin' *contra* Eldridge, May, 15 Jac. li. B. fo. 892 [1617].

Fleetwood *contra* Lenton, about 5 or 6 Car. [1629-31].

Monson *contra* Broxholme, Trin. 11 Car. vel. Jac. li. B. [1635 or 1613].

Tiffin *contra* Harris, 6 Car. [1630-31].

Gilpin *contra* Hillersden, 20 Jac. li. A. fo. 887 [1622-23].

Barkley *contra* Evet, concerning inclosure, [111] where some not consent, are compelled, 8 Car. [1632-33].

Trigg *contra* Payte, a decree made to overthrow inclosures, if the defendant will not recompense the plaintiff so much as he hath been prejudiced by the inclosure being a depopulation, although a remedy at law upon the statute, in Mich. 20 Jac. [1622], and Mich. 22 Jac. [1624].

Capella de New Elmes *contra* Erbury, demurrer overruled where a parson will not answer, nor be compelled to an inclosure, though for common good, in 5 Car. li. A. fo. 461 [1629-30].

Ingram *contra* Wells, the Court will not bind a man to an inclosure that never assented, 2 Car. [1626-27].

Fox *contra* Shrewsbury, the defendant, because agreed to an inclosure, but after disassented, decreed, according to the agreement, 13 Car. [1637-38].

Theed *contra* Hamwell, two inhabitants, no parties to articles for an inclosure, in Mich. 2 Car. [1626].

Wright *contra* Stamford, my Lord Keeper will not confirm articles upon an inclosure, unless the same arable way be maintained as before the inclosure, 10 Car. [1634-35].

Dom. Lumley *contra* Sands, an agreement fourteen years since for good of seve-ral towns and highways set, decreed, in Hil. 14 Car. [1639].

Moreton *contra* Winton, inclosing and continuing of inclosures, and stinting of cattle, in 12 Car. [1636-37].

85. INTERROGATORIES.

Berryman *contra* Berryman, no interrogatories admitted here in Court after commission taken away to cross the plaintiff's examination, Mich. 13 Jac. li. B. fo. 27 [1615].

Lewis *contra* Owen, examined in Court upon new interrogatories if it be joint-commission, Mich. 13 Car. [1637].

86. INTEREST.

Weldon *contra* James, if a surety payeth brokage, in some cases interest upon interest allowed, 14 Car. [1638-39].

87. INJUNCTIONS.

Cockshot and Parke, an injunction was against the plaintiff, and all claiming under him, to suffer the defendant to enjoy possession, one Wilkinson bought the lease, which Cockshot the plaintiff claimed by, and then to avoid the injunction, took a lease till it should be seen how the old lease should be avoided.

Servington *contra* Webb, 12 Eliz. li. A. fo. 176 [1569-70], an injunction for possession, because the defendant would not perfect assurance to prevent a mischief.

[113] Barkley *contra* Pierson, an injunction to stay proceedings at law upon triple damages, notwithstanding the cause dismissed to the Ecclesiastical Court, Trin. 17 Jac. [1619].

Buck *contra* Wood, 12 Jac. li. B. [1614-15].

Tiffin *contra* Tiffin, Hil. 17 Jac. [1620] an injunction against creditors, although none have, about Trin. 16 Jac. [1618], or after.

Finch and his creditors, in Hil. 17 Jac. [1620].

Finch *contra* Hicks, Hil. or Pasch. 17 Jac. [1619-20].

Troit *contra* Wallen, injunction *sine die* awarded, and the money unjustly procured, restored, Mich. 12 Jac. li. B. fo. 322 [1614].

An injunction to stay proceedings in the Spiritual Court, 30 Eliz. li. A. fo. 528, or 28 [1587-88].

Catwallell *contra* Wynn, an injunction to stay judgment and execution in the Exchequer, Hil. 35 Eliz. [1593].

Episcopus Hereford *contra* Carpenter, an injunction to stay proceedings after a judgment, the defendant taking out execution notwithstanding is in contempt, Trin. 6 Car. [1630].

Fisher *contra* Payne, about 6 Car. [1630-31].

Parker *contra* Bowers.

Uvedale *contra* Harvy, and

Beaumont *contra* Harvy, all in 7 or 8 Car. [1631-33], and to stay proceedings in the Ecclesiastical Court.

Treswell *contra* Guibon, 9 Car. [1633-34], an injunction to stay proceedings in the Exchequer.

Miller *contra* Societat' Girdlers, an injunction to stay suit upon an action brought for perjury, before the cause in question here heard, 22 Eliz. li. A. fo. 497 [1579-80], and concerning a promise to make a lease from the corporation.

Knight *contra* Parson, an injunction for stay of a suit at law in an assize for writ of redisseisin, touching the office of Chester herald, and the profits thereof, in 10 Jac. li. B. fo. 177 [1612-13].

Hewes *contra* Blewet, an injunction to stay proceedings upon a *quare impedit*, in 10 Car. fo. 202 [1634-35].

Curteen *contra* Hexeene, march grounds stayed from ploughing, Hil. 8 Car. [1633].

Aylett *contra* Aylett, an injunction to stay proceedings in the Arches or Admiralty, 33 Eliz. fo. 172 [1590-91].

Smith *contra* Snotsbull, an injunction to establish possession, and to stay suits in the Court of Wards, and an attachment awarded for serving an order of the Court of Wards, to stay suit here, in 33 Eliz. fo. 176 [1590-91].

Tanfield *contra* Davenport, the defendant sues in the Ecclesiastical Court for a portion due to his wife, this Court orders an injunction to stay proceedings there, till [115] he shall make a competent jointure, in 14 Car. [1638-39].

Shelton *contra* Stanley, an injunction and commission to the Sheriff by one order of 13 or 14 Car. [1637-39].

Dominus Baltimore *contra* Reynell and Sands, an injunction to quiet possession such as at bill only, Hil. 15 Car. [1640].

Arundell *contra* Arundell, an injunction granted against the issue in tail, to stay the reversing of a fine levied by himself, and (I think) his father also, in 40 Eliz. li. A. fo. 270, and 640 [1597-98].

Bury *contra* Conisby, a verdict at the common law to avoid a lease for three lives, because the lease was to commence at a time to come, which is void in law, yet an injunction to continue possession, 23 Eliz. li. A. fo. 38 [1580-81].

88. JUDGMENTS.

Upon affidavit, endeavour used to have served process to hear judgment, and could not find the defendant, the Court proceeded, Windham and Harwood.

A judgment to let to examine in equity, so the truth of the judgment not examined, as where judgment against the truth of an acquittance without a seal, or where the money paid after the day, Heard *contra* Doddington.

[116] Owen *contra* Dom. Deancourt, a judgment of a debt, and a fine to a purchaser, acknowledged all in one day, the judgment to be preferred, in 4 or 5 Car. [1628-30].

Godshall, in Mich. 5 Car. [1629], for assigning of a judgment for contribution.

Comitissa Winchelsea *contra* Tuston, concerning signing over bonds, 6 Car. li. B. [1630-31].

Allen *contra* Glomville, 4 Jac. [1606-7], a decree after judgment at law.

Courtney *contra* Glanville, 10 Jac. li. 1, fo. 474 [1612-13].

89. JOINTURE.

Ash *contra* Dom. Forrest, a jointure in money not to be touched for the debts of her husband, Mich. 9 Car. [1633-34].

Nash *contra* Preston, concerning a jointure, and not the intolment of a deed, supplied in Pasch. or Trin. 6 Car. [1630], and judge's certificate.

Kniyet *contra* Baxter, a jointure in money or lands, the use thereof in equity shall go to the payment of debts. Pawlet *contra* Dom. Malburgh, in 8 Car. [1632-33].

Knightley *contra* Bevill, in Mr. Churchhill's note of Trin. 8 Car. [1632].

Palmer *contra* Cleveland, the contrary, in Mich. 8 Car. [1632].

Dom. Howard *contra* Comit' Nottingham, a jointure confirmed, although by [117] tenant, Mich. 9 Car. [1633], and Pasch. 7 Car. [1631], the order upon hearing.

90. JURISDICTION.

Davenport *contra* Deane, the Court will in nowise retain a suit of the lands which lie in the county palatine of Chester, 12 & 13 Eliz. fo. 399 [1570].

Monshall *contra* Jewce, in 17 Eliz. [1574-75].

Daniel *contra* Jackson, Nov. 17 Eliz. [1574-75].

Cleeve *contra* Brooke, 15 Eliz. [1572-73].

Bradley *contra* Browne, the like 15 Eliz. fo. 400 [1572-73].

Wentworth *contra* Taccon, in 16 Eliz. [1573-74].

Dom. Savill *contra* Savill, concerning the custom of the province of York, in Mich. 1634.

This Court not to be stayed by an injunction out of the duchy, Barnard *contra* Langley, in 1633.

Tenants of Barwick *contra* Caesar, decree here, after a decree in the duchy, because it was ordered they had no jurisdiction, the lands being out of the duchy, but held off East-Greenwich, 8 Car. [1632-33].

Levingston *contra* , about 10 Car. [1634-35].

Scofield *contra* Finch, Feversham privilege overruled, in 25 Eliz. li. B. fo. 131 [1582-83].

Trinick *contra* Bordfield, to stay proceedings in the stanneries, in 11 Car. [1638-39].

[118] Dom. Seroope *contra* Lasonby, depositions taken at York to be used here, Pasch. 2 Car. [1626].

Simonds *contra* Harbie, this Court declareth that the priority of a suit in the Court of Requests, shall not hinder the proceedings in this Court, in Hil. 15 Car. [1640].

Tollakerne *contra* Steward, a demurrer because the matter was dismissed in the Court of Requests, upon a full hearing overruled, in Hil. 15 Car. [1640].

Askwith *contra* Chamberlaine, though one Miller (no party to a suit here) preferred a bill in the Court of Requests, an injunction awarded to stay proceedings there, in Pasch. 16 Car. [1640].

91. JOINT TENANCY.

Dorne *contra* Dorne, concerning the disposing of a joint tenancy, in 5 Car. [1629-30].

Pettit *contra* Styward, two joint tenants, one by will giveth his part, good in equity, and whether a wife of a feoffee shall have dower or not, in 7 Car. [1631-32].

92. INVENTORY.

Hewet *contra* Baker, in Pasch. 15 Car. [1639], where the defendant did not exhibit an inventory, the Court chargeth the whole legacy on him after twenty years, though pretended not sufficient.

[119] 93. LAND.

Where new annexed land is sold away in fee, and a tenure in *capite* reserved, it is pleadable here, Crompton *contra* Clifford, in Pasch. 37 Eliz. li. A. fo. 128 [1595].

Skinner *contra* Skinner, in Trin. 12 Eliz. [1600], the father of the plaintiff and defendant devised certain lands to the youngest son, which he purchased, the eldest son suing for the same, is decreed according to the devise.

Thynn *contra* Kinsnell, money devised by the plaintiff's father to the plaintiff, out of certain lands which were to be sold by the defendant, the lands were intailed, and provided, that if the heirs went about to sell the same, it should be void, being against the statute of 32 H. 8, it is ordered to be sold in 38 Eliz. li. B. fo. 97 [1595-96], and concerning a discontinuance.

Manwayring *contra* Dudley, the plaintiff's wife's father made a feoffment to uses

for thirteen years, to raise portions of four hundred pounds for his daughters, the father being dead, the feoffees suffer the son and heir to enter into the said land, and sold the same, and yet after a descent, after the death of the first purchaser, at the third hand, although the money be due, yet the Court would not charge the lands with [120] the said money, the example being dangerous, in Hil. 43 & 44 Eliz. li. B. fo. 306 [1601-2].

Hungate contra Hungate, the plaintiff's father being a bachelor, purchased an estate in the defendant's name, but after having issue, the plaintiff, the Court decreed that the lands should go to the plaintiff, and he reassured by the defendant, in 4 or 5 Jac. fo. 1070 [1606-8].

Bowell contra Hancock, a purchaser discharged from a statute in 11 Jac. li. A. fo. 344 [1613-14].

7 Il. 7 10 [1491-92]. A had lands descended to him in ancient demesne, extended by statute merchant, B purchased the lands, and had a recovery by sufferance, in the Court of ancient demesne upon a voucher, and ousted A. A brought a subpoena, and it was holden that A could not satisfy the recovery, and therefore should be restored to the possession by the Chancery, for he had no remedy by law, where, notwithstanding a double judgment, yet the judges directed them to the Chancery.

Buggs contra Sumpner, 8th June, 43 Eliz. [1601], lands given for the discharge of poor inhabitants of a parish, for discharge of fifteens and taxes, with a proviso, that the rents should not be to the discharge of gentlemen's lands of the parish, but of poor men's only, the defendant being but a yeoman (though he have purchased some of [121] the gentlemen's lands and sought to have benefit of the gift) yet not allowed, in 8th June, 43 Eliz. [1601].

Townsend contra Kilmurrey, fee-simple land purchased by the father and descended to the son, this land shall not be assets in law, nor equity to pay debts, 13 Car. [1637-38].

The Countess of Exeter's case.

Episcopus Heref. contra Awbery, where the quantity of a yard-land is not known, a commission to set out so much land as the commissioners shall think fit, upon common intendment, in Hil. 14 Car. [1639].

Eborall contra Hunt, lands passed in a feoffment more than was meant, was holpen in equity, notwithstanding a verdict and judgment at law, supposing some circumvention.

Hire contra Wordall, lands devised to be sold, and the money thereof coming should be devised to children, but the lands could not be sold, because there was none appointed by the will to sell the same, yet ordered to be sold, and the lease was for a thousand years, which is most commonly to prevent the king's right, in 39 Eliz. li. B. fo. 134 [1596-97].

94. LEASE.

A lease containing a messuage in the [122] demise, but land also in the habend', which land had been many years enjoyed accordingly, yet the Lord Chancellor's opinion was, no continuance would make a void lease good, especially against a purchaser, *Meld contra Cooper*, in 25 Eliz. [1582-83].

Bradshaw contra Bradshaw, in 16 & 17 Eliz. li. A. fo. 309 [1574].

Collins contra Syms look from Feb. 26 Eliz. li. fo. 358 [1584].

Ellis contra Beswick, the contrary, 36 Eliz. li. A. fo. 654 [1593-94].

A lease devised to one for life, with several remainders over to others, the first devisee was compelled to enter bond, to let it go according to the devise, but if it were for a perpetual chattel, the Court would not have done it. *Price contra Jones*, 26 Eliz. fo. 599 [1583-84].

Alston contra Easter, Trin. 7 Car. [1631].

Jones contra Frederick, 12 Jac. li. B. fo. 303 [1614-15], the Court will not charge the administrator of an executor.

Smith and Gawdy contra Compton, 14 Nov. 41 & 42 Eliz. [1599]. *Tudnam*, the contrary *Tudnam contra Glanville*, 36 Eliz. li. A. fo. 396 [1593-94].

No relief in equity touching leases of one thousand years, because they tend to defraud the crown, in 39 & 40 Eliz., *Risden and Tuffin* [1597].

[123] A stranger having a lease before a decree, which was not bound thereby, and the same lease being over-wrought by a statute which was bound by the decree, bought

the extent of the statute, and therefore his lease was therefore bound by the decree, so long as the extent should have continued, if it had not been bought. *Alden contra Hanbury*, or *e contra*.

Leases made by deans, canons, or colleges, &c., for twenty one years, or three lives, are here relieved. *Simeon contra Decanus de Windsor*, Trin. 15 Jac. li. A. fo. 1177 [1617].

Long contra Decanum Bristol, 3 Car. [1627-28].

Episcopus Dunelmæ contra Martin, Trin. 5 Car. [1629].

Comes Oxon' contra Gooth, Pasche, 11 Jac. [1616]. *Derham contra Christ church*, Mich. 10 Jac. li. B. fo. 64 [1612], the contrary.

Monsen contra Aiscough, the defendant upon an award did covenant that the defendant and his wife should make a lease void of all incumbrances, yet after denied, and pretended that a former estate was made to his children, so that it was not in his power, and brake off the sale of the said agreement or lease, whereby it was void in law: the Court ordered the award to be performed to all intents and purposes, 11 & 12 Eliz. li. A. fo. 519 [1569], and afterwards, for not performing the same, was committed, 12 & 13 Eliz. li. A. fo. 204 [1570], and after [124] wards he was to become bound by a recognizance to yield himself to the prison, which he did not do, therefore the plaintiff might, and was licensed to take execution upon that recognizance, *eadem folio*, 328.

Golding contra Tuffin, a lease for many years, although it be intailed to many in remainder, decreed to be sold for payment of debts, Mich. 10 Jac. [1612].

The like 17 Jac. [1619-20], *Hubbard contra Hare*, li. A. 944.

Harvey contra Withers, in Pasche, 24 Jac. [?], intailed lands sold for payment of debts.

Powell contra Moulton, a lease intailed not subject to debts, though the lease or assignment supposed to be void, because intended, and the defendant to pay debts out of the personal estate, 5 June, 3 Car. li. B. fo. 1441 [1627].

Chambers contra Gregorie, a lease made for years, and a statute for quiet enjoying, the statute was delivered with the lease, but not assigned: whereupon the assignee of the lease procured letters of administration of the goods and chattels unadministered, of the cognizor of the Statute, and extended the same, which administration being [125] repealed and granted to another, the Court and judges ordered the estate by that Statute to be determined, 22d Nov. 9 Car. [1633].

Birkenhead contra Birkett, a lease made for forty years, by the master and brethren of the hospital of Saint Katherine's, allowed for, good, Hil. 1632.

Bampton contra Freake, a decree to restrain the defendant from selling of a lease contrary to the intent of the ancestors, in Oct. 9 Jac. [1611].

Huddleston and Lamplugh, concerning a lease attending upon an inheritance, and concerning the disposing of the same, and likewise of a trust, in Pasche, 6 Car. li. A. fo. 769 [1630].

Stradling contra Smith, where a lease is made to feoffees, to the use of the wife of the feoffor, the feoffor and wife covenants, that they will levy a fine to extinguish the rent, which was done accordingly, not mentioning a lease of one hundred years, which was made over to the said feoffees to her use, the Court decreed that the lease should be cancelled, 1 Car. li. A. fo. 182 [1625-26].

Kitson contra Williams, a lease made good, though a former conveyance to feoffees in trust and concerning a springing use supplied in this Court, and raising of daughters' portions by the feoffees, in 6 Jac. fo. 618 [1608-9].

[126] *Comes Oxon' contra Neeth*, 13 Jac. li. A. [1615-16], a lease made by a college contrary to the statute, 13 Eliz. (though a demurrer) and the defendant would not answer, yet the Court proceedeth: after the demurrer certified not good, the defendant stood in contempt, the plaintiff was admitted to proceed to his proof without answer. And it was in *Jenning's case contra Taylor*, in 38 & 39 Eliz. [1596], and the bill was taken *pro confesso*, and this after a verdict and judgment at law upon a statute law. The law of God speaks for him, equity and good conscience speaks for him, and the law of the land speaks not against him, Deut. 28, 30, this was too for building upon a voidable lease and improvement in London.

Rumney contra Garnous, 16th June, 36 Eliz. [1594], a lease made to two during their lives, and after to the use of such of the children begotten by Peter Rumney, this being without any express conclusion what child or children, the construction touching

the uses is to be made as near as may be, to the meaning of the said parties, who conveyed the same to uses.

Williams contra Moore, concerning a lease, Paroll, 23 or 24 Eliz. li. A. fo. 624 [1580-82].

Bullon contra Scivell, a decree against a lessee of a prebend, to build a house upon [127] the prebend, where none was when the lease was made, because in the lease, a house was demised, Mich. 14 Jac. [1616].

Gage contra Scory, Hil. 5 Jac. li. B. fo. 878 [1608], the plaintiff being possessed of a lease from the King being defective, the defendant would have avoided it, by composition with commissioners for defective titles, yet relieved here, or any estate whatsoever in like cases.

Harry contra Halse, in Hil. 5 Jac. fo. 466, li. B. [1608], either for years or for dower.

Windham contra Bartram, Feb. 11 Jac. [1614].

Blackell contra Brooke, July, 4 Car. [1628].

Stiles contra , in Mich. 3 Car. [1627], how far a lease for life, shall be assets in equity.

Barlon contra Mawd, 25 Eliz. li. B. fo. 35 [1582-83], a lease was made to one, before the expiration of a former lease, though great question among the Judges, yet determined to be a good lease.

Brooke contra Decanum and Capit' Ecclesie Cathedral' in Oxon' and Daniel the defendant (by mistaking of a clerk) in this word, that the demise, by consent of the whole chapter of the same house have demised, where it should have been the dean and chapter, in 37 Eliz. li. A. fo. 552 [1594-95].

[128] *Dominus Awdley contra Sidenham*, in 32 Eliz. li. A. fo. 251 [1589-90].

Taylor contra Slecombe, in 2 Jac. li. A. fo. 749 [1604-5].

Ellis contra Beswick, 36 Eliz. li. A. fo. 537 [1593-94], a house or tenement edified upon a marsh leased with the appurtenance, the marsh passeth not by law, yet holpen in equity against the heir.

Prince contra Green, a lease made to the defendant by tenant in tail, for forty years, and to commence at a time to come void in law, yet holpen in equity, and the intent of the party performed, in Trin. 40 Eliz. li. B. fo. 111 [1598].

Little John contra Fortescue, the defendant was required by the Court to consent to a decree, if he refused, then it should be judicially against him, that the plaintiff should enjoy the leases made by the defendant's father, which he supposed were void in law, 36 Eliz. li. A. [1593-94].

Preston contra Wood, the plaintiff, and Trinity College being lessees from the defendant, he knowing the lease to be void, for not right naming of the corporation, in 36 Eliz. li. A. fo. 330 [1593-94].

95. LESSEE.

By the Judge's opinion, a lease is good though no lessee is named in the demise, [129] but in the Habend, *Buller contra Doddington*, 22 Eliz. li. A. [1579-80].

The Court compels a lessee for years, to discover what estate of a conusor's, to the end it may be liable to a statute, 25 Eliz. [1582-83], it is between Titchborne and Doddington.

Snagg contra Snagge, 34 Eliz. li. B. fo. 294 [1591-92], to shew commencement, term, things demised, rent, what days of payment of rent, and covenant.

96. LEGACY.

Yelverton contra Newport, 36 Eliz. li. B. fo. 401 [1593-94], the plaintiff's wife had given her by her father's will, three hundred pounds, conditionally that she should not marry without the consent of friends, refused to pay, yet ordered.

Simons contra Lee, a legacy called in question threescore years since, by bill in this Court, dismissed in April, 11 Jac. [1613].

Wilcox contra Cole, about 19 Jac. [1621-22].

White contra Simpson, legacies to particular legatees, and the surplusage to the rest of the kindred, they shall be limited to the fourth degree, and a time appointed to come in, or else excluded, in Hil. 5 Car. [1630].

Gipp contra , in Mich. or Hil. 6 or 7 Car. [1630-32].

April, 8 Car. [1632] and if suit hath priority here, to reverse a sentence in the Spiritual [130] Court, and in Mich. 3 Car. [1627], my Lord allows twenty marks for money detained in the same cause.

Comes Pembroke *contra* Zouch, a legacy decreed, in Mich. 7 Car. [1631].

Holme *contra* Fletcher, concerning a legacy, in Mich. 2 Car. [1626].

Vitner *contra* Pix, a legacy given to a daughter, upon condition that she should behave herself dutiful towards her mother, she married without the consent of her mother, whether this be a breach of condition to avoid the portion, in 11 Car. [1638-39].

97. LEGATEE.

Wasby *contra* Johnson, how far a release shall bind legatees, when they know not the estate, in 14 Car. [1638-39].

98. LUNATIC.

Bonner *contra* Thwaits, the Court will not retain a bill to examine point of lunacy, 10 Jac. li. B. fo. 358 [1612-13].

Thomas *contra* Howorth, a lunatic to answer by his friend, in Mich. 15 Car. [1639].

99. MARRIAGE.

Windham being a widow, had a judicial order, and a commission to make proofs, and after she married, no bill of revivor needed, Pasche, 37 Eliz. [1596].

Leech *contra* Radford, concerning casu [131] al matches, in Trin. 7 Car. Regis. [1631].

100. MISTAKING.

The mistaking of a name of a corporation holpen in equity. Lord Audley *contra* Sidenham, in 32 & 33 Eliz. fo. 251 [1590].

But Willis and Sprint, *contra* 19th June, 33 Eliz. [1591], and Brooke and Daniel, 38 & 39 Eliz. [1596], holpen. Pawlet *contra* Frie, 26th May 42 Eliz. [1600].

Goodfellow *contra* Morris, the mistaking of a name in a conveyance (being heir male), holpen, and lands to pass according to the intent of the party; in the latter end of Mich. term, 16 Jac. li. A. fo. 350 [1618].

Mistaking by the clerk amended according to the record, *Inter* Culpepper and Decanum and Coll' Winton, in 4 & 5 Edw. 6, fo. 440 [1551].

Blevehasset *contra* Fuller, the plaintiff makes a lease of lands to the defendant with a meaning, that all woods growing thereupon should be excepted, saving for necessary botes, but by mistaking of the clerk, in putting in (hereinafter excepted) where there was no exception afterwards excepted; whereupon the defendant cuts down the woods, yet ordered to be stayed, in 37 Eliz. fo. 746 and 838, li. A. [1594-95].

Griffin *contra* Sayer, the plaintiff became surety for the defendant, to one Buck, [132] in a bond of one hundred pounds, and the defendant giving a counter bond, to save the plaintiff harmless of a bond of two hundred pounds, whereby, by the mistaking, the counter bond was void by law, yet relieved here, li. A. 10 & 11 Jac. fo. 890 [1613].

Orrell *contra* Leeke, concerning a mistaking of a power, yet made good to the lessee, in 20th June, 6 Jac. [1608].

Comitissa Oxon' *contra* Stanhop, where a power is mistaken or mis-recited, relieved here, Trin. 8 Car. [1632].

The word (heir) left out in the clause of a reservation, supplied in equity. July 1606. Baildon *contra* Church.

Thorpe *contra* Jackson, misprision in a counter bond, 13 Eliz. fo. 193 [1570-71].

101. MORTGAGOR, MORTGAGEE.

The money paid upon mortgage, the mortgagor sueth to have the deed again, and not admitted, because then he may charge the mortgagee for profit past. Longford *contra* Comit' Salop.' 38 & 39 Eliz. [1596], and 4 Eliz. [1561-62].

Hammer *contra* Lechard, a mortgagor relieved after the day of redemption, yet withstanding it was in infant's hands, and a purchase, Trin. 10 Jac. li. B. fo. 1000 [1612].

Ball *contra* Spane, 10 Jac. fo. 1151 [1612-13].

Chanticleere contra Micheton, in 27 & [133] 28 Eliz. li. A. [1585], notwithstanding the mortgage, lands were alleged to be, &c.

Beale contra Bradford, 15 or 16 Jac. li. , fo. 229 [1617-19].

Holman contra Vaux, about 13 Jac. the mortgagee to account for the profits received, and for the use of those profits.

Popham contra Hinton, about 3 or 2 Car. [1626-28], and in 21 Jac. [1623-24].

Maynard contra Middleton, in Hil. 7 Car. [1632], and Pasche, 8 Car. [1632].

Pell contra Blewet, concerning a mortgage, and how the mortgagee shall account for profits received, and what casualties shall be allowed, and whether any, in 6 Car. li. B. [1630-31].

Mortgagor contra Mortgagee (during the mortgage), contracts with another, the mortgagee had notice, if the moiety be paid by a stranger. *Hatton contra Prince*, 24 Eliz. [1581-82]. *Wallet contra Lewknor*.

Bacon contra Bacon, the Court will relieve a mortgage to the tenth generation, though the purchaser had no notice, because it is supposed that he cannot purchase, but it must be derived from the mortgage, and in some cases, where the mortgagee will suddenly bestow unnecessary costs upon the mortgaged lands, of purposes to clogg the lands, to prevent the mortgagor's redemption [134] tion, my Lord's declaration in Churchill's note, in 15 Car. [1639-40].

102. MORTGAGE.

Barnaby contra Greene, the plaintiff mortgaged lands to the defendant, which was forfeited, and a statute for performance of the bargain, ordered to be reassured, and statute to be re-delivered, 9 Jac. li. A. fo. 218 and 160 [1611-12].

The Court decreed money to the plaintiff against the defendant, albeit he had judgment and execution, being upon the point of usurious contract, and a lease being become forfeited, and the mortgagee devised the same to infants. The Court was of opinion that the plaintiff should have it again, paying the money. *Langford and Barnard*, 37 Eliz. and 28 [1594-96].

Ash contra Wood, and *Maynard contra Middleton*, a citizen having a mortgage forfeited to him, shall be put to the dividend, and not to the heir, 7 Car. [1631-32].

St. John contra Grobham, decreed to the heir, Trin. 11 Car. [1635].

Chapman contra Porter, with advice of Judges, about Mich. 17 Jac. [1619].

Landen contra Cotten, in Pasche, 13 Car. [1637].

Bromley contra Dorell, a mortgage forfeited twenty-four years since, demurred, yet overruled.

[135] *Thetford contra Parr*, 8 Car. [1632-33].

Thetford contra Rowe, and *Rowe contra Thetford*, in 10 Car. li. B. fo. 210 [1634-35], after thirty years.

Flee contra Drake, about 10 Car. [1634-35], where in case of an infant, &c.

Harbert contra Benion, 14 Car. [1638-39].

Keebel contra Powell, notwithstanding lands forfeited, and a release, mortgage relieved, in Mich. 2 Car. [1626].

Keeble contra , mortgages forfeited and released, yet to pay full value, or to re-assure the land, in 13 Car. [1637-38].

Newborough contra Freake, in 40 Eliz. [1597-98], dismissed, in 7 Car. [1631-32].

Fitzherbert contra Leach, Mich. 14 Car. [1638].

White contra Pigion, a demurrer, because the bill is to be relieved for a mortgage after forty-one years, but in respect there was a promise to be redeemed after twenty-seven years, in Trin. 15 Car. relieved [1639].

103. MONEY.

Prat contra Awborne, money delivered out of Court in nature of a sequestration, 3 Car. [1627-28].

With contra Page, the money after execution, to remain in the sheriff's hands till the hearing, Hil. 8 Car. [1633].

Ladkin contra Sackville, money decreed to be delivered to the plaintiff out of other [136] men's hands, in the nature of a sequestration, 11 Car. [1635-36].

Carew contra Peniston and Hales, if money be let out without expression of interest,

shall pay none, but if the trustee let it out to supposed able men (though they fail) will not charge the trustee for no more than he received, in 13 Car. [1637-38].

Poole *contra* Harrington, money by consent of the husband, put forth for the use of the wife, and gives power, she will dispose thereof accordingly, but not allowed, in Mich. 14 Car. [1638-39].

101. NE EXEAT REGNUM.

Ne exeat regnum awarded by this Court, at the suit of men, in suit between party and party.

Welby *contra* Welby, in Trin. 19 Jac. fo. 1159 [1621].

Hasell *contra* Badwick, in 32 Eliz. li. A. fo. 442 [1589-90].

Lee *contra* Bower, Trin. 19 Jac. li. A. fo. 1155 [1621].

105. OATHS.

Weldon *contra* James, in Mich. 10 Car. [1634], a man may dispose for small disbursements which he cannot make proof of.

[137] 106. ORDERS.

Tamworth *contra* Tamworth, the rent suspended by an entry, and in equity, ordered to be paid, about 30 or 31 Eliz. [1587-89].

Price *contra* Lloyd, about 16 Jac. [1618-19].

About 2 Car. [1626-27] Carew and Gill, a fine ingrossed before (*quod juris clamat*), and yet was stayed about the same time.

Hallitey *contra* , in 2 Car. [1626-27].

The defendant hath pleaded *non est factum* at law to a bond of four hundred pounds for payment of fourscore pounds, which passed for the defendant, the plaintiff surmises that after trial the defendant promised payment of the eighty pounds, and the matter was retained, but the order for it was not entered, but it is in my note of 35 Eliz. 18th May [1593], Sutton *contra* Sutton.

Welbie *contra* Ap-Rice, the Court doth order that the plaintiff and defendant shall be examined for discovery after or before hearing, in May, 37 & 38 Eliz. fo. 176 [1595].

Mascall *contra* Shelley, it was ordered that the defendant should pay unto one Mathew, money, who died before payment, yet the defendant should pay it to his executors according to the former order, 11 & 12 Eliz. fo. 176 [1569].

Mayor and Jurats de Feversham *contra* [138] Dominan Amcoats, the defendant ordered (being tenant for life) to be examined for making known, to whom the reversion of the lands in question were to pass, which if she refuse, then the parties to proceed in suit, notwithstanding her present estate, in 11 & 12 Eliz. fo. 292 [1569].

Wilkinson *contra* Deane, Mich. 2 Car. li. B. fo. 88 [1526], the Court ordered and decreed, that the defendant should perfect the assurance intended in a paper draft, being that she refused, in 12 & 13 Eliz. li. A. fo. 55 [1570].

Inter Sherwood and Corbin and Tomlinson *contra* Galding, 11 Jac. li. A. fo. 672, or 762 [1613], and Shapcot *contra* Dowrish, Trin. 17 Jac. [1619].

Errington *contra* Fenwick, the defendant ordered to pay a rent-charge to the plaintiff, 8th Nov. in 7 Jac. [1609], but because the lands out of which the annuity issued was in the infant's hands, could nor ought to pay it, in Mich. 9 Jac. li. A. fo. 214 [1611].

Austen *contra* Cheney (a third person interested, but no party to the bill), prosecuteth suit at law for the matter in question, ordered to be made a party to that bill, and suits to stay in the mean time, Trin. 16 Jac. li. B. fo. [1618].

Fisher *contra* Grivell, the defendant [139] ordered to pass lands, after time of demand past, 4 Jac. li. B. fo. 90 [1606-7].

Mullins *contra* Southked, an order against an infant, and when he came to age, ordered to perform it, Trin. 27 Jac. [?].

Wadham *contra* Mogg, the heir ordered to perform a decree made against him in his minority, in 37 Eliz. li. A. fo. 489 [1594-95], there is another in 2 Car. [1626-27].

Lupton *contra* Harman, an order to stay the money in the sheriff's hands, and to be re-delivered out of the defendant's hands, Pasche, 16 Jac. li. B. fo. 869 [1618].

Edmunds *contra* Edmunds, the defendant would have the cause dismissed, because it concerns the probate of a will, but in respect the will was made to the disinherison

of the plaintiff of lands, as well as of goods, it is ordered to be examined here, in 12 Jac. li. B. fo. 404 [1614-15].

Perriman *contra* Speccott, Hil. or Mich. 6 Car. [1630-31].

Manning *contra* Freake, because the matter is of a penal and criminal nature, allowed for good, Mich. 15 Car. [1639].

Holme *contra* Aloff, a *ferma pauperis* for scandal to pay costs, 6 Car. li. B. [1630-31].

Higham *contra* Ladd, died before livery and seisin, and before assurance perfected, ordered to be perfected, Pasche, 7 Car. [1631].

[140] Allen *contra* Elborough, ordered to stay execution upon an action of the case, 13 Car. [1637-38].

Haddon, a man ordered to procure his wife to levy a fine, and to enter into a new bond of five hundred pounds, because the old bond was worth nothing, upon the mistaking of the writer, 10 Jac. li. B. fo. 101 [1612-13].

Bayliff *contra* Longworth, in the Duchy Court, a note under the plaintiff's hand, ordered against an occupant, in 15 Jac. [1617-18].

Harcourt *contra* Roberts, a dumb man, ordered to answer upon interrogatories by Mr. Colchester, in 14 Car. [1638-39].

Taylor *contra* Hooe, the defendant would not admit the plaintiff to his copyhold, for that the plaintiff committed a torteiture in cutting down woods upon the copyhold, the defendant ordered to admit the plaintiff, tenant, for that the defendant could not prove that the same was done by the plaintiff's directions, but by a tenant, in 25 Eliz. li. B. fo. 78 [1582-83].

Pears *contra* Trelawney, a trial upon a *quare impedit*, upon point of simony, which is *pro hac vice*, the defendant grants away the next avoidance; the plaintiff, coming upon the King's title, desires to stay multiplicity of suits, and to have a settlement according to the first trial, orde [141] red that there shall be no new trial, in Mich. 15 Car. [1639].

Cobb *contra* Cobb, the meaning of a will, ordered to be performed contrary to the general words in a feoffment, in 36 Eliz. [1593-94].

107. OPINION.

The Lord Bromley was of opinion in Caudge and Lawyer's case, 24 Eliz. [1581-82], that the land should go as the law had settled it and conscience should be supplied with money.

Ellis *contra* Bastwick, Eliz. li. A. fo. 537, the contrary.

The opinion of the Court was, the plaintiff having but a promise, could have no decree for the land, yet it might be decreed that the defendant might assure the land, Ferne *contra* Bullock, decreed upon a promise, and ten shillings in hand to assure, in Nov. 9 Jac. [1611].

Dom. Buckhurst *contra* Fenner, question whether writings comprehending warranties, may by law be demanded, being brother and heir to the Lady Daeres against the defendant, to the custody of, she being her executor, she in her lifetime committing the keys of the chests where the evidences lay, they the defendants being in possession of the same, and claiming the [142] manor and lands, which they conceive to be devised, and conveyed unto them by the said Lady; the Judges hold, and are of opinion, they belong to the plaintiff, in 37 Eliz. li. A. fo. 853 [1594-95], and 39 Eliz. li. A. fo. 775 [1596-97].

108. OUTLAWED.

Grevill *contra* Bancks, 4 Jac. li. B. fo. 69 [1606-7], the plaintiff being outlawed, not admitted to sue.

109. OUTLAWRIES.

Whitney *contra* Strachey, outlawries must be pleaded all at one time, or otherwise compelled to answer, in Mich. or Hil. 5 Car. [1629-30].

Edwards *contra* Plowden, if the plaintiff hath conveyed to the defendant for payment, of which the defendant pleadeth outlawry, then the defendant ordered to answer, Pasche, 5 Car. li. A. fo. 888 [1629].

Kingston *contra* Pinchard, Mich. 10 Car. [1634], pleaded at his own suit.

Preden *contra* Dom' Mohune, no advantage to be taken upon the outlawry of a stranger, 7 Car. fo. 169 [1631-32].

William *contra* Gold, concerning outlawries at stranger's suit, 7 Car. [1631-32].
 Trion *contra* Brocas, because the outlawry was before the last general pardon, not to be pleaded, 7 Car. [1631-32].
 Hemmings *contra* Dayers, an outlawry [143] being pleaded at the defendant's own suit, overruled, in 8 Car. [1632-33].
 Kingston *contra* Pritchard, 10 Car. [1634-35].
 Spry *contra* Coryton, outlawries overruled, in 10 Car. [1634-35].

110. OFFICES.

An office of town-clerk without patent decreed for life. Corp. and Mayor of Lincoln. Pasche, 30 Eliz. [1588].

111. PARSON.

Everard *contra* Boucher, a parson instituted and inducted by a wrong title by a common person, ordered to resign at the King's suit, and the King presented, 8 Car. [1632-33], and Attorney-General *contra* Smith, Mich. 1632.
 Holmes *contra* Conway, a patron let his parsonage by lease, in 15 Jac. [1617-18].
 Harding *contra* Weedon, my Lord's declaration, that he will not bind a parson's successor, where the consent doth not improve his tithes in kind, in Pasche, 15 Car. [1617].
 Stubby *contra* Stubby, in Mich. 2 Car. [1626].

112. PASTURE.

Brooke *contra* Denton, Mich. or Hil. 9 Car. [1633-34], ancient pasture not to be ploughed up.
 Atkins *contra* Temple, in 2 & 3 Car. [1627].
 Dom. Howard *contra* Ridler, a decree for staying of ploughing up ancient pasture [144] ground, in Pasche, 19 Jac. li. A. fo. 878 [1621].
 Ewens *contra* May, Mich. 22 Jac. [1624].
 Sheldon *contra* Dormer, April, 14 Jac. [1616].
 Tresham *contra* Gerrard, Hil. 2 Car. [1627].
 A jointress restrained from ploughing up of ancient pasture grounds.
 Packer *contra* Dom. Newell, jointure lands being good lands, and not ploughed within forty years, stayed by injunction, 6 Car. li. B. [1608-9].
 Gurnard *contra* Dom. Eyres, look into about 8 Car. concerning ploughing up of pasture, of what nature.
 Walrond *contra* Gold, 12 Car. [1636-37].
 Rolls *contra* Miller, and to shew cause why should not lay down that was ploughed, in Mich. 15 Car. [1639].
 Sill *contra* Mole, a restraint from ploughing of land worth five shillings an acre, being ancient warren, though punishable here, about 6 Car. [1630-31].

113. PARCEL.

Egerton *contra* Egerton, by the opinion of the Judges, parcel or no parcel determinable here, where the bill is not simple parcel.
 Tattersall *contra* Dalton, upon turning of water lying in two counties, about 11 Car. [1635-36].
 Hobby *contra* Bonby, though parcel or [145] not parcel fit for law, yet no news to settle things according to proof, and a commission awarded accordingly, Pasche, 2 or 3 Car. [1626-27].
 Hetley *contra* Com. Suff. parcel or not parcel overruled upon the demurrer, and decree in Pasche, 12 Car. [1636]. Mr. Page's report.

114. PANNAGE.

Pannage was dismissed, the lessor felled the trees, that felling in equity is to be stayed so far, as the pannage may not be taken away, 1593. Lord Marquess *contra* Corham, 35 Eliz. [1592-93].

155. PLAINTIFF.

My Lord's order and opinion, the plaintiff may examine, and have publication within fourteen days after the return of the *certiorari* to pray the surmises, and give the Court

jurisdiction, but the defendant is not to examine or publish any to disprove it; and if upon the plaintiff's proofs it be retained, then the plaintiff and defendant may examine orderly touching the body of the cause, and have publication according to the rules, and though the defendant examine as soon as the answer, yet shall not they be published, but in ordinary course, Checkey and Allen.

Lambert *contra* Lambert, the plaintiff is to be examined on interrogatories, [146] 12 & 13 Eliz. fo. 380 [1570].

Kent *contra* Benham, to examine the plaintiff at the hearing of the cause, Pasch. 6 Car. [1630].

Drury *contra* Drury, the plaintiff examined as a witness in a cause, and after becomes plaintiff for the interest in that business, allowed, and not to be suppressed, about 9 Car. [1633-34].

Smith *contra* Gabry, the plaintiff released out of prison, though detained at other men's suits, because he was arrested when he was going about his business or suit in Chancery, 8 Car. [1632-33].

Mayor of Bristol *contra* Whitson, the plaintiff examined as a witness, 8 Car. [1632-33].

Allen *contra* Allen, in Trin. 15 Car. [1639], the plaintiff relieved for a debt against an heir in tail, and possession, to be established with the plaintiff till the heir in tail recover at law.

116. PERPETUITY.

Poole *contra* Poole, the Court doth not allow of perpetuities, nor of statutes to warrant them, Pasch. 5 Jac. li. B. fo. 619 [1607].

Bacon *contra* Smith, 12 Jac. [1614-15].

Hunt *contra* Bancroft, 14 Jac. [1616-17], Hil. and Mich. 15 Jac. fo. 455, and 883, li. B. [1617-18], and Pasche, 16 Jac. [1618].

Hooe *contra* Arnold and al', about 17 Jac. [1619-20], the contrary.

[147] 117. POSSIBILITY.

Romney *contra* Garnons and al', a conveyance made to the defendant to uses, and to their heirs, for want of issue, then to such child or children of Eliz. (one of them to whom the use was limited), begotten of her former husband, being the plaintiff's father, they to whom the use is limited, die without issue, and before their death did grant and devise the lands so in use to the plaintiff. It was thought good, and decreed for the plaintiff, it being but a possibility in them, and contrary to the words of the first entail and grant, being limited to the children, in 37 Eliz. li. A. fo. 286 and 949 [1594-95].

Povey *contra* Barker, a demurrer, because a possibility cannot be disposed of, overruled, notwithstanding a decree in the Marches, 9 Car. [1633-34].

Decreed here notwithstanding a decree in the Marches.

118. POSSESSION.

Delahay & Pottenden, Mich. 39 & 40 Eliz. [1597]. Possession as at time of subpoena served.

Rowswell *contra* English, Trin. 16 Jac. [1618].

Le Stationers London *contra* Simeox, the Court establisheth possession until eviction at law against a patent, Mich. 7 Car. [1631].

[148] Pleydall *contra* Prettiman, Mich. 12 Car. [1636] no advantage to be taken by unity of possession at law, being point of common, and after a trial, a commission to issue out of Chancery.

Wild *contra* Sliford, the Judge's certificate.

Berd *contra* Dormer, the Lord Keeper's difference concerning unity of possession when it continued in the abbot's hand, in Trin. 15 Car. [1639].

119. PLEA.

Yelverton *contra* Burtow, 1594, to be sworn to it, and to put in a plea not foreign.

120. PRIVILEGE.

Cases against the Court of Chancery for privileged places, and for the county palatine of Chester, overruled.

- Hulst *contra* Daniel, Mich. or Hil. 5 Car. li. A. [1629-30].
 Dom. Morley *contra* Martin, 25 Eliz. [1582-83].
 Brereton *contra* Donne, 24 Eliz. [1581-82].
 Egerton *contra* Comitem Darbie, determined here, yet decreed there, in 11 Jac. [1613-14].
 Inter Swinnerton quer' *contra* Savage, defendant; it was ordered, that in respect the suit depended there, that the cause should be determined there, in 37 H. 8 [1545-46].
 Pope *contra* Thatcher, in Pasche, 2 Car. [1626].
 [149] Croker *contra* Holme, dismissed in 22 & 23 Eliz. li. A. fo. 520 [1580].
 Nevill *contra* Nevill, 26 Eliz. li. A. fo. 329 [1583-84], in the duchy, overruled, between Barnard and Langley, 9 Car. [1633-34].
 Beare *contra* Stockhall, the matter remitted to be tried at Oxford, in 1 & 2 Ph. & Ma. [1554].
 Davis *contra* Corpus Christi, Mich. 19 Jac. [1621].
 Huntley *contra* Henney, 4 Jac. li. B. fo. 303 [1606-7].
 Cottrell *contra* Standish, Pasche, or Trin. 12 Jac. or Hil. li. B. fo. 925 [1611-15].
 Wingfield *contra* Fleetwood, in 21 Eliz. li. A. 137, li. B. 138 [1578-79].
 Bent *contra* Oldfield, Pasche, 1 Car. li. B. fo. 1044 [1625].

PRIVILEGES OF CHANCERY AGAINST THE CINQUE PORTS.

- Brown *contra* Biggs, about 36 Eliz. [1593-94].
 Merwithie *contra* Johnson, Mich. 44 Eliz. li. A. fo. 35 [1602].
 Hilton *contra* Lawson, 2 Eliz. li. A. fo. 199 [1559-60]. [S. C. Cary, 48.]
 Smith *contra* Delves, Mich. 2 Jac. li. A. fo. 133, Chester [1604].
 Starkey *contra* Starkey, a report, in Mich. or Hil. 16 Jac. [1618-19].
 Langham *contra* Beauchampe, the defen [150] dant committed because he would not answer, the land lying in the Cinque Ports, 40 Eliz. [1587-88].
 Fitton *contra* Fitton and Wrenhum, 13 Car. [1637-38].
 Fenwick *contra* Barnard, July, 10 Car. [1634].

STANNARY COURT PRIVILEGED.

- Daw *contra* Derry, Trin. 23 Eliz. li. A. fo. 477 [1581].
 Trewynard *contra* Killigrew, 4 & 5 Eliz. fo. 287 [1562].

DUCHY COURT OF LANCASTER.

- Hulst *contra* Daniel, Mich. 5 or 6 Car. [1629-30].
 — *contra* Pauperes de Wogston, the Court will not hold plea against the Duchy Court of Lancaster, in 10 Eliz. li. B. fo. 853 [1567-68].

PROCESS INTO CINQUE PORTS, AND TOUCHING PRIVILEGED PLACES, AS ALSO INTO COUNTY PALATINES.

- No [ex]chequer-man hath privilege against a subpoena. Take *contra* Clark, in 3 Car. [1627-28].
 Guilielm *contra* Welsh, for a cause between parties where the Queen's interest cometh not in question, Trin. 36 Eliz. [1594].
 Cutts *contra* Peters, 23d April, 28 Eliz. [1586] li. A. fo. 403, exchequer man not privileged but to answer.
 Equivalent is to have privilege, and not every servant. Putton *contra* Green, Trin. 36 Eliz. [1594].
 Browne *contra* Riggs, a demurrer [151] overruled, about 34 or 35 Eliz. [1591-93].
 Blackley *contra* Laneston, a *corpus cum causa* to remove the plaintiff out of the Cinque Ports, Pasche, 4 & 5 Eliz. [1562].
 Langham *contra* Beckham, Trin. 40 Eliz. [1598], and 41, li. A. [1599], and 34 [1591-92], li. A. and 40.

CINQUE PORTS PRIVILEGED AGAINST CHANCERY.

- Hudson *contra* Taylor, 41 Eliz. li. A. fo. 147 [1598-99], *pro* Chancery.
 Shutterson *contra* Nevill, 34 Eliz. li. B. fo. 249 [1591-92].
 Francklin *contra* White, 41 Eliz. li. B. fo. 726 [1598-99].

CINQUE PORTS OVERRULED.

Harbie *contra* Saltonstall, in 5 Feb. 2 & 3 Jac. [1605].

An injunction out of the Exchequer disallowed, and the party which procured it sent for it by a pursuivant, because her Majesty's revenue not in question here, Hartopp *contra* Hartopp, in 1594.

Ellords, widow, claimed her privilege because her husband was privileged, and if it were for her husband's act, it was holden clear that she should be privileged, but this was for her own act, and yet *hac vice* privileged.

Lloyd *contra* Lloyd, Pasche, 35 Eliz. [1593], but this is no order to privilege others, in li. A.

Barkley *contra* Hussey, the defendant [152] not allowed his privilege, because his wife joined him, 21st Nov. 32 Eliz. [1589].

Oxford privileged against Chancery.

Hopper *contra* Eastmond, 1587, in 33 Eliz. li. A. fo. 21 [1590-91].

Onewry *contra* Glasier, Trin. 1588.

White *contra* Howger, in 17 & 18 Eliz. li. A. [1575].

Overruled between Horwood *contra* Smith, in Mich. 12 Jac. li. B. fo. 308 [1614].

Court of Requests, not allowed privilege here, Garnons *contra* Maddox, 39 Eliz. [1596-97].

COUNTY PALATINE OF CHESTER.

Any dwelling there, must appear upon the process, and plead their privilege, by the Master of the Rolls' opinion, in Herenden's case, in 36 & 37 Eliz. [1594].

PRIVILEGE IN CHANCERY.

In what cases the Chancery doth privilege.

The defendant coming to execute a commission was arrested, and had a *corpus cum causa*, and set him at liberty, Jackson *contra* Vaughan, Trin. 23 Eliz. [1581].

Fowler *contra* Aylhurst, removed from Rochester, in 22 Eliz. li. B. fo. 557 [1579-80].

The plaintiff arrested when he came up to examine witnesses, and discharged by *supersedeas* of privilege, Barnardiston [153] *contra* Bawd, Trin. 1591, or 32 Eliz. fo. 738 [1589-90].

A defendant coming up upon an attachment would have had his privilege against a citation in the Arches, and had not, because a citation is no stay of his person, Cooke *contra* Dix, Pasche, 30 Eliz. [1588].

Marshall *contra* Moore, the plaintiff coming up to follow his suit half a year after his bill exhibited, was arrested in London, and had his privilege, 1588.

Hughes *contra* Middleton, in Hillary term, and paid costs for the same, 4 & 5 Car. [1629].

Diggs being committed by the Court of Requests for not answering a bill there, for the same matter for which he had a bill here, had a *corpus cum causa*, in 36 Eliz. li. A. fo. 539 [1593-94].

Because Master Bridgeman served a clerk in Master Shugborough's office, a commandment from to stay here, he was committed to the prison of the Fleet, at the suit of Carleton, Pasche, 37 Eliz. A. fo. 135 [1595].

Inter Carleton and Bridgman, with the opinion of the Court, that no Court can hinder the point of equity of this Court.

Binion *contra* Thimble, in Pasche, 1632 or 1633, concerning the privilege of the University of Oxon.

[154] Morgan *contra* Richardson and al., the plaintiff having a writ of privilege, was taken in execution, ordered to go abroad by *habeas corpus*, and the party that arrested him to be committed, about Hil. 17 or 18 Jac. [1620-21].

Johnson *contra* Obbin, the plaintiff delivered out of execution, 12 & 13 Eliz. fo. 238, li. A. [1570].

Mathew *contra* Com. Arundell, a demurrer, because an Exchequer-man, overruled, 6 Car. li. B. [1630-31].

Welbore *contra* Collins, concerning King's College, in Cambridge, overruled, 7 Car. [1631-32].

Bancks Attorney Dom. Regis by information, where an inquisition was awarded

to inquire of Rooke's estate in the Cinque Port of Sandwich, a writ of seizure awarded, about 11 Car. [1635-36].

Pepwell *contra* Goldsmiths, London, an attorney at law joins with another in action, thereby to avoid a privileged man in this Court, the suit stayed, and the privilege allowed, in 28 Eliz. fo. 247 [1585-86].

Mostin *contra* Thomas, though the defendant a clerk in the Court of Requests, because the suit had priority there, demurred in respect of that, and of privilege, overruled, in Hil. 14 Car. [1639].

[155] 121. PARTITION.

Long *contra* Miller, Mich. 1594. An unequal partition relieved here.

Speke, the plaintiff, had one part, Walrond, the defendant, another, and Morgan, a ward, another, and Walrond overcharged Speke, and Morgan had his part set out by commission, and no partition could be had against Walrond, without making the ward party to the writ, which he could not do during the ward's minority, therefore thought meet the plaintiff should be helped in equity during the minority, Hil. 40 Eliz. [1598].

Norse *contra* Ludlow, a decree that two partners which have made an unequal division, should be divided into equality, in 32 Eliz. li. A. fo. 404 [1589-90].

Broughton *contra* Broughton, Hil. 28 & 29 Eliz. B. fo. 264 [1586], whether a partition made without writing, be good or not ? quere.

Babb *contra* Dudeney, in Mich. 14 Car. [1638], the Court would not grant a partition, the matter being but nine pounds per annum. Norbury *contra* Yarbury, otherwise, this is upon a joint-tenancy, in Mich. or Hil. 14 Car. [1638-39].

Windham *contra* Weare, 15 Car. [1639-40].

[156] 122. POSSE COMITATUS.

Sidenham *contra* Courtney, *Posse comitatus*, awarded to be taken, 41 Eliz. li. B. fo. 324 [1598-99].

Harrington *contra* Horton and Cox, about Mich. 16 Jac. li. A. fo. 9 [1618].

123. PROCESS.

All process that go in affirmance of the recognizance, must go into the same country where the first *scire facias* goeth, it is not so in these which go in disaffirmance, Haselwood and White, 30 Eliz. [1587-88].

No clerks of this Court shall make out process of subpoena against any to testify before any officer, unless it be before a Judge, or commissioners warranted and authorized by this Court, to take examinations of witnesses, 11 & 12 Eliz. li. A. fo. 28 [1569].

124. PERJURY.

In the judgment roll, 37 H. 8 [1545-46], between Baskerville and Guilliams, set on the pillory for procuring perjury in the Spiritual Court.

And 16 Eliz. fo. 17 [1573-74], between Siderson and Eastcourt.

Bullen *contra* Bullen, 44 & 45 Eliz. li. B. fo. 170 [1602].

Freeborne *contra* Leasure, in Trin. 20 Jac. li. B. fo. [1622].

Perjury to be examined here. Halse [157] *contra* Browne, notwithstanding the cause was dismissed, 16 Eliz. fo. 401 [1573-74].

Mound *contra* Culme, forty pounds costs given for perjury, in Mich. 14 Car. [1638].

125. PROCEEDINGS.

The Court proceeds, because the defendant would not answer or appear, Michell *contra* Harry, in May, 39 Eliz. fo. 775 [1597].

126. PURCHASERS.

Vavasar, or Waserer, *contra* Row, in 33 & 34 Eliz. [1591], the said plaintiff bought land of one who had no power to sell, and moved, that if the defendant should be compelled to bring in the leases, which might incumber the plaintiff's purchase, then the plaintiff might bring in the ancient evidences which might discover that he which

sold to the plaintiff had no power to sell; the Court answered, that no aid should be given to overthrow purchases made *bona fide*.

Smith *contra* Killigrew and Ognell, in 34 & 35 Eliz. li. A. fo. 88 [1592]. Ognell would have charged land purchased by the plaintiff of Killigrew, by a former because a collateral, which grew after the plaintiff's purchase, was not performed; it was thought no reason to load the land with heavy agreement, after Smith purchased, Hall *contra* Offen, 3 Jac. [1605-6].

[158] The Court would not stay a purchaser from selling of woods, though the vendor had an estate for life. Tittingham *contra* Eyres, 37 Eliz. [1594-95], and the Court would not bar him remedy at law, upon any evidence he could produce.

Banister *contra* Brooke, a man possessed of a lease for fifty years, he dying intestate, the wife administers, and makes a feoffment to her own use, a little before her marriage with a second husband, the feoffees sell the land for valuable consideration, and was enjoyed many years accordingly; after the wife's death, the second husband would avoid this purchase by reason of the use, the Court decreed that the purchasers should enjoy it, notwithstanding a verdict at law, in Mich. 17 Jac. li. A. fo. 413 [1619].

Swan *contra* Rogers, Mich. 9 Jac. li. A. fo. 305 [1611], the Court relieveth the purchaser against a breach of condition.

Burlace *contra* Burrell, in Pasch. 19 Jac. li. B. fo. 1244 [1621], being a purchaser. Stonehouse *contra* Dell, the contrary in 10 Jac. li. B. fo. 274 [1612-13].

Buller *contra* Smith, in Trin. 15 Car. [1639].

Comes Pembroke *contra* Eyre, in 17 Jac. li. B. fo. 863 [1619-20], a purchaser relieved against an ancient statute.

Stile *contra* Michell, in Pasch. 19 Jac. li. A. [1621].

[159] Dimmock *contra* Williams, in Mich. 16 Jac. li. A. fo. [1618].

Warcroft *contra* Dom. Culpepper, in Mich. 15 Jac. li. B. fo. 244 [1617], relieved against ancient statutes.

Garfield *contra* Humble, in 16 Jac. [1618-19].

White *contra* Phillips, in Trin. 21 Jac. li. B. fo. 768 [1623].

Standen *contra* Bullock, the plaintiff bought several manors of Thomas Bullock, deceased, who (before the plaintiff's purchase) had conveyed the same by fine and recovery to the defendant and his heirs males, which being done without consideration, was adjudged and decreed to the plaintiff, in 38 Eliz. li. A. fo. 713 [1595-96], and 42 Eliz. li. B. fo. 289 [1599-1600].

The like between Cheek *contra* Beaumont, in Hil. 18 Jac. fo. 775, and 1165 [1621], look for the final order upon the Judge's certificate, lands conveyed when sick, in Trin. following.

Hurt *contra* Hurt, Hil. 12 Jac. li. B. fo. 727 [1615].

Helam *contra* Colt, in 9 Car. [1633-34].

Boll *contra* Hancock, in Oct. 11 Jac. [1613], a purchaser relieved against a statute.

Lister *contra* Harrison, a purchaser relieved against a statute in 9 Jac. li. B. fo. 619 [1611-12], sought to be extended by a se-[160]-cond agreement after the purchase.

Curson *contra* Blackall, the father makes a voluntary conveyance in tail of lands, reserving an estate for life, after sells the woods upon the lands to a stranger, decreed that the vendees of the woods shall have the woods, notwithstanding the conveyance of the lands, 25th Jan. 9 Jac. [1612].

Chandler *contra* Dawtree, in 41 Eliz. li. B. fo. 480 [1598-99], the opinion of the Court, that a statute for performance of covenants, ought not to take away the possession of a purchaser.

Dom. Burgh *contra* Wolfe, an ancient statute being against a purchaser, though no direct proof on either side, decreed to be cancelled, in 11 Jac. li. B. fo. 426 [1613-14].

Maynard *contra* Pauperes de East-Greensted, a purchaser that comes in without notice of a rent-charge, shall not be chargeable therewith, although given to a charitable use, in 6 Car. li. B. [1630-31].

Rutter *contra* Bartley, purchasers relieved of a sleeping mortgage, in Mich. 2 Car. [1626].

Comes Bristol *contra* Hamond, the defendant would avoid a lease against a purchaser upon proof that the lease was made by one of *non sane memoria*, and that point of parcel is determinable at law, the lease decreed, 9 Car. [1633-34].

[161] Simeon *contra* Greene, to help a defective deed, and take off incumbrances, as statutes and judgments subject to those lands, being against a purchaser, in Hil. 10 Car. [1635].

Simeon *contra* Cheriton, in Mich. 10 Car. vel Jac. [1634 or 1612] a statute set on foot nine years after decree to overt it, stayed.

Mutts *contra* Com. Kancie, a purchaser of a lease, out of which a rent is issuing, shall not be liable, but the executor of the will, 31st Jan. 9 Jac. [1612], this rent was without a clause of distress, and the executrix and her trustee sold away the lease.

The like between Nurton and Nurton, 9 Jac. [1611-12].

Thornburgh *contra* Grobham, about 17 Jac. [1619-20], a purchaser for a valuable consideration restrained from bringing an *audita querela* upon pretence that a purchaser had levied monies upon other securities.

Walton *contra* Lewkner, a man buys land, knowing of a former agreement, 11th May, 12 Car. [1636].

Yeaveley *contra* Yeaveley, in 14 Car. [1638-39], purchasers coming in *pendente lite* bound.

127. PROCEDENDO.

Because a *certiorari* was made with a long return (skipping a term) a *proce*-[162]-*cedendo* was awarded, Ashley *contra* Godser, 36 H. 8, fo. 30 [1544-45].

128. PROMISE.

Where the law cannot give a lease, or a thing promised but damage, there is some cause for the Court to compel the party to perform the thing promised, Browne *contra* North, Waller *contra* Salter, in Trin. 8 Jac. li. A. [1610].

Ferne *contra* Bullock, Mich. 9 Jac. li. A. fo. 274 [1611], the defendant promised to sell the plaintiff land, whereof ten shillings was given him, yet the defendant would not perform, yet he should.

Clarke *contra* Hackwell, in 3 Jac. li. A. fo. 596 [1605-6], five pounds paid, decreed.

Long *contra* Long, in 40 Eliz. li. A. fo. 360, or 369 [1597-98], the defendant promised and agreed to assure leases in marriage with the plaintiff's daughters, who would not perform it, but ordered.

A man promiseth to assure lands in consideration of marriage, but after the marriage refuseth, yet ordered, Gerard's case, in 2 Jac. li. A. fo. 202 [1604-5].

Fox *contra* Fox, in 8 Jac. li. B. fo. 248 [1610-11].

Wroughton *contra* Stafford, to leave consideration thirteen thousand pounds at death, Mich. 21 Jac. [1623].

Hale *contra* Hicks, in Nov. 38 Eliz. a cople [1596-97].

[163] Otway *contra* Hibblethwaite, upon a promise made by the defendant to pass his lands unto him, was the cause of his marriage, but when the said defendant came to be old, conveyed away the same lands from the plaintiff, contrary to his promise, the plaintiff was relieved for part of the said lands, 13th July, 11 Jac. [1613].

Battersby decreed *contra* Prowse, to pay portions decreed, in Hil. 5 Car. [1629].

Egerton *contra* Eldred, the defendant promised to procure a lease of certain lands for the plaintiff, from the contractors, but passed the same to himself, yet ordered and decreed that the same shall be passed to the plaintiff, according to the first agreement, in Feb. 8 Jac. June, 11 Jac. [1611, 1613].

Plaile *contra* Plaile, the defendant promised to his father to assure certain copyhold lands to the plaintiff, but the father dying before any surrender denied to assure the same, yet decreed he should, 21st May, 9 Jac. [1611].

Perry *contra* Peckham, in Pasch. 3 Car. [1627].

Longman *contra* Hopgood, concerning a promise in marriage, Hil. 3 Car. li. A. fo. 633 [1628], and a sequestration of lands for non payment of money.

Erby *contra* Evans, concerning a promise or bare agreement, in Mich. or Hil. 5 Car. [1629-30].

[164] Bancks *contra* Sheriff, promise left to the law, Mich. or Hil. 5 Car. [1629-30].

Clark *contra* Briers, in June, 9 Jac. [1611] one relieved for a lease for lives upon a promise.

Noble *contra* Washborne, to answer a promise, 5 Car. li. A. fo. 461 [1629-30].

Russell *contra* Read, a promise of five hundred pounds to make himself a baronet would not pay it, yet decreed, about 5 or 6 Car. [1629-31].

Church *contra* Donn. Mordant, a promise to make a lease in marriage, decreed against a purchaser, in Trin. 2 Car. [1626].

Stadd *contra* Cason, a single witness could not decree a promise, but referred to law, and then equity reserved, 10 Car. [1634-35].

129. PROOF.

Manser *contra* Fotherby, supplemental proof allowed of, about 7 Car. [1631-32].

Wagstaffe *contra* Foliambe, the like in May, 5 Car. [1629].

130. QUARE IMPEDIT.

Comes Pembroke *contra* Bostock, a bill to discover a patron, whereby to enable one to bring *quare impedit*, ordered, in 2 Car. [1626-27].

Peirs *contra* Trelawney, the question being title of advowson, and the incumbent who had one verdict (simony or not simony being the point) decreed the possession upon one verdict, and stayed *quare impedit*, in Hil. 15 Car. [1610].

131. QUID JURIS CLAMAT.

A fine ingrossed before *quid juris*, the tenants ordered to attorn, Hinsh *contra* Blaid, Blackwell, and Eyre, 36 Eliz. li. B. fo. 10 [1593-94], *Et* Roll *contra* Shute, in 12 Jac. li. B. fo. 1375 [1614-15], and 13 li. A. fo. 612 [1615-16].

Mancase *contra* Clayton, li. , 8 Jac. fo. 715 [1610-11], arrearages of rent to be paid.

132. RECOMPENCE.

Tooker *contra* Mayor Oxon', in Mich. 16 Jac. [1618], it is for a recompence for a building and a promise.

Fellow *contra* Gibbons, the defendant got a lease away by craft, and cut down certain woods to a great value, the land could not be recovered, but recompence for the spoil committed thereupon, in April, 11 Jac. [1613].

Recompence for building upon a voidable lease, *antea inter* Comes Oxon' and Neeth.

Browne *contra* Bridges and Ley, a decree for recompence of waste done, in 32 Eliz. li. A. fo. 836 [1589-90].

133. RE-EXTENT.

A re-extent awarded *antea, inter* Chivers and Bampton.

[166] 134. RECOGNIZANCE.

A recognizance without condition, not in twenty years inrolled, yet upon affidavit (that he who acknowledged it was living) the Court ordered that it should be inrolled, about 40 Eliz. fo. 195 [1597-98], *inter* Rol and Roll, *Et* Long and Owen, *eadem termino*, fo. 205, li. A. 11 & 12 Eliz. [1569].

Horshall *contra* Folden, 6, 5, vel 8 Jac. [1607-9 or 1610-11], a recompence being ancient, and no money proved to be paid, was cancelled.

Bradshaw *contra* Kimmersley, being without decessance, Feb. 10 Jac. [1613].

Linch *contra* Digbie, concerning a recognizance, in July, 7 Car. [1631].

Mico *contra* Drake, a recognizance to be inrolled, which neglected, by the negligence of the plaintiff, in 11 Car. [1635-36].

135. RECUSANT.

Leman *contra* Roe, the power of the statute of 3 Jac. concerning a gift of presentation, when a recusant presents, in 7 Car. [1631-32], and likewise a sequestration until determined.

136. RELEASE.

Denton *contra* Bolt, 11 & 12 Eliz. li. A. fo. 360 [1569], the plaintiff became bound in an obligation to the defendant, to deliver to a third person a general release from Alice Denton his mother, the bond was [167] not performed, yet relieved here.

Palmer *contra* Reynell, one thousand pounds bond entered into to feoffees, after (during coverture) releaseth this bond, yet the gitt stands good, Trin. 14 Car. [1638].

Horner *contra* Barrell, notwithstanding the defendant pleaded the Statute of Limitation, overruled, 6 Car. li. B. [1630-31], and a release of one administrator not to prejudice the other.

Wilson *contra* Grove, a release of an estate being not known, relieved against an executor, 7 Car. [1631-32].

Priestley *contra* Johnson, the opinion of the Court, how far a release touching children's portions shall bind, in 14 Car. [1638-39].

137. RELIEF.

Sir Henry Lea granted a rent to Crocker and his assigns during Peniston's life. Crocker died, making no assignment and no occupant without a rent, Crocker's son (to stay the penalty of his father's bond made for payment of the rent) was enforced to pay it, and sought relief in equity against Sir Henry Lea. Crocker and Peniston, Hil. 1590.

Judgment and execution had at law, the plaintiff preferred his bill to be relieved, but dismissed and had no relief.

Farrington *contra* Wolwich, 12 Eliz. fo. 118 [1569-70].

[168] Bolt *contra* Reignolds, the like, 12 Eliz. fo. 129 [1569-70].

Brewer *contra* Temblet, the plaintiff was relieved of a promise, both for a lease and a personal estate, 13 & 14 Eliz. li. B. fo. 76 [1571].

Grove *contra* Preston, the plaintiff relieved of a promise and agreement, 4 Jac. li. B. fo. 54 [1606-7].

Standen *contra* Hickman, in 39 Eliz. li. B. fo. 86 [1596-97].

Points *contra* Hensley, 38 Eliz. li. A. fo. 279 [1595-96].

Tregonwell *contra* Reeves, relief of general words in a patent against express in another, 41 Eliz. li. B. fo. 244 [1598-99].

Huet *contra* Hurston, no relief after judgment, in Trin. 17 Jac. fo. 909 [1619].

Dom. Crompton *contra* Bishop, the plaintiff is relieved against his own act, in Mich. 8 Jac. vel. Car. [1610 or 1632].

Waller *contra* Waller, 16 Jac. [1618-19].

Woodward *contra* Alport, in Hil. 12 Jac. fo. 765, li. A. [1615], the plaintiff seeketh to be relieved for brokerage and wares that were sold by cozenage.

Freeman *contra* Hugget, Hil. 16 Jac. [1619].

Lyde *alias* Joyner *contra* Lyde, the father by fine passed disinherited his heir, the Court ordered that the land should be reassured, yet that the plaintiff should not sell the land to any, in case he died without [169] issue, Mich. 14 Jac. fo. 335, and Trin. following, li. B. fo. 1388 [1616-17].

The like betwixt Hoskets *contra* Hillier, Pasch. 17 Jac. li. A. fo. 1025 [1619].

Salisbury *contra* Griffith and Owen, 10 Jac. li. A. fo. 491, and 658 [1612-13].

Long *contra* Long, 18 Jac. li. B. fo. 1730 [1620-21].

Humphrey *contra* Humphrey, Pasch. 21 Jac. the contrary [1623].

Harbert *contra* Lownes, Hil. 3 Car. [1628].

Warren *contra* Towler, the Court is of opinion that the plaintiff having suspended his rent, no reason but that the defendant should detain it, by reason of the plaintiff's act, 31 Eliz. fo. 312 [1588-89].

Haley *contra* , in 2 Car. [1626-27], the contrary.

Gayner *contra* Lucas, the defendant had execution and judgment upon two recognizances and a statute, amounting to three hundred pounds, but in respect it was a sleeping statute, the Court ordered the obligor to be discharged out of execution, and the plaintiff's possession of the lands to be delivered, in 5 Jac. li. A. fo. 319 [1607-8].

Charnock *contra* Charnock, the defendant acknowledged a recognizance, which was taken away privately, the plaintiff had relief, either that the said plaintiff should have his money, or else the recognizance [170] to be inrolled, 22 Eliz. li. A. [1579-80].

Tuck *contra* Pattison, the plaintiff relieved upon a promise against a deed of purchase, there being some practice in the purchaser, in April, 11 Jac. [1613].

Toplace *contra* Dickenson, relief against an occupant, 5 Car. li. B. 357 [1629-30].

Maneright *contra* Roberts, a man relieved against his own deed, the same being gotten by threats and practice, though the same be vested in an infant, and the purchaser to become bound in recognizance to assure it, when, &c., in 10 Jac. [1612-13].

Jacques *contra* Huntley, if one neglect to enrol his bargain and sale, being his only assurance, and the bargainee bring an *ejectione firme* against him, and bath judgment, the bargainee resorts to Chancery, (if not for land) yet for money paid for it, 13th July, 1599.

Deane *contra* Deane, relieved against a release, about *anno* 3 Car. [1627-28].

Smith *contra* Smith, 12 Car. [1636-37], a woman relieved for dower or jointure, notwithstanding a deed of intail.

Cuddington *contra* Hutton, a simple man drawn to make leases, and to enter into bonds, relieved, in 8 Jac. fo. 905 [1610-11].

Sumner *contra* Tilling, the plaintiff relieved against his own release, being an [171] ignorant person, 12 Jac. li. A. fo. 49 [1614-15].

138. RENT.

Page *contra* Clarke, a chief of ten shillings retained.

Barew *contra* Bancken, Mich. or Hil. 39 Eliz. li. A. fo. 473 [1597].

Drury *contra* , 4 Jac. li. B. fo. 632 [1606-7], twelve pence in Court, being former precedents shewed.

Cornwallis *contra* Brugton, in 38 Eliz. about fo. 199, li. A. [1595-96], 44 Eliz. li. B. fo. 355 [1601-2].

Taylor *contra* Harborne, three shillings and sixpence, 6 Jac. li. B. fo. 117 [1608-9].

Wincombe *contra* 'Presiden' Magdalen' Coll' Trin. 12 Jac. li. B. fo. 1029 [1614].

Ferrers *contra* Newby and al', the Court allows seisin to a rent-seek, in 43 Eliz. li. B. fo. 736 [1600-1].

Brevost *contra* Buckett, in Feb. 11 Jac. li. B. fo. 538 [1614], of twenty shillings per ann. decreed.

Man *contra* Marker, omits rent, 1 Car. [1625-26].

Ingleby *contra* Wade, contribution of a rent, 3 Car. li. A. fo. 108 [1627-28].

Lloyd *contra* Gwynn, to proportion a rent, in Hil. 5 Car. [1630].

Sutton *contra* Wright, concerning an annuity or rent-charge to be paid by the executor, lands being not charged, the executor ordered to pay it, Pasch. 6 Car. fo. 507 [1630].

Parsons *contra* Parsons, rents of lands [172] adjudged mean profits, in 8 Car. [1632-33].

Lenner *contra* Lennington, in the county of Warwick, a rent demised to a charitable use, carrieth the land, in 8 Car. [1632-33].

Neale *contra* Lister, though there can be no proof of an endowment, but because of long possession, and being presentative, decreed to be enjoined, 9 Car. [1633-34], a case between Grimes and Smith, in the Exchequer Chamber, about 39 Eliz. [1596-97].

Judge's opinion, a rent paid for a long time (although no assurance can be produced), yet decreed to be paid.

Churchill *contra* Brewer, in Hil. 10 Car. [1635], a rent-charge decreed, though no evidence.

Cesar *contra* Gater, concerning rents which have been paid, by reason of a long constant payment, decreed, 12 Car. [1636-37].

Halliley *contra* Skarret, relieved against an extinguishment of rent, in Mich. 2 Car. [1626], and Sheedon *contra* Gibbs, Mich. 2 Car. [1626].

139. REPRISE.

Dom. Strode *contra* Corbett, 2d June 1632, lords rents, reparations, and tithes duties, are payable to the King's Majesty, churchwarden, and all other common and annual charges and duties declared to be *ultra Reprises*.

140. RESCOUS.

The attachment must be special, reci [173] ting the return of the rescous the same term, Alchurch *contra* Bold, 37 Eliz. [1594-95].

141. RESTITUTION.

After judgment and execution, the defendant ordered to restore twenty-five pounds, *Some contra Portell*, 30 Eliz. [1587-88].

Moore *contra* Taylor, the like the year before.

Walter *contra* Francis, 4 Jac. li. B. fo. 633 [1606-7].

142. RESOLUTION.

Les resolutions Popham and Anderson *super statuto*, 39 *propter errorem*, 41 Eliz. li. A. fo. 102 [1598-99].

Opinion de Juges sur Aulita quereba and opinion de la Cour sur ces cas, in 1, 32, and 33 Eliz. [1588-91].

143. REVOCATION.

Eyre *contra* Wortley, concerning a point of revocation, when one is sick and holding up his hands, and certify thereupon, and a demurrer overruled for matter of legacy.

144. REVIEW.

Cock *contra* Hobb, a review of a decree allowed upon putting in security, Hil. 1632. Et Hall and Hobb, Hil. 1632.

145. REVIVORS.

Master Cecil and the Lady Rosse, his wife, joined in a bill against the Earl of Rutland, for two hundred pounds, arrearages by year to her due, she died before [174] hearing, he after her death exhibited a bill of revivor, and served process to hear judgment, yet upon an objection that the defendant should first have been called to answer, the hearing was put off, 1591.

No appearance or oath needs to a bill of revivor, 25th Nov. 35 Eliz. [1592]. Wolverston *contra* Darleston.

An assignee cannot revive a suit, Haselwood *contra* Reynolds, in 23 & 24 Eliz. [1581].

An executor (his testator dying after publication) could not be permitted to exhibit a new bill to make further proofs, but was held to a bill of revivor, Ferney *contra* Lawney, 30 Eliz. [1587-88].

Windham being widow, had a judicial order for the substance of the matter, and a commission to make proofs, and after she married the defendant, supposed it needed a revivor, and ruled not, 37 Eliz. [1594-95].

146. SALARY.

Daie *contra* Hampden, concerning salary for serving of a cure, in Pasch. 3 Car. [1627].

147. SCIRE FACIAS.

Broughton *contra* Vicecom' Bindon, it was ordered that the plaintiff might take out *scire fac*, against the defendant for not paying of money according to an order, in 12 & 13 Eliz. li. A. fo. 162 [1570].

[175] 148. SCRIVENERS' CASE.

Huet *contra* De la Fontaine, 20 Jac., one Glover having the setting forth of the defendant's money to whom the plaintiff paid the money again at a day, because the money was not paid to the defendant, and the scrivener breaking, the defendant puts the bond in suit, ordered to cancel the bond, in Hil. 20 Jac. li. B. fo. 464 [1623].

White *contra* Hall, the Scrivener's case, in 14 Car. [1638-39].

Oxenbridge *contra* Whittacre and Dixon, in 14 Car. [1638-39].

Comes Ancoram *contra* Douglas, in Mich. 15 Car. [1639].

Middleton *contra* Johnson, in 14 Car. [1638-39].

149. SEQUESTRATION.

Knightly *contra* Graunt, 25th Jan. 31 Eliz. fo. 529 [1589], the tenants compelled to bring in their rents in the manor of A.

Nelson *contra* Cooper and Harecourt, sequestrator, in May, 3 Car. li. B. fo. 1003, and 986 [1627].

Barker *contra* Shepherd, in Hil. 4 Car. li. B. fo. 120, and 660 [1629].

Eyre *contra* Wortley, about 3 Car. [1627-28].

Lakes *contra* Meares, after the defendant was committed for not performance of a decree, yet the Court ordered that a sequestration should be granted to levy [176] monies of his in other men's hands, 18th Nov. 14 Jac. li. A. fo. 329 [1613], and he committed, because his wife would not bring in bonds after, but the chief order is in May, 10 Jac. li. A. fo. 353 [1612].

Lupton *contra* Harmon, concerning a sequestration, in Pasche, Trin. and Mich. 16 Jac. [1618].

Maddox *contra* Prast, in Pasch. 5 Car. [1629], Ancher and Frith, 16 Jac. *eodem* [1618-19].

Roane *contra* Stepney, in Mich. 17 Jac. li. B. fo. 171 [1619], or Pasche or Trin. Anno 18 [1620]. Sequestration.

Copeland *contra* Mudd, a sequestration granted of certain lands, for debts only, in 13 Jac. li. B. fo. 502 [1615-16], or thereabouts. Et Mich. 14 Jac. li. B. fo. 309 [1616].

Goslet *contra* , upon an extent, in 10 Jac. li. A. fo. 54 [1612-13].

Mullins *contra* Bawden, 13 Jac. li. A. [1615-16], sequestration for money, both or copyhold and freehold, fo. 105.

Prentice *contra* Roupe, in Trin. 17 Jac. li. A. fo. 1302 [1619], sequestration for money decreed; and another between Frith and Trion, or Ancher and Frith, in Jan. 16 Jac. li. A. fo. 428, and 397 [1619].

Whrareby *contra* St. John, the Court was inclined to grant a sequestration for money, from Hil. 37 Eliz. to Trin. 38 Eliz. li. B. [1595-96].

Cottle *contra* Brooke, in Pasche, 18 Jac. li. B. fo. 1111 [1620].

[177] Middleton *contra* Fawcett, money grew due for tithes, in Mich. 1 Car. [1625].

Eardley *contra* Eltonhead, a sequestration for a marriage portion in 8 Car. [1632-33], the decree was 15 or 17 Jac. [1617-20].

150. SOLICITOR.

Wilson *contra* Grove, in Trin. 6 Car. li. B. fo. 626 [1630], a solicitor or promoter not to be examined as a witness.

Waserer *contra* Key, 36 Eliz. [1593-94], the solicitor of the defendant ordered to serve a process upon his client, because the plaintiff could not find him.

151. STANNARIES.

Davie *contra* Michell, the stannaries overruled here in 25 Eliz. li. B. fo. 65 [1582-83].

152. STATUTE.

Overman *contra* Wright, Hil. 17 Jac. li. B. fo. 807 [1620], a statute extended upon a bankrupt's lands before the liberate filed, ordered to bring or stay the statute, and likewise ordered to take the like composition as other creditors.

Mathew *contra* West and others, in 37 Eliz. li. A. fo. 655 [1594-95], one Knight acknowledged a statute to the defendant and another, not to alien or waste his land, and afterwards leased it to the plaintiff, the statute being acknowledged in consideration of marriage, and now by reason of the lease [178] so made, the defendant being the survivor conuzee, extends the statute, yet ordered in respect the lease is no waste, the conuzee not to receive any benefit by the said statute.

Boswell *contra* Weddall, the defendant ordered to answer, notwithstanding a demurrer put in upon the statute of 21 Jac. [1623-24], the debt being demanded, being without specialty.

Clethero *contra* Beckingham, the plaintiffs relieved against a statute, and ordered to have the possession thereof, because the extender had received his debt according to the yearly value, Pasche, 21 Jac. li. B. fo. 951 [1623].

Griffin *contra* Vellers and Leeson, lands were extended upon a statute for payment of money, the plaintiff had those lands by order at the same rate the lands were extended for payment of the defendant, in 41 Eliz. li. A. fo. 229 [1598-99].

Langham *contra* Whetcombe, 6 Car. li. B. [1630-31], a demurrer upon the Statute of Limitation maintained.

Lanymare *contra* Thorpe, in Mich. 15 Car. [1639]. Statute of Limitation pleaded and allowed, but upon no trust.

Brinker *contra* Kington, the Lady Lewes' case, 6 Car. [1630-31].

Woolhouse *contra* Barnes and Bullock, pleads the statute after a judgment at law. [179] not allowed, and it was for assets, 6 Car. [1630-31].

Ancient statutes against a purchaser cancelled, Smith *contra* Rosewell, Mich. 2 Car. [1626].

Mountjoy *contra* Wakeman, the Statute of Limitation overruled, in 8 Car. [1632-33].

Reston *contra* Reston, 9 Car. the like [1633-34].

Harris *contra* Bayning, 8 Jac. li. A. fo. 910 [1610-11], a statute extended at a low value, of purpose to keep off other extents, the Court orders, that the filing of the extent be stayed.

Barnes *contra* Trosse, if he can prove continual claim of reckonings although the pleading of the Statute of Limitations, overruled, in 14 Car. [1638-39].

Sutton's Hospital *contra* Com' Suff., £1000 in demand, the defendant pleads two releases, and no point of limitation, and no demand in due time, and now fallen upon an heir, and concerning a special trust, how far some shall be bound $\frac{1}{2}$ in Trin. 6 Car. [1630], referred to judges.

Harrison *contra* Bludder, a great case concerning the Statute of Limitation of actions, in Mich. 15 Car. [1639].

153. STEWARD.

Walron *contra* Corham, 15th June, 11 Jac. [1613], a steward of a Court, cannot make a letter of attorney to a man to take a surrender.

154. SUIT.

Clarke *contra* Hunlock, a suit to compel [180] the defendant to join in equal payment of money given by decree, in Trin. 2 Car. [1626].

Homadge *contra* Farley, 38 Eliz. li. A. fo. 413 [1595-96], suits prosecuted upon false imprisonment stayed by injunction.

155. SUPERINDUCTION.

Newton *contra* Price, concerning superinduction, Pasche, 17 Jac. li. A. fo. 961 [1619].

Pistle *contra* Hardie, the like in Mich. 15 Jac. li. B. fo. 358 [1617], and Pasche, 17 Jac. li. B. fo. 817 [1619].

Middleton *contra* Lort, in Mich. 15 Jac. [1617].

Wilson *contra* Thornton, in Mich. 20 Jac. li. B. fo. 081 [1622].

Stephens *contra* Potter, in 2 vel 3 Car. [1626-28].

Maddox *contra* Prust, Pasche, 5 Car. [1629].

Weston *contra* Sumner, demurrer because it concerns a superinduction overruled, in 7 Car. [1631-32].

Maddox *contra* Prust, 7 Car. [1631-32], concerning a sequestration upon a superinduction.

156. SURRENDER.

Hughs *contra* Carpenter, Mich. 9 Jac. [1611], the plaintiff's brother being within age, surrendered a copyhold to the use of the defendant, held not good.

157. SURETIES.

A surety relieved here where a bond is contained in use without his privity, he thinking the same to be paid. As Saunders [181] *contra* Smith and Churchill, about 10 Car. li. A. fo. 664 [1634-35].

Bullock *contra* Pope, Mich. 11 Car. [1635].

Fotherby *contra* Hutchins, in 2 Car. [1626-27].

Wilson *contra* Dunstar, in Mich. 15 Jac. li. B. fo. 565 and 617 [1617].

Hollis *contra* Deane, in Hil. 13 Jac. li. A. fo. 606 [1616].

Johnson *contra* Pudicot and al., one became bound with sureties, and afterwards bankrupt, the creditors sued the sureties, because they were remediless as against the

bankrupt, yet ordered not to take any advantage, in Mich. 10 Jac. li. A. fo. 65, or 165 [1612].

Bourne contra Ironmonger, in Mich. 17 Jac. [1619].

Little alias Brooke contra Good and al' in Trin. 16 Jac. [1618], to the contrary of the aforesaid note, li. B. fo. 1584.

Saunders contra Churchill and *Smith*, 10 & 11 Jac. li. A. fo. 664, and 728 [1613], the plaintiff being bound with the said Churchill's father for payment of money at a day which the plaintiff supposed the money had been paid accordingly, the money was not paid, the said Churchill the father dies three years after, upon whose death the obligee puts the bond in suit against the plaintiff, but in respect the bond was continued without the plaintiff's privity, and Churchill's son having a good estate from his father, was [182] ordered, and the feoffees to whom the son had conveyed those lands in trust, was ordered to sell those lands for payment of the said Churchill's debts.

[See *King v. Baldwin*, 1817, 2 John's Ch. (U. S. A.), 559.]

Higham contra Longeastle, assigning a bond for a surety, the surety relieved, in 4 Car. [1628-29].

Moile contra Dom. Roberts, the heir of a surety where the bonds are continued without the privity of the surety, relieved, in Mich. or Hil. 5 Car. [1629-30].

[S. C. Nels. 9. See *King v. Baldwin*, 1817, 2 John's Ch. (U. S. A.), 559.]

Hare contra Michell, a surety relieved where the bond is continued twelve years, without the plaintiff's privity, in 12 Jac. fo. 81 [1614-15].

158. SURVIVOR.

Saunders contra Thompson, 7 Car. [1631-32], a personal estate equally divided betwixt two, whether the survivor shall have all or not.

159. SUSPENSION.

Cæsar contra Feild, concerning Feild's relief against the suspension, Trin. 4 Car. [1628].

160. TENANT.

Windham contra Saunders, tenant for years not to attorn to him in remainder, without producing precedents to that purpose, 11 & 12 Eliz. li. A. fo. 28 [1569].

Wilson contra Smith, in 8 Car. li. B. fo. 123 [1632-33], the plaintiff's father seised of lands in tail, sold the said lands for small or no consideration, and suffered a common recovery of [183] those lands, whereby the sale was good in law, yet holpen in equity, for the plaintiff being daughter and heir, the nacity of those lands were sold, yet the vendee ordered to pay a better consideration.

Tenants of the manor, not parties to a decree, ought not to be bound, *Seamor contra Beare*, in 9 Jac. li. B. [1611-12].

Shute contra Mallorie, tenant for years ordered to attorn, 5 Jac. li. B. fo. 205 [1607-8].

Bowen contra Wrilow, 40 Eliz. li. A. fo. 11 [1597-98].

Jackson contra Barrow, Hil. 1 Car. [1626], upon a statute, and arrearages to be paid ever since the attornment.

Man contra Morley, Trin. 4 or 5 Car. [1628-29].

Dannet contra , in 11 Car. [1635-36] or thereabouts.

The Court compels tenants for years to set down in certain, the time of the making commencement, determination, and what rents are reserved, and the times the same are payable, to the end the same may be liable to an extent upon a statute.

Buck contra Lupton, in 30 Eliz. li. A. fo. 511 [1587-88].

Dom. Corbet contra Sellenger, the defendant holds over his term, the Court compels him to confess a lease notwithstanding, whereby the plaintiff may ground an action, Mich. 6. Car. li. A. [1630].

Pearce contra Pearce, intailed lands sold [184] instead of freehold lands, the infant when he comes to age, shall pay the money which hath been paid according to the father's will, or else the plaintiff shall have the fee-simple lands, 8 Jac. li. A. fo. 1007 [1610-11].

Stafford contra Stafford, 10 Car. [1634-35]. Tenant for life the remainder, over

tenant for life, because he admits of a recovery to be suffered, forfeited his estate, relieved here.

161. TESTATOR.

Samborne contra Samborne, the plaintiff's father being seised of lands in fee, devised by a nuncupative will of £300 to be paid to raise portions, some two hours before his death, but in respect his father had disinherited him of some other lands, the Court decreed that the lands should be freed from the portions, in 13 Jac. li. A. fo. 195 [1615-16].

162. TITHES.

Moone contra Bond, 34 Eliz. li. A. fo. 621 [1591-92]. My Lord declares that matters for tithes are determinable in this Court.

Windham contra Norris, a demurrer because the matter concerneth tithes over-ruled and ordered, in 17 Eliz. li. A. fo. 282 [1574-75].

Underhill contra Joyner, concerning tithes in kind, and the parson having common for beasts in the field, was ordered to take a quantity of ground in lieu thereof, and concerning an act of parliament, in Mich. [185] 18 Jac. [1620]. Decreed upon a report.

Hungate contra Croke, the plaintiff being a common person, having a lease of tithe in kind, which hath long time been obscured by union, or otherwise, ordered that a commission should go forth for setting out meadow and other grounds in lieu thereof, in 12 Jac. li. B. fo. 748, and 104 [1614-15]. Look in Hil. li. B. 11 Jac. fo. 1202 [1614].

Decanus et Capit' Ecclesiæ Christi, in Oxon' contra Grant, point of tithes determinable in this Court, and parcel or not parcel, in June, 11 Jac. [1613].

Browne contra Whetford, a *Modus decimandi* dismissed, otherwise performed.

Charles contra Bent, in 8 Car. [1632-33].

Custos new Coll' contra Sumpter, in Pasch. 10 Car. [1634], for tithes in kind, the Bishop of Exeter's case.

Custos new College contra Astley, concerning rates, tithes, and tithes in kind, Hil. 11 Car. [1636].

Southby contra Moore, every one must pay their tithes in kind, unless there be a composition real, or good prescription, *modo decimandi*, 10 Jac. [1612-13].

Shires contra Burgoine, a decree for tithe conies, and tithe wood, in 12 Car. [1636-37].

163. TRIAL.

Merefield contra Merefield, the Court [186] directs a special trial, about 11 Car. [1635-36].

164. TRUST.

A conveyance absolute in words, and yet there is a bruit of a trust, but doubtful whether there be a trust or not, and on the hearing the bruit bought the land, yet shall not be concluded by such a bruit, as Sir Thomas Egerton said, *Cornwallis's case*, 37 & 38 Eliz. [1595], and it is not like the use at common law, neither is the buyer to believe one which would not have him to buy it, if he tell him there is a trust.

A suit is depending for a trust, and after upon hearing the trust is proved, then that is a sufficient notice of trust to any man which buyeth it (hanging the suit), my Lord said, in *Diggs and Boys*, 16th May, Pasche, 40 Eliz. [1598].

Parramor contra Zouch, concerning notice of trust and purchasers, 9, 10, and 11 Jac. [1611-14], and between *Peacock and Reynell, or e con'*, in June, 17 Jac. [1619], the decree was Mich. 19 Jac. [1621].

Pitts contra Edolph, if a man coming under one that had notice of trust (though he had none) shall be bound, and to examine witnesses after a hearing upon point of fact, 7 Car. [1631-32].

Farley contra Warmestrey, in 23 Car. [1647-48]. *Cestui que* trust for wife makes a lease [187] not good, but if she accept rent, good.

Vanlore contra Lidall, or e con', look into it, how to remove a trust made for use of children, a leading case, in 2 Car. [1626-27].

165. TRUSTEES.

Sherborne *contra* Foster and Towneley, trustees shall not be examined as witnesses one against the other, 7 Car. [1631-32].

Windsor *contra* Sneath, a trustee may sue in his own name, in 10 Car. [1634-35].

Mansell *contra* Aubrey, a trustee to put in security for money and damages, in Pasche, 7 Car. [1631].

Springet *contra* Springet, Browne's case, 7 Car. [1631-32].

166. TITLE.

Hunt *contra* Youngman and Clarke, the Court relieved the plaintiff against a title of occupaney, in Mich. and Hil. 17 Jac. li. A. fo. 371 and 874 [1619-20].

Ewer *contra* Ewer, about 2 or 3 Jac. [1604-6].

Reeve *contra* Alcock, 3 Jac. li. A. fo. 201 [1605-6].

Dux Buck *contra* Paul, 5 Car. [1629-30].

Tovy *contra* Bristow, in the Court of Wards, Pasche, 11 Car. [1613].

Hall *contra* Ingram, in the Court of Wards, upon the intent of a will, about 2 Car. [1626-27].

[188] 167. UNION.

Rawley *contra* Yaxley, concerning an union, or not, in 7 Car. [1631-32].

Hartley *contra* Deynall, Nov. 37 Eliz. [1594-95].

Custos new College *contra* Goslet, no advantage to be taken upon unity of possession, 6 Car. and enjoyning of commons, such as for the most part of twenty years.

168. USE.

Sambach *contra* Dalston, because one use cannot be raised out of another, yet ordered, and the defendant ordered to pass according to the intent, 9 Car. [1633-34].

169. WASTE.

Waste done by one which held by covenant, therefore, not punishable by law, yet holpen here. Songhurst *contra* Dixy, 221.

170. WILL.

Thimblethorp *contra* Thimblethorp, the question being only a will or no will, determined in this Court, in Mich. 20 Jac. li. A. fo. 222 [1622].

Pawlet *contra* Carey, in Pasch. *primo* Car. the contrary [1625].

Peacock *contra* Glasecock, an averment of a will not good by law, yet good in equity, and the intent of a will allowed, 6 Car. li. B. [1630-31].

Cage *contra* Pearse, will or no will, referred to law, 10 Jac. li. B. [1612-13].

[189] Moggeridge *contra* Wither, an estate in land devised by will in writing after made a verbal will to revoke that, which is not revocation, 13 Car. [1637-38].

Sidenham *contra* Courtney, the lands to pass according to the intent of the will, 41 Eliz. li. B. fo. 236 [1598-99].

171. WITNESSES.

Comes Suff. *contra* Harris, examination of witnesses before answer, in 12 Jac. li. B. fo. 951 [1614-15].

Stratford *contra* Conaway, in 9 Jac. li. B. fo. 1058 [1611-12].

Bagnell *contra* Green, 2 Eliz. [1559-60]. [S. C. Cary, 48; Dick. 2.]

Hunt *contra* Goodwin, 9 Car. [1633-34].

Dom. Morrison *contra* Wethired, witnesses in the Court of Wards and Exchequer Chamber to be used in this Court, in 10 Jac. li. B. fo. 334 [1612-13].

Witnesses examined on the defendant's part, after the plaintiff's commissioners were gone away with the commission, Trevor and Trevenan, in 1594.

A prescription of common examined here and publication, and after witnesses examined in Star Chamber, to prove assents to inclosures, and not thought fit to be read here. Tenants of Petworth, and Earl of Northumberland, 1594.

Tadlow being examined as a witness, [190] calling himself better to mind afterwards,

was suffered to amend his former examinations, and was further examined *ad informandum*, Trin. 27 Eliz. [1585].

The defendant examined after plaintiff left to his proofs, Meretvither *contra* Fulmer, 37 & 38 Eliz. [1595-96].

A witness once examined shall not be called up to be examined upon further point, Lord Scroope, Sir Thomas Egerton.

Long *contra* Long, contrary, about Hil. 17 Jac. [1629], but Anguish *contra* Trevor, not admitted, in Mich. 19 Jac. [1621].

Long *contra* Long, after interrogatories preferred in the country by the defendant, he may examine other witnesses, either in Court or by commission, about Hil. 7 Jac. [1610].

Welby *contra* Welby, in 36 Eliz. li. A. fo. 404 [1594-95].

Cupid *contra* Quaintron, Pasche, 12 Jac. li. B. [1614].

Hungate *contra* Croke, witnesses examined in the country, if the other side have seen the interrogatories not to be examined here in Court, Trin. 11 Jac. [1613].

A witness to be examined *visa voce*, at the hearing, Wright *contra* Moore, 6 Car.

Comes Pembroke *contra* Hacket, Trin. 8 Car. [1632].

Knivet *contra* Webb, to examine witnesses before answer, Mich. 8 Car. [1632].

To examine witnesses upon oath for proof of acquittances, payments, and o-[191]-ther disbursements upon hearing, Comes Kancie *contra* Gore, in Pasche, 6 Car. [1630].

Clotworthie *contra* Leech, June, 10 Car. [1634].

Sheffield *contra* Lipton, May, 43 Eliz. [1601].

Rotheram *contra* , in Hil. or Mich. 9 Jac. [1611-12].

Swan *contra* Turberville, in Trin. 5 Car. [1629], witnesses examined after publication, because the defendants out, if publication or rule shall stand.

Dalby *contra* Mace, witnesses after hearing examined *ad informandum, conscientiam judicis*, Feb. 3 Jac. [1606].

Thynn *contra* Rawlinson, to examine witnesses in perpetual memory, 5 Car. [1629-30].

Hancorne *contra* Emery, after publication examined witnesses, Mich. 3 Car. [1627].

Molesworth *contra* Oppie, witnesses examined before answer, 8 Car. [1632-33].

Weeks *contra* Thelwall, witnesses examined after publication allowed, in 9 Car. [1633-34].

Henshaw *contra* Wright, to examine witnesses upon exceptions put into the commissioners, upon the statute of Charitable Uses, Trin. 9 Car. [1633].

Tailor *contra* Tailor, witnesses examined upon new interrogatories after a commission to counterprove a man's testimony at law, upon which a verdict passed, 9 Car. [1633-34].

Dux Lenox *contra* Dom. Clifton, wit [192] nesses after a hearing re-examined to clear the matter by the advice of the Lord Chief Justice, and the Lord Chief Baron, in 8 Jac. li. A. fo. 381 [1610-11].

Leech *contra* Manners, to examine witnesses, who owes the soil of a manor, in Trin. 6 Car. [1630].

Veizey *contra* Veizey, examination of witnesses after a hearing, to prove a Court roll, in Mich. 14 Car. [1638].

Pindar *contra* Bateman, whether it be in the power of the party to examine witnesses in Court, or by commission, will consider of precedents in April, about 6 or 7 Car. [1630-32], look the reason.

Watkins *contra* Fursland, one examined in the Admiralty Court, used here at the hearing, 16 Eliz. li. A. fo. 530 [1573-74].

172. WRITINGS.

Ward *contra* Scrimshaw, writings under the plaintiff's clerk's hand, ordered to be recorded, 8 Car. [1632-33].

REPORTS of CASES Argued and Determined in the HIGH COURT OF CHANCERY. Collected by John Dickens, Esq., Late Senior Register of that Court [1559–1798].

BULL *v.* BODIE.

(Lib. Reg. A. fol. 263.) 2 & 3 Eliz. A.D. 1559.

Injunction to stay a party from proceeding at law for land, where a bill brought by him merely to recover the same land, was depending in Chancery.

Entry of an injunction to stay the defendant's proceedings at law states, that the defendant, John Bodie, had preferred a petition in Chancery against the plaintiff Robert Bull, and one James Young, his then tenant, for recovery of four tenements in Wellington, in the county of Somerset, which the plaintiff stated to have come to him as heir of the body of Luey Bodie, under an entail created by the will of John Cumbersbat; and that an answer had been put in by the said Robert Bull and James Young, by which Bull disclaimed as to two tenements, but as to the others said, they did not pass by the will, but descended to the testator's two sisters, his co-heiresses at law; that they made a partition, [2] by which one was allotted to one sister (whose heir at law was the defendant Bodie), and that the other was allotted to Joanna the other sister, the wife of Robert Taylor; that she entered, and enjoyed, and the same descended to Joanna Taylor, her heiress at law, and that the plaintiff Bull purchased of Thomas the heir at law of the said Joanna Taylor, and was in possession.

The injunction then states, that after the petition so preferred, the said John Bodie had brought an ejectment against the present plaintiff Robert Bull, and Thomas Gyfford his tenant, for recovery of the said premises; that the suit instituted by the said John Bodie in Chancery as aforesaid remained undecided: That the proceedings at law were in contempt, and derogatory to the jurisdiction of the Court of Chancery, the aforesaid matter in Chancery being there undetermined.

And therefore the Court staid the proceedings at law, till the aforesaid matter in Chancery should be discussed and determined.

[S. C. Cary, 50.]

BAGNOLD *v.* GREEN.

(Lib. Reg. A. fol. 1788.) 2 & 3 Eliz. A.D. 1559. Carey's Rep. 48, S. C.

A suggestion that if certain persons should die, their death would be very prejudicial to the plaintiff's title, commission issued to examine them, although the defendant had not answered.

Upon suggestion merely, there being no affidavit, that if certain persons should die, their death would be very prejudicial to the plaintiff's title, a commission issued to examine witnesses on the part of the plaintiff, although the defendant had not answered.

[Mews' Dig. Evidence, VII, 4, a, iv.]

[3] WILLIAM WILD AND EDITH HIS WIFE, Plaintiffs; THOMAS WELLS, Defendant.
(Lib. Reg. B. fol. 112.) 25 & 26 Eliz. A.D. 1583.

Bill to have dower set out, and for arrearages. *Vid.* 1 Fonbl. 22. 2d edit.

Forasmuch as upon the hearing of the matter touching the dower demanded by the plaintiffs in right of the plaintiff Edith out of the lands of Leonard Fulks, her former husband, it appeared she ought to be endowed of the same lands according to the petition of the bill, and the defendant was nevertheless (as by an order * of the 19th of October last, appeareth) to be advised for a time, and give answer to this Court, whether he would give the plaintiff £10 in recompence of the said dower, and of the arrearages, or else would give the plaintiff £4 for the arrearages, and suffer the said petitioners to have their dower set out by commissioners; and for that also the said defendant hath not hitherto given any answer thereof to the Court, it is ordered, that a subpoena be awarded against the defendant to shew cause by Wednesday come sen'night, wherefore a decree should not be made for the plaintiff for the said lands, and tenements, which they demanded in dower, and for all the arrearages thereof, and wherefore a commission should not be awarded for setting out the same, or in default of such cause to be shewed, the same should be decreed accordingly.

[4] BATES *v.* HEARD.

(Reg. Lib. fol. 864.) May 1612. Toth. 66, [? 4] S. C.

Spoliation of marriage articles made good.

Upon the marriage of the plaintiff with Elizabeth the daughter of the defendant Thomas Heard the elder, an agreement was entered into, by which the plaintiff was to have £100; and if the defendant Thomas the son died in the lifetime of his father, without issue male, the father covenanted to leave the plaintiff and his wife one moiety of his lands, &c., in fee; and if Thomas, the son, should leave issue male, then Thomas, the father's heirs, executors or administrators were to pay the plaintiff £300 within one month after the death of the father.

The bill charged that the defendants had cozened the plaintiff to procure the agreement, and to deliver it to them, and prayed the benefit of it.

The defendants, by their answer, denied there was any such agreement.

But it appearing from the depositions that such agreement was sealed, and delivered to the plaintiff: It was ordered, that if the defendant, Thomas Heard, the son, died in the lifetime of his father, without issue male, the plaintiff and his wife should quietly hold, and enjoy one moiety of the lands, &c., according to the true intent and meaning of the agreement; but if Thomas the son, or issue male of him should survive Thomas the father, the heirs, executors or administrators of Thomas the father, should, within one month after his death, pay unto the plaintiff £300.

[Mews' Dig. Settlement, B, 1.]

[5] ARNOLD *v.* BARRINGTON.

(Reg. Lib. fol. 864.) 24 Nov. 1631.

Bond for performance of a promise to make a settlement having been cancelled by the obligor, he was ordered to settle lands agreeably to the bond.

John Arnold, the plaintiff's brother, being seised of copyhold lands, and having issue two daughters, Elizabeth and Catherine, and intending to make a provision for Elizabeth, his eldest daughter, surrendered part of the lands to the use of the said Elizabeth, and other part thereof to Thomas Barrington for payment of his debts, and the residue being of the value of £500, he left unsurrendered to descend to Catherine his youngest daughter as heir by the custom of the manor: After the surrender, John Arnold made his will whereby he confirmed the surrender, and directed the

* I searched the books but could not find any entry of it.—John Dickens.

plaintiff to have the care of the marriage of his daughter, and appointed him executor.

Afterwards, a clandestine marriage was effected between the defendant Walter Barrington, and the said Catherine; and, upon the marriage, the defendant Walter Barrington promised to make a jointure of lands of £60 a-year, and entered into a bond to the defendant Catherine in the penalty of £1000 for performance of the agreement.

Some time after the said Walter Barrington and Catherine cancelled the bond.

The plaintiff filed his bill to have the benefit of the bond, stating that no provision was made for Catherine, and in case of the death of Walter Barrington she would be left destitute.

[6] Upon reading the answer, it appeared the marriage was had, and the promise made, and the bond given, and afterwards cancelled.

It was decreed that the defendant Walter Barrington should by Wednesday then next, convey lands in fee-simple worth £60 a-year, free from incumbrances, unto trustees for the said Catherine, in lieu of jointure, for her life.

[Mews' Dig. Settlement, B, 1.]

SNELLING *v.* FLATMAN.

(Reg. Lib. fol. 431.) A.D. 1631.

A defendant against whom a supplicavit had issued, complaining the articles to ground it, were not sufficient, and producing a certificate of his good behaviour, the Court referred it to the two next justices of the peace in the neighbourhood, to enquire into it.

A supplicavit against the defendant; he took exceptions to the articles as not being sufficient on which to ground a supplicavit, they being too general; and produced a certificate of his good behaviour: the plaintiff averred the contrary.

The Court ordered the two next justices of the peace in the neighbourhood, to call the said parties before them, and to examine into the truth of the articles, and the certificate, and that the question of the supplicavit should be stayed in the meantime.

LEWIS *v.* OWEN.

7 Nov. A.D. 1637. Toth. 112, S. C.

Before publication, new interrogatories may be exhibited to new witnesses, though a joint commission hath been executed.

The question was, whether after a joint commission executed, new interrogatories might be exhibited to new witnesses.

The Master of the Rolls, upon a conference with the Lord Chancellor, was of opinion, that new interroga-[7]-tories might be exhibited into Court for the examination of new witnesses at any time before publication, although there had been a joint commission executed.

EMMERSON *v.* DALLISON.

(Reg. Lib. A. 30.) 6 March 1660. 1 C. R. 194, S. C.

Costs for scandal in a bill taxed at £100, reduced on exceptions to £50, an act of indemnity held not to exempt the plaintiff from the payment of them.

Costs, under an order to expunge scandal out of a bill, and tax costs, were taxed at £100, upon exceptions they were reduced to £50. A bill of indemnity having passed, the plaintiff applied to be discharged from the payment.

Lord Clarendon, *C.*, assisted by the judges, determined he was not exempted by the act from the payment.

INGLET *v.* VAUGHAN.

(Reg. Lib. A. 476.) 15 Car. 2, A.D. 1663. 1 C. R. 261, S. C.

Commissioners on a commission of rebellion have it in their discretion to take bail of a person for not performing a decree.

A question arose upon a commission of rebellion for not performing a decree, whether bail ought to be taken? Upon reference, it was held to be in the discretion

of the Commissioners; but if they refused, they ought to bring the party into Court without delay.

[8] CRANBOURNE v. DALMAHOY.

(Reg. Lib. A. fol. 519.) 14 Car. 2 [1662-63]. 2 Freem. 169, S. C.

If a feme marry, pending a suit, and the cause proceed, and a decree be made, it is not a ground to reverse the decree.

If a feme, pending the suit, marries, and the cause proceeds, and a decree is made, this is not sufficient to reverse the decree. And so it was held by the Lord Chancellor, assisted by the judges, on a plea to a bill of review on that ground, who said, that marriage was a matter of abatement only, not of right, and was matter of fact out of the decree.

[S. C. Nelson, 85. See Westropp v. Healy, 1841, Flan. & K. 146.]

WILLIAMS v. OWEN.

24 June, 16 Car. 2, A.D. 1674. 1 C. C. 56, S. C.; 2 Eq. Ca. Abr. 174, S. C.; 2 Freem. 181, S. C.

On demurrer to answer to bill of review and supplemental bill to carry a former decree into execution, which wanted to draw into question, and have a new examination of the decree, it was ordered that no matter should be re-examined.

Bill of review, and supplement to carry a former decree into examination. The defendants answer, and thereby wanting to draw into question, and have a new examination of the matters in the decree, the plaintiff demurred to the answer on that ground. On arguing the demurrer, it was ordered by Lord Clarendon, C., that no matter should be re-examined.

SIR WILLIAM WALLER, KNT. v. DALT.

(Reg. Lib. B. fol. 518.) 1 May A.D. 1676. 1 Eq. Ca. Abr. 90, S. C.;

1 C. C. 276, S. C.; Finch, C. R. 295, S. C.

Improvident young men relieved against bonds, and judgments executed by them through fraud on re-paying the money really and *bona fide* advanced to them.

The bill states, that about fourteen years since, the plaintiff and Robert Thomas, and Robert Rayner, being then all young men, agreed to take up upon their joint security £500, which one Wilshire, a near kinsman of the defendant, did, by the defendant's direction, agree to furnish them with in [9] ready money. A meeting was appointed; they met, and Wilshire produced, ready engrossed, two bonds, with warrants of attorney to confess judgment, to the defendant, one in £500, the other in £200, and the money he affirmed was just coming, and desired them to execute the bonds and warrants of attorney in the mean time; which they did, and delivered for the use of the defendant, whom they had never seen, or before heard of, but who was made obligee in the bonds; and the bonds and the warrants of attorney were laid on the table, there to remain till the money was brought: But Wilshire privately took them away, and sent them to the defendant without any money being paid. At a subsequent meeting, Wilshire pretended, there was a disappointment in procuring the money, and proposed a parcel of silk in lieu of it, which was of equal value (but did not produce it), and undertook to sell the same, and to pay them the money arising from it; that he afterwards paid to them £200, which he alleged was all the money received from the sale, and which was all the co-obligors received as a consideration for their bonds, and warrants of attorney; that Wilshire promised to deliver up the securities upon payment of £200 and interest; they rested satisfied; but Wilshire afterwards dying, the defendant sued the plaintiff upon the bonds, and judgments for £1000; and the other co-obligors having withdrawn themselves, and refusing to join with the plaintiff, the plaintiff filed his bill stating as above, and praying that on payment of £200 and interest, the bonds might be delivered, and the judgments assigned to the plaintiff. The defendant, by his answer, said he was an utter stranger to the transaction between [10] the co-obligors and Wilshire; but being informed by one Willis, who was a silk throwster, that the plaintiff, and the other obligors had

occasion for a parcel of silk, and would deal for a good quantity, at a meeting between them and Wilshire (the defendant resolving not to part with the silk without security), they executed a bond dated the 24th of December 1660, in the penalty of £600 for payment of £300, with a warrant of attorney to confess judgment; and thereupon he delivered to the co-obligors a parcel of silk of the value of £300; and they being satisfied therewith, and wanting £200, they executed to him another bond, dated the 17th of December 1660, for £200, with a warrant of attorney to confess judgment, and thereupon he delivered to them another parcel of silk to the value of £200; that Wilshire, Willis, and Rayner were since dead, and the monies not being paid, he had caused judgment to be entered up, and the plaintiff being the only solvent obligor, the defendant had sued him for the money secured by the bonds; the silks sold by the defendant being worth the full of the money secured at the time they were delivered, and therefore he insisted he ought to have the benefit of the said securities.

On the part of the plaintiff, it was insisted, that he was drawn into the said securities by fraud and contrivance between the defendant and the said Wilshire, and on promise of £500, to be lent, which never was lent.

Upon debate, and hearing the proofs, it was decreed, that on the plaintiff's paying the sum of £200 at midsummer-day then next, and £80 for interest, making together £280, by the first day of Term, the bonds [11] should be delivered up, and the judgments assigned to the plaintiff at his expense, in order that he might be reimbursed by his co-obligor; and in default, the injunction granted in the cause was to be absolutely dissolved.

The decree is silent as to costs.

GARLAND v. RADCLIFFE.

(Reg. Lib. fol. 224.) 10 Nov. 1676.

Deeds destroyed.—Plaintiff decreed to hold and enjoy.

The bill was for discovery, and to be relieved upon an agreement, between Ann Buller, the mother of the plaintiff Elizabeth, and Peter Radcliffe, son of the defendant Peter Radcliffe, upon a marriage to be then had between the said Peter the son, and the said Elizabeth; and to have the lands decreed to the plaintiff Elizabeth, according to the said agreement, and a settlement made in pursuance of it; and for an account of the rents and profits of the lands settled on Peter the son, accrued since the death of Peter the son.

The bill stated, that Peter Radcliffe the father, and Peter the son, being seised of lands, and entitled to settle them, in March 1661, a treaty of marriage was set on foot between Peter the son, and the plaintiff Elizabeth; and in consideration of £500, the portion of the said Elizabeth, lands were agreed to be settled; that the marriage was had, and the £500 were paid; and by indenture dated about of Car. 2, the lands were settled, as to some of them, to the use of Peter the father for life, to his wife for life, remainder to Peter the son in fee: And as to the rest of the estate, to the use of Peter the son in fee: Peter the father by will devised his estate to his wife for life; then to his daughter the plaintiff Ann, an infant.

Peter the son entered on all the lands, except those limited to his father and mother for their lives.

The limitations not being sufficiently expressed according to the agreement; it was agreed a new deed should be prepared, and executed according to the agreement.

Peter the son being ill of the sickness of which he died, trusted the old deed with his attorney, with orders not to deliver it until the new deed was executed.

Peter the father being a prisoner in Derby Gaol, having got the old deed and the intended new deed into his custody, refused to execute the new deed or to deliver the old one.

Shortly after, Peter the son died, seised and possessed of the estates limited to him by the first deed, of which he received the rents: And after his death, Elizabeth his widow entered, and was possessed of the same for three months.

Peter the father having, as before stated, got possession of the old deed, and cancelled it, by contrivance of a servant of the plaintiff Elizabeth, got into the house, and destroyed all the writings, &c.

The plaintiff Garland intermarried with Elizabeth the widow of Peter the son, but for want of the deeds could not bring an ejectment.

Peter the father admitted the marriage of his son with the plaintiff Elizabeth, but said his son, and Elizabeth his wife had no right to the estate: He denied the knowledge of any settlement; and said, he hoped [13] to prove, that if such there ever were, neither he nor his son had power to settle the lands, and claimed the same under a former settlement.

The defendant Coply, the trustee, admitted himself a trustee in the settlement; said he was willing to act, but had not the deed in his custody.

The *Lord Chancellor* being satisfied there had been such a deed; ordered the plaintiffs Garland and Elizabeth his wife, to hold the lands agreed to be settled in possession, during the life of the plaintiff Elizabeth; and the daughter to hold the same, as well those in possession as in reversion, after the death of the defendants Peter the elder and his wife, to her and her heirs; and Peter Radcliffe, and Henry Radcliffe, his son, to execute a new deed.

And the Master to take an account of the rents, and profits of the estates limited to Peter the son in possession.

PAVIE v. ACOURT.

18 Jan., 28 & 29 Car. 2, A.D. 1678.

The defendant, the husband, put in a plea in the name of himself, and his wife, and swore to the plea; the wife refused to swear: The plea allowed by Lord Nottingham, C., to stand as to the husband.

WAKELYN v. WATHILL.

8 Dec. 1679.

Plaintiff may revive when the time for answering is out, but the defendant is debarred from making his defence.—Craven v. Craven, 12 Dec. 1711; Lord Harcourt, C., S. P.

Lord Nottingham, C.—A plaintiff may revive, when the time for the defendant to answer is out, the bill praying, that he may shew cause why the suit [14] should not be revived; but though it should be ordered to be revived, it doth bar the defendant from making his defence.

GLENHAM v. STUTWELL.

(Reg. Lib. A. fol. 755.) 32 Car. 2 [1680–81]. 2 C. R. 193, S. C.

Demurrer to a bill of revivor for costs only, which were taxed, allowed, because the decree was not inrolled.

The plaintiff, a feme covert, filed her bill against the defendant her husband, and others: Her claim was decreed with costs. The costs were taxed, and a writ of execution served: Before the costs were paid, the plaintiff the wife died; the defendant her husband obtained letters of administration to his wife, and filed a bill of revivor for the costs only: The defendant demurred, and the demurrer was allowed, because the decree was not inrolled.

LORD NORTH v. LORD GRAY.

9 June 1680.

Bill to perpetuate the testimony of witnesses to a deed, which the bill stated to be lost, or in the hands of the defendant.—Demurrer, for that there was no impediment to the plaintiff's trying his right at law: The demurrer was allowed.

LEAKE v. MORRIS.

(Reg. Lib. B. fol. 360.) 28 Feb. 1682. 1 Eq. Ca. Ab. 23; 2 C. C. 135, S. C.

Plea of statute of frauds, to a bill for performance of an agreement by parol, but which the bill charges was to be put into writing; the defendant ordered to answer on that charge.

The matter upon the plaintiff's bill, and the defendant's plea and demurrer put in thereto, com-[15]-ing on this present day to be heard and debated before the Lord

Keeper (Lord North) of the Great Seal of England, in the presence of counsel learned on both sides, the scope of the plaintiff's bill being, amongst other things, to be relieved upon an agreement touching an assignment of a lease and goods, where the defendant pleaded the statute of frauds, and perjuries, for that if any such agreement was made, it was by parol; but the plaintiff's counsel insisting that the plaintiff doth by his bill set forth that it was agreed that the agreement should be put into writing: Upon opening, and debate of the matter, and hearing of what could be alledged, his Lordship doth order that the defendant do answer so much of the plaintiff's bill only, as doth charge, that the said agreement was to be put into writing: And after such answer put in, the plaintiff may reply and proceed in his cause as he shall be advised; but the benefit of the said plea, and demurrer is hereby saved to the defendant to the hearing of the cause; when, if the plaintiff shall be relieved, this Court will give such directions touching the defendant's being examined upon interrogatories, as to this Court shall seem meet.

NEAL v. ROBINSON.

(Reg. Lib. B. B. fol. 168.) 7 Nov. 1683.

Bill of review reheard.

[16] WHITLOCK v. MARRIOT.

(Reg. Lib. B. fol. 700.) 3 May 1686. 2 Ch. R. 386, S. C.

Answer reported scandalous. Exceptions to the report. Upon arguing the exceptions, the defendant was fined £100, and his solicitor, who had forged the council's name, £20, and committed until payment.

[Mews' Dig. Criminal Law, F, C; Practice, XXV, a.]

LLOYD v. POWIS.

19 June 1671. Nel. C. R. 147, S. C.; 3 C. R. 65, S. C. *Vid.* also Temple v. Rouse, 2 C. C. 7, S. P.

The plaintiff brought his bill against the defendant's father for land, and revived it against the defendant as heir, and afterwards the bill was dismissed with costs.

The question was, whether the defendant should have the costs expended by his father before the revivor: And it was ruled he could not, for they died with the person.

AUDLEY v. AUDLEY.

(Reg. Lib. A. fol. 69.) 19 Nov. 1690. [1] Eq. Ca. Ab. 277, S. C.; 2 Vern. 192, S. C. The committee of a lunatic's estate hath not power, by purchasing real estate with the savings, to alter the nature of the property, and lands so purchased will be considered as personal estate.

Thomas Audley, the plaintiff's brother by the half blood, being found a lunatic, Sir Geo. Audley his father, and Lord Cornwallis, and others were appointed his committees. The father dying in 1666, the lunatic thereupon became entitled to estates, partly under the settlement on the marriage of his [17] father and mother, and other estates, which descended, of the yearly value of £2000. There being very considerable savings from the rents, after paying for the lunatic's maintenance, the committees laid out £9700, part of such savings, in a purchase of lands contiguous, and convenient to the lunatic's estate, and took the conveyance to the lunatic in fee.

The bill was filed by the plaintiff, his brother by the half blood, and one of the lunatic's next of kin, to have the estate so purchased, with the savings, considered as the personal estate of the lunatic; and it was argued, that it was not in the power of a committee to alter the nature of a lunatic's estate.

After long debate by the Attorney General, and Solicitor General and other counsel, before the Lords Commissioners Sir John Trevor, Sir William Rawlinson, and Sir George Hutchins, the Court declared the committee of a lunatic had not power to alter the nature of a lunatic's property, and that the laying out of the lunatic's money in the purchase of lands did not in any manner alter the property thereof, and that the plaintiff, as brother of the half blood of the lunatic, was entitled to one-third part of the money so laid out in the purchase of lands, and also to one-third part of all other the

personal estate of the said lunatic, and the Master was to enquire, whether the estate purchased was, at the time of the purchase, worth the money paid for it.

[Mews' Dig. Lunatic, II. h. 1. See Att.-Gen. v. Alesbury, 1887, 12 App. Cas. 672; Lunacy Act, 1890 (53 & 54 Vict. c. 5), sects. 117-124.]

[18] MINEVE v. ROW.

3 March 1702.

Both sides had joined in a commission, and the defendant had commissioners present when it was executed, but had not interrogatories, therefore could not examine. He this day moved for a new commission, and to examine his witnesses, and produced an affidavit, that he had neither seen, nor knew the contents of the depositions; but it was refused.

[Mews' Dig. Evidence, VII. 12. See Coventry v. Coventry, 1715, Dick. 25.]

HAYNE v. HAYNE.

Michaelmas 1702.

A will having been destroyed by the brother of the disinherited heir, the devisee was decreed to hold and enjoy, and a trial was denied.

[Mews' Dig. Evidence, III. e. 2. See Cowgill v. Rhodes, 1863, 33 Beav. 312.]

BAKER v. HOLMES.

(Reg. Lib. A. fol. 202.) 25 Feb. 1705. Lord Keeper Wright.

Service of subpoena on the mother of infants, to appear and answer, they being secreted, deemed good service on the infants.

This cause came on to be heard the 16th of May last, when it was ordered to stand over, with liberty for the plaintiff to amend his bill by adding parties: the plaintiff did amend his bill by adding the children of one Rudge; but not being able to find them, and the defendant's solicitor refusing to tell where they were to be found, by an order dated the 20th of December last, it was ordered, that service of a subpoena for the infants to appear, on the defendant Mary Rudge their mother, should be good service. [19] She was served, and the children not having appeared, and the plaintiff not knowing where they were to be found, it was, on the motion of Mr. Vernon, ordered that the plaintiff should be at liberty to sue out an attachment against the infants to compel them to appear.

[Mews' Dig. Infant, G, 2.]

FAWCET v. FOTHERGILL.

Francis Calvert and others, claiming a mortgage for £1000 on the estates sequestered, by order dated 18th February 1669 (entered Reg. Lib. A. fol. 396), they were to come in to be examined *pro interesse suo*, and the plaintiff was to exhibit interrogatories for that purpose.

By an order dated the 7th of January 1700 (entered Reg. Lib. A. fol. 340), on petition of the plaintiff, after stating that the claimants had been examined, and the depositions returned; it was referred to the Master to certify what proof the claimants had made of their pretended right.

The Master made his report.

The matter of the said report came on to be heard 8th of April 1703 (entered Reg. Lib. A. fol. 206), when his Lordship ordered the plaintiff to reply to the examination, and the examinant was to be at liberty to examine witnesses touching his claim, and to take out a commission, wherein the plaintiff was to join if he thought fit.

Witnesses having been examined, there was an order for setting the matter down to be heard on the [20] report, the 26th October 1705, entered (Reg. Lib. A. fol. 101).

The matter of the report, by which the master found the claimant to have really and *bona fide* paid £400 and no more, came on to be argued. Upon debate of the matter, and hearing the exhibits, and the proofs taken in relation to the matter aforesaid, his Lordship conceived the sequestrators might redeem the mortgage, and direct an account as to £400.

CLARE v. WERDEN.

A.D. 1706. 1 Eq. Ca. Ab. 3, S. C.; 2 Vern. 548, S. C.; Minshul v. Lord Mohun, 10 Nov. 1711, S. P.

It was held that a defendant, by his answer to a bill of revivor, is not to contest the justice of a decree, but only to shew cause against it.

[Mews' Dig. Executor and Administrator, XIII, c. See Minshull v. Mohun, *sub nom.* Mordant v. Minshull, 1724, 6 Bro. P. C. 32.]

BRADLEY v. HIND.

12 Feb. 1707. Lord Cowper, C.

Verdict against verdict; a new trial denied.

HOLMDEN v. TILLY.

4 Feb. 1708.

A decree *ad computandum* inrolled, several of the answers being omitted; it was certified to be irregular, and held to be so.

[21] MORETON v. MORETON.

12 Jan. 1710. Lord Harcourt, C. Bower v. Grosvenor, 5 March 1718, S. P.

Commission executed after four in the afternoon of the day on which it was returnable, held to be regular.

[Mews' Dig. Evidence, VII, 8.]

PRICE v. SOLLY.

22 Nov. 1711. Lord Harcourt, C.

A decree obtained by surprise: on application by motion to discharge it, it was ordered that the defendant should be at liberty to shew cause against the decree before the costs of his default were paid, and that the whole costs should be reserved until the time of shewing cause.

MEERS v. LORD STOURTON.

20 Dec. 1711. 2 Salk. 512, S. C.; 2 Eq. Ca. Abr. 14, S. C.; 1 P. W. [146], S. C.

On a bill for a partition, there is no occasion to examine witnesses previously to the hearing.

The commissioners named in the commission may examine witnesses under the commission *ore tenus*, or take their depositions in writing, as they think fit, and found their partition on such evidence. This was affirmed by Mr. Vernon to be the practice.

Where a peer is to perfect an answer by being examined on interrogatories before a Master after hearing, and the like; in such cases, it is to be upon honour; but where a peer comes himself, and is to [22] make satisfaction to a party, or the bill is for discovery of deeds, or the like, it must be upon his oath; and so it was held on motion the above day, Lord Stourton insisting it ought to be upon honour.

[Mews' Dig. Partition, D, 3; 6, b.]

ROBERT v. MILLECHAMP.

(Reg. Lib. 386.) 16 July 1712. Lord Cowper, C.

The depositions of witnesses taken under a commission, the title of which was mistaken, ordered to stand, and the mistake to be set right.

The plaintiff sued out a commission; the defendant's commissioners joined, and signed the plaintiff's interrogatories, and witnesses were examined on the part of the plaintiff, and the defendant's commissioners signed the depositions: after which, it was discovered that the title of the cause in the commission was mistaken. Upon an application to suppress the depositions, Lord Chancellor ordered the Six Clerk to amend the commission in respect of the title of the cause; but the plaintiff to pay the

costs of the motion, and to be at the expense of sealing a new commission for the examination of the defendant's witnesses, and the Master to settle a time and place for the execution of the commission.

[Mews' Dig. Evidence, VII, 10, b; 15.]

NORTHCOTE v. NORTHCOTE.

(Reg. Lib. B. 303.) 21 April 1713.

Liberty given to amend exceptions after arguing them.

[23] GALE v. CROFT.

4 Nov. 1713. 2 Eq. Ca. Abr. 415, Pl. 5, S. C.; *Ibid.* 494, Pl. 9, S. C.

Parol evidence refused, that it was the testator's intention to devise his personal estate exempt from debts.

The testator bequeathed his personal estate to his executor, and devised his real estate to be sold for payment of his debts, the surplus of which he gave to his heir at law. The heir at law insisted that the personal estate ought to be first applied towards payment of the debts, in ease of the real estate. The Lord Chancellor would not permit parol evidence to be read of the testator's intention, that the devise of the personal estate should be exempt from debts, and decreed the executor to account for the personal estate.

Ex parte ASHTON.

21 Nov. 1713; 28 Nov. 1713; 20 Jan. 1713-14. Lord Cowper, C.

A woman of weak mind, supposed to be an infant, being seduced from her friends in order to marry, a writ *de homine replegiando* was granted on the first of the above days. On her being afterwards married (although no ward), on the second of those days the husband, and the clergyman were committed to the Fleet. It being afterwards discovered she was neither an idiot, nor under age, they, on the last of the above days, were discharged.

[Mews' Dig. Ecclesiastical Law, II, 10, c.]

[24] THE KING v. BRADFORD.

(Reg. Lib. A. fol. 249.) A.D. 1714. 2 Lord Raym. 1327, S. C.

A bond to the King in his political capacity subsists to his successor. *Bromley v. Jolliffe*, 20 June 1774, S. P.

Whereas a writ of *scire facias* issued against the defendant, upon his not having performed the condition of a bond entered into by him, and one Isaac Pike, in the penalty of £500 to her late Majesty Queen Ann, her heirs, executors, and administrators, to which, upon rules given, the defendant appeared, and put in a demurrer, and his Majesty's Attorney General having joined in the same, and the proceeding having been made a *concilium*, and coming on this day to be argued before the Lord Chancellor in the presence of Counsel on both sides, his Lordship declared the said bond having been given to her late Majesty in her political capacity, the same subsisted to his present Majesty as her successor, and did therefore order that the demurrer be over-ruled.

[Mews' Dig. Crown, E, 1.]

PITT v. WILLIS.

27 May 1715. Lord Cowper, C.

The answer of a defendant, not brought to hearing, read as evidence against another defendant, at the hearing.

[25] EARL OF COVENTRY v. COUNTESS OF COVENTRY.

6 July 1715.

The defendant joined in a commission for the examination of witnesses, and had commissioners present at the execution of it, but had not any interrogatories. On

application a new commission was granted for the examination of her witnesses ; but the Master was to settle the interrogatories.

[Mews' Dig. Evidence, VII, 12. See *Mineve v. Row*, 1702, Dick. 18. See *King of Hanover v. Wheatley*, 1841, 4 Beav. 84.]

BERTIE v. LORD FALKLAND.

10 Nov. 1715. Lord Cowper, C.

The cause was heard the 26th of January 1677. There was an appeal to the House of Lords on the minutes of the decree. All rested ; and the decree remained undrawn, until the suit abated by the death of Lord Falkland. The plaintiff applied to have the decree drawn *nunc pro tunc* : it was objected, that the suit being abated ought to be revived.

Lord Chancellor.—The drawing up of a decree is as material a thing as can be taken care of, and to pass and enter a decree *nunc pro tunc*, is to debar the representative of the deceased party from taking that course he may be advised ; therefore the suit ought to be revived before the decree be passed, and entered *nunc pro tunc* ; and this Court cannot execute a decree of the House of Lords, but by their order.

[26] HAMPDEN v. HAMPDEN.

Lord Cowper, C. 1 P. Wms. 733, S. C. ; 1 Bro. P. C. 250 [2nd ed. 3 Bro. P. C. 550], S. C.

A will was destroyed, and upon strong proof, it was decreed, the will should be taken as set out in the bill : a trial denied. On appeal to the Lords the decree was affirmed.

[Mews' Dig. Will, VIII, e. S. C. in H. L. 3 Bro. P. C. 550. *Followed*, *Williams v. Williams*, 1863, 33 Beav. 306 ; See *Cowgill v. Rhodes*, 1863, 33 Beav. 312.]

HALES v. SUTTON.

12 Jan. 1716. Lord Cowper, C.

The defendants, who were the executors of the testator in the cause, living abroad, gave a letter of attorney to a person to prove the will : service of a subpoena to appear, and answer, on such attorney or proctor, held to be good service on the defendants.

[See *Smith v. Hibernian Gold Mine Co.*, 1803, 1 Sch. & Lef. 238 ; *Hobhouse v. Coventry*, 1841, 12 Sim. 140.]

LEWIS DOLMAN AND DOROTHY DOLMAN, infants, AND ANNA MARIA DOLMAN, administratrix of THOMAS HUMPHRY DOLMAN, Plaintiffs ; PHILIP WESTON, JOHN SMITH, HENRY DEAN, AND SARAH SMITH, Defendants.

(Reg. Lib. A. 238.) 25 Feb. 1716. Lord Cowper, C.

Devise of real estates charged with debts, &c., and of the personal estate to the same person, there being no express words to exempt the personal estate from the payment of debts, &c., it was held first applicable. —2 Vern. 740, S. C. ; Rep. Eq. 128, S. C. ; Picc. [Prec.] Ch. 456, S. C. ; 2 Eq. Abr. 496, S. C. ; *Poply v. Poply*, 23 & 24 Car. 2. S. P. ; *Bonham v. Newman*, 2 Ch. Ca. 58, 159, S. P. ; *Hall v. Hall*, A.D. 1693, Reg. Lib. A. 130.

Sir Thomas Dolman, by his will, dated 5th February 1710, bequeathed to the defendant Sarah Smith all his household goods, and sundry other particulars, [27] and gave to the plaintiff Dorothy £1000 to be paid at twenty-five ; and devised his real estates in Shaw and Speen, to the defendants Philip Weston, John Smith, and Henry Dean, and their heirs, upon the trusts after mentioned, chargeable nevertheless with the payment of his debts, annuities, legacies, and funeral expences (his intent being, as the plaintiff Anna Maria Dolman alledged, that his real estate, and not his personal estate, should be liable to the payment thereof), and did thereby charge his real estate with the payment of the same ; and directed the said trustees, and the survivor, &c., to receive the rents and profits of the real estates, until his nephew Thomas Humphry Dolman, since dead, or the person who, by virtue of the will, should be entitled to the next immediate reversion of the premises, should attain the age of twenty-

five years, and out of the rents to dispose of particular sums mentioned in the will in the maintenance of the said Thomas Humphry Dolman and the present plaintiffs, the infants, until they attained the age of twenty five years ; and willed that the residue of such rents (after the payment of his debts, annuities, legacies, and funeral expenses), should be paid to the said Thomas Humphry Dolman, or such person as the next reversion of the premises should belong to, at twenty five ; and after the death of the said Thomas Humphry Dolman, and in default of heirs male of his body, to the use of the plaintiff Lewis Dolman, and the heirs male of his body, with remainders over to the heirs male of other persons therein named ; and thereby also gave £500 to the plaintiff Lewis Dolman, payable at twenty-five ; and the residue of his personal estate he bequeathed unto the said Thomas Humphry Dolman ; and [28] appointed the defendants Philip Weston, John Smith, and Henry Dean, executors of his said will. The testator died the 30th of April 1711. John Smith and Henry Dean proved the will (Weston declining to prove the same), and entered on the real estates devised, and received the rents and profits thereof, and possessed the personal estate, and with the rents paid several of the debts secured by mortgage and bond.

The plaintiff Lewis Dolman insisted, that the residue of the personal estate, not specifically bequeathed, ought to have been applied to such payment, the same being expressly devised to Thomas Humphry Dolman, who being dead without issue, aged about nineteen years, the plaintiff Lewis thereby became entitled to the said real estate, and to the £500 given to him by the will as aforesaid. And the plaintiff Anna Maria Dolman, having administered to the said Thomas Humphry Dolman, claimed to be entitled to such personal estate as was devised to him, subject to be distributed according to the statute of distributions.

The bill was brought for an account.

The defendants admitted the testator was seized and possessed of such real and personal estates, and that he made such will, and died, as before stated: That the defendants Henry Dean and John Smith alone proved the will, and entered on, and received the rents and profits of the real estates, and possessed the personal estate; and insisted that all the personal estate was liable to the debts, and that they did not know or believe that it was the intention of the testator, that his real estate only, and not his personal estate, should be subject to the payment of his debts, funeral expenses, and legacies; and admitted the death of Thomas Humphry [29] Dolman, an infant and without issue, but submitted whether he was entitled to any part of the testator's personal estate.

Lord Chancellor.—I am of opinion, that although the residue of the personal estate (above what the testator hath by his will before bequeathed, is devised, yet it is devised to the same person whom he makes devisee of his real estate, which real estate, and the surplus profits thereof, the testator designed should be received by his trustees, till the devisee, who should first take, should attain the age of twenty five years; so that his intent was to increase and enlarge the estate of the devisee of his real estate as much as possible; and here not being express words in the will to exonerate the personal estate from the payment of debts, to which by law it is liable in the first place; to construe it to be exempt from the payment of debts, and to put the residue of the personal estate into the hands of the first taker of the real estate before the age of twenty five, when it might fall (which hath in fact happened) to an administration, would be according to the will, but contrary to the intent of it, which principally favours the taker of the real estate: And therefore let an account be taken of the testator's personal estate, not specifically bequeathed, and of his debts, legacies, and funeral expenses, and let the personal estate be applied in payment of them; and demand the over surplus of the said personal estate, after payment of the testator's debts, &c. belonging to Thomas Henry Dolman, and now to the plaintiff Anna Maria Dolman, the administratrix of the said Thomas Henry Dolman, subject to the law concerning intestate's estates, and let the same be paid to her.

[30] HARVEY v. MATTHEW.

11 July 1716. Lord Cowper, C.

A demurrer, after the defendant had stood out all process of contempt to a satisfaction, allowed to stand.

MOORE v. MEYNELL.

Lord Cowper, C. 1 August 1716.

A writ of *ne exeat regno* against a feme covert, the administratrix of her late husband, who had come to England to get in his property.

By an order (the order is not entered.—J. D.) dated the 11th of April 1719, on an application for the wife to go to her husband, who was at Antigua, it appeared that the plaintiff had had dealings with the late husband of the defendant Ann Meynell, who was his administratrix, and had possessed what effects she could; that she had intermarried with the defendant John Meynell; that she had come to England upon business, and meant to return; that a writ of *ne exeat regno* had issued against her until answer, and further order; that having given bail, and put in her answer, she had applied to have the writ discharged, which the Court had ordered, upon her giving security to abide the event of the suit; and that she had given security accordingly.

N.B.—The Court upon this application put terms upon the plaintiff to speed the cause.

[Mew's Dig. Ne exeat regno, 2.]

[31] LORD HOWARD v. LORD ABERGAVENNY.

6 August 1717. Shepherd v. Shepherd, 25 May 1732; Tribe v. Teal, 27 May 1745; Billers v. Billers, 1 August 1751, S. P.

A testamentary guardian for an infant, who is abroad, to answer and defend the suit.

[Mew's Dig. Infant, G, 6. g.]

DEARDAN v. HALSEY.

28 Jan. 1718.

The defendant ordered to be committed for a contempt; but not being to be found, a sequestration issued; the sequestrators having returned *nulla bona*, liberty was given to execute the want of commitment.

PERISHAL v. SQUIRE.

Hil. 1718. Lord Macclesfield, C. *Vid.* Dickenson, v. Marie inf. [Dick. 582].

The plaintiff, a pauper, claimed as heir at law; the defendant claimed under a will not proved, and a deed disputed: the bill was retained, with liberty to bring an action. The tenants ordered to pay the plaintiff £150 to enable him to go to trial. [Mews' Dig. II, Practice, II, h; 2, XXI, a. See Nye v. Maule, 1839, 4 My. & Cr. 342.]

[32] DAVIS v. DAVIS.

(Reg. Lib. A. fol. 619.) 3 May 1718. 2 Eq. Abr. 554, S. C.

An executor having voluntarily paid legacies, and the assets afterwards proving deficient, the legatee was decreed to refund. The like determination in Roberts against Roberts (Bro. C. C. 487), by Lord Thurlow, C., and the like in Deschamps v. Tomkins, at the sittings after Trinity Term, 1789. *Vid.* also Dagly v. Crump. inf. [Dick. 35].

CRESWELL v. RADCLIFFE.

(Reg. Lib. A. 557.) 15 Oct. 1718.

The bill was brought without the consent of one of the plaintiffs: upon application to dismiss the bill, it was ordered that his name should be struck out as one of the plaintiffs.

WOODROFFE v. WOOD.

24 Feb. 1719.

Heir at law destroys the will, whereby the estate was, as it was alledged, devised to the plaintiff. The heir at law was decreed to convey the estate to the plaintiff, and his heirs. A trial was denied whether there was such a will as set out in the bill.

[See Hayne v. Hayne, Dick. 18; Hampden v. Hampden, Dick. 26,—3 Bro. P. C. 550; Cowgill v. Rhodes, 1863, 33 Beav. 312.]

[33] ALPHA v. PAYMAN.

East. 1719.

Liberty given to take an answer off the file, and to put in a new answer, upon a discovery that defendant at the time was ignorant of his interest.

The plaintiff drew the defendant into an agreement, whereby, in consideration of £300, he was to relinquish to the plaintiff all his right to the real and personal estate left to him by J. S. The bill was, to have the agreement performed: the defendant put in his answer, in which he confessed the agreement, and submitted to have it performed; but afterwards discovering that the estates so left to him were of several thousand pounds value, he, therefore, this day applied for liberty to take his answer off the file, and to put in another answer, which was granted.

WOODWARD v. WOODWARD.

11 May 1719.

The defendant appealed from a decree pronounced by the Master of the Rolls in the original cause. Before it was brought on, the plaintiff filed a supplemental bill to carry the decree into execution, apprehending he had not proper parties to the decree when pronounced: the defendant demurred (*inter alia*), for that the appeal was not determined: the demurrer was over-ruled.

CLIFFORD v. BEESTON.

Trin. 1719.

The course pursued when a *certiorari* cause is brought to hearing.

A *certiorari* bill, to remove a cause out of the Mayor's Court. Upon the cause coming on to be heard, a question arose, whether the bill in this [34] Court should be first opened. After debate, the bill in the Mayor's Court was first opened, then the answer to that bill, and the counsel for the bill in the Mayor's Court stated the case and proofs, and then the plaintiffs in this Court made their defence.

DIDDLEFORD v. TICHNER, an infant.

(Reg. Lib. A. fol. 493.) 13 July 1719.

Plea to a *subpœna scire facias*, to revive a decree, allowed.

The original bill was brought to have a settlement made by the late defendant John Tichner, the father of the present defendant, of certain lands, &c., to the use of himself for life, and after his death, to the late plaintiff Elizabeth and her heirs for ever, in lieu of a former settlement, which he had destroyed. And upon hearing the said cause, the said late defendant was decreed to execute a good conveyance to the plaintiff Elizabeth and her heirs, to commence from the death of the then defendant John Tichner. John Tichner died, and a *subpœna scire facias* having been issued against the defendant John Tichner, his infant son, he put in a plea stating that the lands that came to him on the death of his father, and no other, he claimed as heir in tail male of his father, under the will of John Tichner his grandfather, his father having done no act by fine, or otherwise, to bar the entail: the plea was allowed.

[35] DAGLY v. CRUMP.

18 July 1719. Lord Macclesfield, C.

Liberty given to amend an answer so as to explain an admission therein of assets.
Vid. sup. [Dick. 32], *Davis v. Davis*.

John Eglesham in 1692 procured of Sir Richard Crump to admit him a partner in buying particular parcels of tallow, by means of which, and otherwise, being indebted to Sir Richard Crump, Crump arrested him, and he confessed judgment for one thousand pounds.

Matters were referred to arbitrators, and they found Eglesham indebted to Sir Richard Crump in two hundred and sixty-eight pounds.

Before payment Sir Richard died, and Dame Margaret his widow, the executrix, proved his will.

In 1699 Eglesham filed a bill against her for an account of dealings and transactions between him and her said late husband: she answered, and submitted to account: and in 1704 the cause was heard at the instance of the defendant, and an account was directed.

The Master, on the 16th June 1712, reported, that there was due from Eglesham to the estate of Sir Richard, £67. Both sides took exceptions; and on the 14th January 1714, it was referred to the Master to review his report. Before it was reviewed, Dame Margaret Crump died, having made her will, and appointed the defendant sole executrix, who proved it.

Eglesham filed a bill of revivor and supplement, to revive, and have the benefit of the decree in the original cause.

The present defendant answered, and from an idea that upon taking the account Eglesham would be found [36] indebted to the estate of Sir Richard Crump, admitted assets to satisfy the plaintiff's demand.

The Master proceeded to review his report, but the defendant, and her testatrix Dame Margaret Crump, having unfortunately employed a clerk in Court who neglected their affairs, and did not attend the Master therein; on the 26th of October 1717 he made his report, and thereby found Sir Richard Crump was indebted to Eglesham to a large amount.

The defendant took exceptions to the report, which came on to be argued on the 1st and 3d days of May 1717, which, for want of full evidence, through the neglect of her solicitor, were over-ruled.

The balance found due being twice as much as the defendant was worth, she, as executrix of the said Dame Margaret, having never possessed, nor been able to possess, more of the estate of the said Dame Margaret, or of the estate of the said Sir Richard Crump, after payment of his debts and funeral expences, than £400, except £100 a-year, in freehold lands, which came to her partly by descent, and partly by purchase, which could not have been liable to the plaintiff's demands had she not inadvertently admitted assets; she on the 19th of June preferred a petition stating to the above effect, that as the case stood she was not only in danger of losing the whole of her estate, but her liberty: that she had obtained an order to re-argue the exceptions, but before the same were re-argued, the said late plaintiff John Eglesham died, and the plaintiff's were his representatives; and by her petition she prayed, that she might be discharged from the admission in her answer.

[37] Upon hearing the petition this day, after reading an affidavit of John Rowe the counsel, and Richard Hassel the solicitor, who drew and advised her answer, and thereby admitted assets, upon an idea, and that only, that instead of Sir Richard Crump's being indebted to Eglesham, he was indebted to Sir Richard: and upon reading an affidavit of the defendant to the like effect, his Lordship, after hearing counsel on all sides, declared he was of opinion, considering the circumstances of the present case, that the defendant ought to be at liberty to alter and amend her answer, so far as to explain the admission of assets therein in such manner as to admit assets to answer the plaintiff's demand, if such demand do not amount to above £400, and gave her leave to amend the same accordingly, she reswearing the answer so amended: but the plaintiff was to be at liberty to examine the defendant as to further assets.

PITT v. BREWSTER.

3 Feb. 1721.

Bill for an account of the testator's estate. It was objected, that one of the executors was not a party: he was ordered to be introduced into the decree (the decree is not entered.—J. D.) then made, as a party, and ordered to account before the Master, without putting off the cause to add parties.

[Mews' Dig. Executor and Administrator, XIII, c; Practice, II, b; XX, 5, c.
See *White v. Hall*, 1830, 1 Rus. & M. 332; *Sapte v. Ward*, 1844, 1 Coll. 24.]

[38] RICHMOND v. TAYLOUR.

3 Nov. 1721. 1 P. Wms. 734, S. C.; 2 Eq. Ca. Abr. 516, S. C.

Where there is any fraud in carrying on or defending the cause of an infant, he may seek his satisfaction against his guardian, or bring his bill to be relieved against the fraud.

A decree by consent, to the prejudice of an infant, and no day given for him to shew cause when of age: having attained twenty-one, he filed a bill to be relieved against the decree, and to set the same aside.

Lord Chancellor.—Where there is any fraud in carrying on or defending the cause of an infant, he may seek his satisfaction from his guardian, or he may bring his bill to be relieved on the head of fraud; but no fraud appearing in obtaining the decree, the plaintiff is barred thereby, and therefore let the bill stand dismissed.

HAMPHREYS v. INCLEDON.

18 Dec. 1721. 1 P. Wms. 753, S. C.

Demurrer to a bill of revivor, for that the plaintiff doth not charge she hath proved her husband's will, allowed.

[Mews' Dig. Executor and Administrator, II, c, XIII, b, 1.]

BOWHEE v. GRILLS.

14 May 1722. *Vid.* *Bagshaw v. Earl of Thanet*, 12 Nov. 1743; *Earl Gower v. Duchess of—*, May 1764; & — & *Christ Coll.*, 14 Dec. 1787.

The defendant, without being served with a subpoena to appear, put in a plea and answer: the plea was allowed: a question was made, whether the defendant was entitled to costs, having appeared voluntarily. *Lord Chancellor* held that by the practice the defendant did not lose his costs.

[39] CARTER v. DE BRUNE.

12 July 1722.

It should seem the cause, upon this order's being granted, was compromised, there being no further traces of it.—J. D.

Application that service of a subpoena to appear on a person, who transacted matters under a letter of attorney from the defendant, might be deemed good service on the defendant. This, although opposed, was granted.

[See note to *Hales v. Sutton*, Dick. 26.]

SIR CÆSAR CHILD Baronet, Plaintiff; HENRY GODOLPHIN, AND FRANCES COMTE AND OTHERS, Defendants.

(Reg. Lib. A. fol. 135.) 11 March 1723.

If a defendant pleads the Statute of Frauds to a bill for a specifick performance, he must by answer deny the agreement: for if he admits it, he takes it out of the statute.

The matter of the plea put in by the defendant Comber coming on the 5th instant to be argued in the presence of Counsel learned on both sides; the said plea, as to such part

of the bill as seeks to compel her to execute an assignment of her term in the lease from the Dean and Chapter of Saint Paul's in the bill mentioned, and of all her right and benefit of and in renewing the same, and of her right and title from the crown for holding Shadwell Market, and which seeks to compel her to perform the pretended agreement for the said defendant's interest in the said lease, and purchase of the grant in the bill also particularly mentioned, being, that by an act of parliament made in the 30th year of King Charles II. entitled, an act for the prevention of frauds and perjuries, it is amongst other things enacted, that from and after the 24th June 1677, no action should be brought whereby to charge any person on any [40] agreement or contract for sale of lands, tenements, and hereditaments, or any interest in or concerning them, unless the agreement on which such actions should be brought, or some memorandum or note thereof, should be in writing, and signed by the parties to be charged therewith, or some other person by him lawfully authorised. And the said defendant insisted, that she, or any other person by her lawfully authorised, did never sign any agreement or any memorandum or note, whereby she agreed to sell or assign the said premises, or any part thereof, for the sum of £750, or any other sum; nor did she remember that she, or any other person by her authorised, did ever sign any memorandum, writing, or note, or any ways relating to any agreement for the sale of the said premises, or any part thereof, to the plaintiff, saving the letter in the bill mentioned to be dated the 22d of April last, which was brought to her by the plaintiff, ready written and prepared by the plaintiff, as she believes, and to which the plaintiff earnestly desired her to subscribe her name, alledging the same to be only a letter of recommendation; and as the same was directed to the said Dean, she apprehended it was to have been carried to and left with the said Dean; and in confidence thereof, she was induced to subscribe the said letter; and is advised and insists the said letter is not such a writing, note, or memorandum as is meant by the said act to make good an agreement relating to land, in regard the terms of the said pretended purchase, or the sum or price which the plaintiff was to pay for the same, is not expressed therein, and the omission thereof leaves the case liable to all the mischiefs and inconveniences [41] which by the said act are intended to be prevented; and after she had subscribed the said letter, the plaintiff was so far from thinking the same was binding to the defendant, that he offered to give her £1000 for part of the said premises, and proceeded so far as to procure a writing to be drawn touching the said subsequent proposed agreement.

Upon hearing the said plea, and debate of the matter, and hearing of what was alledged on both sides, it was ordered that the said plea should stand for an answer, with liberty for the plaintiff to except thereto, and that the benefit thereof should be saved to the defendant until the hearing of the cause; with which order the defendant Comber conceiving herself aggrieved, for that the plaintiff may except to the said plea touching the matters relating to the said pretended agreement which she is advised she ought not to answer unto, and after a replication filed, may serve her with a subpoena to rejoin and examine witnesses to establish his pretended parol agreement, by means whereof the defendant may be deprived of the benefit of the said statute, or at least be put to great and unnecessary expence; therefore appealed therefrom, and petitioned the Right Honourable the Lord Chancellor of Great Britain to have the said plea re-argued, which being granted, and depositing five pounds with the Register, and the matter of the said plea coming this present day to be re-argued before his Lordship.

Upon hearing the said plea and the plaintiff's bill read, and of what was alledged on both sides, his Lordship saw no cause to vary the said order, and [42] doth order that the same be confirmed, and that the deposit be paid to the plaintiff.

His Lordship said, the plea insisting on the statute was proper, but then the defendant ought by answer to deny the agreement; for if she confessed the agreement, the Court would decree a performance notwithstanding the statute, for that such confession would not be looked upon as perjury, or intended to be prevented by the statute.

[Mews' Dig. Contract, D. 2; Specific Performance, I. B. 2. d; Vendor and Purchaser, A, 2, d, vii. S. C. Swans. 423 n.]

DAVIS v. LARNER.

11 March 1723.

Demurrer to an original bill to vary a decree, allowed.

On a demurrer, for that the plaintiff seeks to vary a decree against him, which by the rules of the Court cannot be done by original bill (It will for fraud.—J. D.); it was urged that the decree not being signed and enrolled, a bill of review doth not lie: but the Court held it did, and allowed the demurrer.

SAYER v. SAYER.

(Reg. Lib. B. fol. 386.) 23 May 1723.

Suit revived by *scire facias*, and costs of a plaintiff, who had married since the decree ordered to be taxed.

The decree gave the plaintiff Mary Sayer her costs: the decree was signed and enrolled, and the accounts were taken; but before the costs of the said Mary Sayer were taxed, she intermarried with Edmund Littlehales. Application was this day made for a subpoena *scire facias* against the defendants in the original cause, to shew cause why the decree and pro [43]-ceeding should not stand revived, and why the same should not be performed to the said Littlehales and his wife, as the same would have been, had they not intermarried. The defendants shewed cause, which was disallowed, and the order made absolute, and the decree and proceeding were ordered to stand revived.

HAYWARD v. COLLEY.

(Reg. Lib. A. fol. 370.) 3 July 1724.

A joint commission executed. The plaintiff examined several witnesses: afterwards the defendant added interrogatories in the examiner's office, and examined several witnesses. The regularity being questioned, it was referred to the Master, and upon exceptions to his report, the Court, as publication had not passed, held it to be regular.

HEATH v. LAKE.

20 July 1724.

It was said, that the answer cannot be read to support a demurrer: but it appears by the order that the answer was read.

[44] RASTEL v. HUTCHINSON.

10 Feb. 1726.

Plea of the Stat. of Frauds to have the benefit of a purchase made by the defendant, who was employed for the purpose, but who took the conveyance to himself.

Plea of the Statute of Frauds: the bill charged, that the plaintiff had employed the defendant Hutchinson to purchase a house for him of Sir Matthew Jennison: that he accordingly made such purchase, and took a conveyance to himself, and refused to make a conveyance to the plaintiff, and that in order to prevent the plaintiff from enjoying the premises, he reconveyed the same to the said Sir Matthew Jennison: the bill was, therefore, against both, and by it the plaintiff prayed to have a performance of the purchase.

Upon the plea's being argued, it was ordered to stand for an answer, with liberty for the plaintiff to except, and the benefit saved to the hearing.

GAMBIER v. LEHEUP.

20 April 1726.

The defendant put in his answer: the plaintiff afterwards amended his bill: the defendant then put in a plea to the whole bill. On the above day, the plaintiff moved to discharge the plea, because it was to the whole bill: but the Court denied the motion.

[45] GIBSON v. SCUDAMORE.

(Reg. Lib. A. fol. 181.)

7 Nov. 1726. Lord King, C. Select. Ca. in Ch. 63, S. C. ; 2 Eq. Abr. 773, S. C. ; Mosel. 6, S. C.

Lands purchased by the guardian of an infant with his personal estate, will, in case of his death during his minority, be considered still as personalty.

On a bill brought on behalf of an infant against his trustee, under his father's will, the sum of £8000 and upwards was found to be in the hands of Mr. Price, the trustee. The said trustee afterwards purchased an estate contiguous to the infant's, and by will devised that estate to the infant in fee simple, and died. The infant afterwards died intestate. Upon the infant's death, a question arose between the heir at law, and the next of kin of the infant, whether the estate so devised was to be considered as real, or personal estate ; and this suit was instituted to determine it.

The *Lord Chancellor* was of opinion, that the devise of the estate was a satisfaction *pro tanto* of what was due from the devisor, and that £3330, the purchase money, was to be deducted out of it, with interest, and that such £3330, and the interest, were to be considered as part of the personal estate of the said infant.

[*Mews' Dig. Conversion and Reconversion*, A. 4, a ; *Infant*, C. 5 ; H. 4, b ; *Trust and Trustee*, C. 6, c, v ; *Will*, IX, k, 18. See *Att.-Gen. v. Ailesbury*, 1887, 12 App. Cas. 672.]

HOLLES v. LONDON ASSURANCE COMPANY.

15 Jan 1728.

Bill to be relieved as to a policy of insurance, upon pretence, that the trustee would not consent to have his name used. The defendant demurred ; and the demurrer was allowed.

[46] LETHIEULLIER v. LORD CASTLEMALIN

(Reg. Lib. B. fol. 196.)

27 Oct. 1726. Lord King, C. 2 Eq. Abr. 161, S. C. ; Sel. Ca. in Ch. 60, S. C.

Issue to try and settle boundaries of two manors by a special jury, and to have a view.

The bill was, that the defendant might admit the boundaries between the manors of the plaintiff and defendant, or that a commission might issue to set out the same, and to examine witnesses to perpetuate their testimony, and to be quieted in the possession of the pond in question, and for an injunction.

The bill stated, that the plaintiff had for many years been seised in fee simple of the manor of Aldesbrook in Essex, and of the capital house called Aldesbrook House, and of a pond containing eight acres, and of three hundred acres of heath, furze, and moor, being the waste grounds, and part of the demesne of the said manor : that the right to the said manor was derived under letters patent, dated the 26th of April, 26th of Henry VIII. : that the said manor and waste ground had been, time out of mind, distinguished from other manors in the neighbourhood by marks, and bounds, and in particular from the manor of Wansted belonging to the defendant : that sundry acts were done by the former proprietors of the said manor of Aldesbrook, such as cutting turf, and by bringing actions against the owners of the said manor of Wansted, for trespasses by them committed on the said manor of Aldesbrook, in which verdicts had been obtained.

The bill then states, that the defendant had, in order to enlarge his park, cut the head of the said pond, and had taken part of the waste of the said manor of [47] Aldesbrook into his park, claiming right thereto as part of the said manor of Wansted.

The defendant by his answer admitted the plaintiff's right to the manor of Aldesbrook, and that he the defendant had enlarged his park, and had inclosed in it part of the waste, but denied the same to be part of the plaintiff's manor ; and admitted he claimed all the waste ground, and the pond, which the plaintiff by his bill stated to be within the manor of Aldesbrook.

Mr. Attorney General and Mr. Smart were Counsel for the plaintiff.

Mr. Solicitor General, Mr. Lutwyche, and Mr. Mead, were Counsel for the defendant, who argued, that the matter was entirely legal; that the plaintiff might try his right at law, and that there was nothing to prevent the plaintiff's bringing an action at law.

Lord Chancellor.—Let the plaintiff proceed to a trial at bar in the Court of King's Bench, to try whether the pond in the bill called Aldesbrook Pond, be the plaintiff's or the defendant's; and also to try what are the boundaries between the plaintiff's and the defendant's manors, lands, and soil; the plaintiff offering, if he shall be entitled to costs, to accept *nisi prius* costs; and if the defendant shall be entitled to costs he will pay costs on a trial at bar, and the issues to be tried by a special jury of the county of Essex, and the jury to be returned not to be freeholders of the forest of Waltham, but freeholders in other parts of the county; and each party is to deliver to the other a note in writing, containing a particular of the boundary insisted on by them; and each boundary is to be tried, and if the jury shall find any other particular boundary, they are to mark the same on the back of [48] the *habeas corpora* or *distingas*; and the jury are to have a view of the places in question before the trial, to be shown to them by two persons, one of whom is to be named by the plaintiff, and the other by the defendant; and reserve costs and further directions.

[Mews' Dig. Boundaries, Party Walls and Fences, 1, b.]

BLAKEWAY v. EARL OF STRAFFORD.

19 Oct. 1726. 2 Eq. Abr. 579, S. C.; Sel. Ca. in Ch. 57, S. C.; 2 P. Wms. 373, S. C.; 3 Bro. P. C. 305 [2nd ed. 6 Bro. P. C. 630], S. C.

Bill to be paid a debt of twenty years standing, due from Sir Thomas Johnson: by his will he directed his personal estate to be applied in payment of his debts; and if the personal estate should not be sufficient, then his real estate to be subject to his debts. The defendant pleaded the Statute of Limitations; the plea, on argument, was over-ruled; the will directing his debts to be paid taking the case out of the statute.

[Mews' Dig. Limitations (Statutes of), B, II, 7. See case in H. L. 6 Bro. P. C. 630; see *In re Stephens*, 1889, 43 Ch. D. 39.]

BURROWS v. JAMEREAU.

22 Nov. 1726. Sel. Ca. in Ch. 69, S. C.; 2 Stra. 733, S. C.; 2 Eq. Abr. 524, S. C.; Mosel, 1, S. C.

Decree at Leghorn allowed to be read as evidence; and this Court would not over-rule what was determined there.

The bill was, to be relieved against two actions brought upon two bills of exchange, the drawer having failed before the bills were accepted; and by the custom of Leghorn, the acceptance is void, if it be after the drawer becomes a bankrupt; and so it was determined in the present case in the proper Court of Leghorn, in which a decree had been made for setting aside the acceptance.

Upon hearing this cause, the Court allowed the said decree to be read, and said, This matter hath [49] been judicially determined at Leghorn, and this Court will not over-rule what was determined in a proper Court, where the action was brought; therefore let the injunction granted in this cause be perpetual, and let the defendant, at the plaintiff's expence, acknowledge satisfaction on the record of the judgment.

[Mews' Dig. Evidence, III, a, 4. See *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 234.]

STRICKLAND v. MACKENZIE.

11 Jan. 1727.

Plea, and answer: plea, on arguing, ordered to stand for an answer, without liberty to accept. The plaintiff took exceptions, and at the same time served the defendant with a subpoena to make a better answer: the Court held he could not do both.

GAGE v. HUNTER.

1 Feb. 1727.

Liberty given to examine a witness *viva voce* after publication, as to a particular fact, and the defendant to cross-examine him.

BOX v. ALLEN.

26 April 1727.

Bill to be relieved against an order of the Commissioners of Sewers. Demurrer to so much of the bill as sought to alter any of the orders of the Commissioners, or to return any money by them received, for that the remedy was at law, and no equity to be relieved in this Court. The demurrer was over-ruled.

[Mews' Dig. Sewers and Drains, 2. See Att.-Gen. v. Forbes, 1836, 2 My. & Cr. 133.]

[50] HAMOND v. —.

28 April 1727.

A witness examined two days after publication passed; the time having been previously appointed without thought of the day.

Publication would pass; and the defendant having cross-examined the witness, the Court would not suppress the deposition.

THOMAS v. HOLE.

11 April 1728. 2 Eq. Abr. 332, 368, S. C.; Ca. Temp. Talb. 251, S. C.

A bequest to relations means such persons as would be entitled under the Statute of Distributions.

John Harrold, by will, directed his executors to pay £500 to all the relations of Edith Hole, to be equally divided between them. The question was, what persons should be deemed relations to take under the devise.

The Court was of opinion, that by the relations of Edith Hole it was to be understood, such relations as would be entitled to a share of Edith Hole's estate according to the Statute of Distribution of intestate's estates; and that such persons were entitled to the £500 equally between them, and decreed payment accordingly.

[Mews' Dig. Will, IX, h, 1, f.]

MACKWORTH v. PENROSE.

19 July 1728.

Application to use depositions taken in a former cause between other parties at the hearing of this cause, as to the credit of one Spoller, a witness, denied.

[Mews' Dig. Evidence, III, b, 2, c.]

[51] COUNTESS OF WARWICK v. EDWARDS.

6 Nov. 1728. 1 Eq. Abr. 140, S. C.; 2 Bro. P. C. 494 [2nd ed. 1 Bro. P. C. 207], S. C.; *Vid.* 2 P. Wms. 171.

Reversion in fee after an estate tail spent, held to be assets to pay debts.

By indentures of lease and release, dated 5th and 6th of January 1696, previous to the marriage of Edward Earl of Warwick, deceased, with the plaintiff the Countess, the said Earl conveyed the manors of Abbots Kensington and Earl's Court Kensington, and other estates therein mentioned, to trustees, to the use of himself and his heirs, until the marriage; and then as to the premises (except Abbots Kensington and Earl's Court), to trustees for 90 years, without impeachment of waste, if the said Earl and his intended wife should so long live, in trust to pay her £400 a-year for her separate use as pin-money, if she should so long live, and the remainder of the rents to the Earl Edward: and as to all the premises (subject to the said term), to the use of the said Earl

Edward for 99 years, if he should so long live, without impeachment of waste, remainder to trustees to preserve contingent remainders : then as to all the estates (except Kensington Abbots and Earl's Court), to the use of the Countess for life, for her jointure ; with remainder for a term of 500 years, for raising portions for younger children of the marriage ; with remainder, as to all the estates, to the first and other sons in tail male. And a term of 500 years was created for raising portions, and for maintenance of the daughters in case of failure of issue male ; with remainder to the use of the said Earl Edward and his own right heirs.

And reciting that £10,000, part of the Countess's fortune, was placed out on security, it was covenanted that the same, when paid in, should be laid out in the [52] purchase of lands, and those lands to be settled to the same uses as the real estates were thereby limited.

The marriage was had. Edward Henry, afterwards Earl of Warwick, was the only issue of it.

Earl Edward made his will, dated 4th July 1702, and thereby directed his debts to be paid, and charged and subjected, as far as he was able, his real estate with the payment.

On the 13th of the same July he died, leaving the Countess of Warwick, the plaintiff in this cause, his widow, and the said Edward Henry, his only child, his heir at law.

There being no other issue, the two terms of 500 years ceased.

Earl Edward Henry entered, and became seized of the manors of Abbots Kensington and Earl's Court as tenant in tail, with remainder to himself in fee, and levied a fine of the estates, and declared the uses to himself in fee.

The £10,000, part of the Countess's fortune, had not been laid out in the lifetime of Earl Edward.

On the 18th of August 1720 Earl Edward Henry died intestate, and without issue, having never been married, and the estates descended in fee to the Lady Elizabeth Edwards, his aunt and heir at law, who was also heir at law of the said Earl Edward.

The £10,000 not having been laid out in lands, John Edwards, and the said Lady Elizabeth his wife, filed their bill to have the said £10,000 laid out in lands, and settled so as to give Lady Elizabeth an estate in fee simple.

On the 16th June 1723 the cause was heard, and the £10,000 was decreed to be laid out in the purchase of lands, and settled to the use of the right heirs of Earl Edward Henry.

The defendant the Countess, the mother of the said Earl, and plaintiff in this cause, appealed to the House of Lords, for that, as she was advised, by the fine levied by the said Earl Edward Henry as aforesaid, the estate tail in the manors, &c., settled as aforesaid, was barred, and he ought in equity to be considered as possessed of the said £10,000.

On hearing the appeal, the decree was affirmed [1 Bro. P. C. 207].

In 1726, the Countess of Warwick, on behalf of herself and others, creditors of Earl Edward her late husband, filed a bill stating the above recited facts ; and that the said Lady Elizabeth Edwards was dead, leaving the defendant Edward Edwards, her eldest son and heir at law, an infant, whereby the trust of the said £10,000 descended to the said defendant Edward Edwards, as heir at law as well of his mother as of the said Earl Edward, and Earl Edward Henry, and insisting that the same, and also the estates and the premises settled as aforesaid, in regard the estate tail therein was spent, and the remainder in fee had taken place therein in possession, were and ought to be considered as part of the assets, and real estate of the said Earl Edward deceased, descended from him to the said defendant Edwards, as heir at law of the said Earl Edward, Earl Edward Henry, and Lady Elizabeth Edwards his mother, and that the same ought to be subject to the payment of the several debts due from the said Earl Edward to the plaintiffs, and his other creditors ; and the plaintiff, the Countess of Warwick, by her bill prayed satisfaction out of the personal estate of the said [54] Earl Edward, or out of the real estate, and the said £10,000.

Part of the debt claimed by the plaintiff the Countess, was for the arrears of the £400 a-year under her marriage settlement, for pin-money.

It was insisted on the part of the defendants, that the claim of pin-money was very stale, no demand having been made for twenty-five years ; that the other demands of the plaintiff were within the Statute of Limitations, no action having been brought against the administrator, with the will annexed of the said Earl Edward : that although

Earl Edward did make such will as stated in the bill, and did charge his reversion in the estate with payment of his debts, yet Earl Edward Henry having, in Trinity 1719, levied a fine, and there being no demand from that time till 1726, when the bill was brought, it ought to be presumed, from the length of time, that the plaintiff's demand had been satisfied.

To which it was answered, that the length of time between the arrears of pin-money accrued, and the demand, was owing to the said Earl Edward's not having left personal assets, and that till his reversion in fee fell in, which was not till August 1720, there was nothing to pay the demands; and in 1726 the plaintiffs filed their bill: that the said Earl Edward had, by his will, charged and subjected his real estate with the payment of his debts, and that reversion in fee of the estates was the only estate he had to charge in aid of his personal estate, and therefore the only question was, whether the reversion in fee after an estate tail spent, were assets in the hands of the heir at [55] law to whom the reversion descended. *Traver v. Black*, July 1708, was cited, where assets descended were decreed to be sold to pay debts.

The Lord Chancellor was of opinion, that the reversion in fee of the estates descended to the heir at law, was assets liable to the debts of the said Earl Edward, and directed the necessary accounts, and payment, and sale of the real estates for the purpose.

DONE v. ALLEN.

13 Nov. 1728. Lord King, C.

Demurrer, and answer to a bill for a discovery. The defendant finding he had made the discovery by his answer, did not set down the demurrer to be argued, and the plaintiff not proceeding, the bill was dismissed for want of prosecution. This, upon reference, found to be irregular, as the demurrer should have been disposed of. The order for dismissing the bill was discharged.

COX v. COLLEY.

4 March 1729. Lord King, C.

Demurrer to a bill to examine witnesses to perpetuate their testimony, for that the plaintiff had not established his right at law, over-ruled.

The bill was to examine witnesses *in perpetuum rei memoriam*. The defendant demurred, for that the plaintiff had not established his right at law, which he ought to do before he was permitted to examine his witnesses.

The Solicitor General for the plaintiff. There is a plain impediment laid in our bill, whereby we are prevented from trial, and they have an injunction on [56] a bill filed by the defendant to stay our proceedings at law in ejectment, and the plaintiff hath a verdict for another part of the estate upon the same title.

After debate, the demurrer was over-ruled.

COUNTESS OF SUTHERLAND v. NORTHMORE *et e contra*.

(Reg. Lib. A. fol. 431.) 1 April 1729.

A feme covert having a power under her marriage settlement to create a term, and to raise money after the death of her husband, and being in distress, executes that power in the lifetime of her husband, and assigns her interest for a trifling consideration. The judges, upon a case sent to them, were of opinion it was a good execution of the power. And so this Court held it on the judges' certificate, but gave the plaintiff liberty to redeem, on payment of the money really and *bona fide* advanced, with interest, by a given day, or the plaintiff to be foreclosed.

The case was this: by deed dated 18th January 1698, Sir Thomas Travell and Frances his wife, covenant to levy a fine of certain estates of £1200 a-year, the estate of the wife, the use of which was to trustees for 1000 years, to raise £2500 for Sir Thomas Travell, remainder (subject to the said term) to the husband for life, to the wife for life; remainder to the issue of the marriage; remainder to the issue of Lady Travell by any other husband; remainder to Sir Thomas Travell in fee, with power, in case Lady Travell should have no issue, for her by deed or will to charge the pre-

mises with £1000, and to create a term for the purpose, which was to be redeemable on payment of the £1000; but the said £1000 was not to be payable until the end of six months after the death of Dame Ann Hodgson: with a power likewise, in case of the death of the husband in her lifetime, to charge the premises with a further sum of £2000 in like manner.

On the 17th July 1703 she executed the power, and in consideration of £150 paid to her by Thomas Northmore, she charged the premises with £1000, £500 to be paid to him on the first day after the end of six [57] months from the death of the above-named Dame Ann Hodgson, and the remaining £500 the day after; and for that purpose created a term of 2000 years to Northmore, to commence immediately after her own death, to be redeemable on payment of £1000, &c., and should the said Sir Thomas Travell her husband die in her lifetime, she then charged the £2000, which by her settlement she had a power to do, except that the term was to commence immediately from the death of the said Sir Thomas Travell, and redeemable in like manner as to the £1000.

Sir Thomas Travell being dead, the plaintiff in the first cause, his widow exhibited her bill against the said Northmore, to be relieved against the said assignment of her interest under the said two powers, offering to repay the £150 paid to her as the consideration, with interest, charging the same to have been obtained from her by surprise; and when she was under great necessity, and distress, which Northmore knew, and being also contrary to the agreement between her, and him.

Northmore's cross-bill was to have the benefit of the assignment, and to be paid the £2000.

Upon this cause coming on to be heard, the Court directed a case to be made for the Judges of the Court of King's Bench, and the questions to be, whether the said deed of the 17th of July 1703 was a good execution of the power reserved to Lady Travell by her said marriage settlement to raise £2000; and suppose it was a good execution, then whether the £2000 was to be raised.

The Judges certified it was a good execution of the power, and that the £2000 ought to be raised upon the death of Sir Thomas Travell.

[58] Upon this cause coming on to be heard the above 1st of April 1729, upon the Judges' certificate, for further directions; the Court declared the power was well executed, and that the estate was chargeable with the £2000, but with regard to the defendant Northmore, that the deed of the 17th July 1703 was to be considered only as a security for the £150 and interest at 6 per cent. from the date of the deed till Michaelmas 1714, and from that time at 45 per cent.; and the Master to compute the interest, and tax Northmore his costs; and on payment, Northmore to convey, and assign the term, and in default of payment the plaintiff to be foreclosed.

[Mews' Dig. Powers, VII, g. 1; VIII, c. 1.]

EYLES v. WARD.

30 Nov. 1729. Mosel. 255, S. C.

Liberty given to amend the inrolment of a decree, although said to be material.

ROWE v. STUART.

20 July 1729.

The plaintiff, under a common order to amend his bill, on payment of 20s. costs amended his bill; the amendments being long, the plaintiff was ordered to pay £3 additional costs.

[59] YOW v. TOWNSEND.

17 Dec. 1729.

A mistake in a report made in 1722, and inrolled, ordered to be amended, and the docketting of the inrolment to be altered accordingly.

This came before the Court upon the special matter of a report, after an enquiry as to a mistake in a former report of the Master in 1722, whereby he had directed the sum of £300 to be divided between William Harris, and the then defendant Grace Cole, and which report, with the decree and proceedings, had been inrolled. The Master

by his subsequent report certified that he had been surprised by Harris, the solicitor for Grace Cole ; that the decree was to pay the money that should be found due to the defendant Grace Cole ; whereas he had appointed it to be paid to Grace Cole and William Harris, which was not directed by the decree.

The Court ordered the Master to amend the report by striking out William Harris, and inserting defendant for defendants, and the docquetting of the inrolment to be altered accordingly.

EARL OF LITCHFIELD *v.* ROBERTS AND OTHERS.

(Reg. Lib. A. fol. 329.) 11 Feb. 1730.

Defendant Roberts brought up by an *alias pluries habeas corpus* for want of his answer ; and the bill decreed to be taken *pro confesso* against him.

On the 6th of March 1731, the cause was brought on to hearing against the other defendants, and a complete decree.

[60] ELLY *v.* EDWARDS. Reg. Lib. fol. 494. 30th May 1769. Defendant Edwards was brought up by an *alias pluries habeas corpus*, and the bill decreed to be taken *pro confesso* against him. On the 8th June 1769 a complete decree was pronounced.

TANDY *v.* HOLME, 12 July 1773. The like against the defendant Holme, and he was ordered to be remanded.

WOODMAN *v.* SMITH, Easter Term 1779. The like against defendant Smith.

OSMAN *v.* FITZROY.

15 May 1730.

A witness who had been served with a subpoena *ad testificandum*, ordered to attend, and be sworn in four days and be examined, or to stand committed.

The like order in ARNOT *v.* BISCOE, 12 May 1747.

" " OWEN *v.* PINKARD, 4 Feb. 1756.

" " RYE *v.* TENTERDEN, 26 March 1765.

LADY KILMURRY *v.* CREW.

30 June 1730.

Application, that in taking the accounts under the decree, the examination of the plaintiff taken before the Master might be allowed as evidence in her discharge, was refused.

[61] COMMISSIONERS OF CHARITABLE USES *v.* HICKS.

7 July 1731.

Contempt towards Commissioners of Charitable Uses punishable by the Great Seal.

The question was, whether contempt against Commissioners of Charitable Uses was punishable in this Court.

It was insisted it was, for that under a commission of bankruptcy the orders of the commissioners have been enforced by the Great Seal ; so in commissions of lunacy, the Great Seal hath interposed to enforce the orders of the commissioners : that the authority of the commissioners in the present case is derived from the Great Seal, and as such, any contempt of it is punishable by the Great Seal ; and so it was allowed.

ROBSON *v.* CRANWELL.

18 Dec. 1731.

Bill dismissed, owing to the neglect of the plaintiff's solicitor, and the order of dismission enrolled : the inrolment discharged, and the cause reheard.

The plaintiff's solicitor having received money on account, and likewise money to fee counsel at the hearing, neglected to deliver briefs, and the bill was dismissed for want of the plaintiff's appearing, and the order for dismission inrolled.

The plaintiff applied the above day to have the cause reheard, which was ordered, and the inrolment ordered to be discharged upon payment of the costs of the day, and of the subsequent costs.

[62] EDGILL v. BROWN.

23 Jan. 1732.

Costs taxed become a judgment debt, and though personal, do not drop with the party ; but the suit may be revived for the costs only. *Vid.* Temple v. Row, *sup.*

Bill by John Brown deceased against Edgill, the plaintiff in this cause : the bill, upon hearing the cause, was dismissed with costs : the Master taxed and made a report of the costs.

The plaintiff applied to have the costs retaxed, which was ordered, but the report already made was to stand as a security for the costs, in case the plaintiff died before the retaxation.

The plaintiff did die, and thereupon the present plaintiff filed a bill of revivor against the representative of the late plaintiff, merely for the costs.

It was objected by the defendant, that the costs being personal, they dropped with the party, and that a suit could not be revived for costs only.

Lord Chancellor.—Where costs are taxed, they become a judgment debt ; and as at law you may revive a judgment, so you may here. It would have been otherwise had the costs not been taxed. And his Lordship therefore ordered the suit to be revived.

BROWN v. BROWN.

23 Feb. 1732.

Persons appointed to hold the Courts of Manors, and the Court Rolls, &c., ordered to be delivered to them for the purpose.

Similar Orders, Davy v. Acland, 6 Feb. 1744.

" " Compton v. Compton, 22 Jan. 1760.

[63] FARNHAM v. BURROUGHS.

13 March 1753.

A creditor having come in under a decree, and prayed a commission to prove his debt, though he went no further, held to have made his election, and not permitted to proceed at law to recover his debt.

A decree for an account of debts, and for creditors to come in before the Master, and debts to be paid out of the personal estate, and real estates devised for that purpose ; if deficient, liberty to apply when the defendant, the heir at law, an infant, attained twenty-one, to have the deficiency raised out of legal assets descended. The defendant, who was a bond creditor, came in under the decree, and obtained a commission to prove the debt, but finding the personal estate, and equitable assets insufficient, he went no further, but when the infant attained twenty-one, he brought an action against him on his bond. The heir filed a bill for, and prayed an injunction.

Lord Chancellor.—The defendant having come in under the decree in the said cause hath submitted to the terms of it, and hath, in effect, made his election to proceed in this Court, therefore I will not suffer him to proceed at law to recover his debt, and let an injunction issue.

JAMES v. DORE.

25 March 1734.

If the suit abates, and the defendant (though a defendant in the original cause) absconds to avoid being served, the act of 5 Geo. 2 must be pursued, as if he had been a new defendant.

After a decree, and proceedings under it before the Master, William Conner, one of the defendants, died, and administration having been granted to the plaintiff, he filed a bill merely to revive against Dore, the surviving defendant. Dore absconded to avoid service of a subpoena to revive : the plaintiff pursued the steps directed by the act of 5 G. 2, c. 25, [64] to render process effectual against persons that abscond, &c.

And on hearing the cause this day on the bill of revivor, the Lord Chancellor decreed that the former decree and proceedings should stand revived, and the same be carried into execution.

GIBBS v. COLE.

(Reg. Lib. A. fol. 338.) 1 May 1734. 3 P. Wms. 225, S. C. ; 2 Eq. Abr. 14, S. C.

Upon application to dissolve an injunction upon coming in of the answer, which was to stay the printing and publishing of a book, the Lord Chancellor said, it was proper to allow affidavits to be read in support of the injunction ; and affidavits were read.

Note.—The order for the injunction is dated the 28th of February 1733, Reg. Lib. A. fol. 194, and appears to be founded on the affidavit of the plaintiff.

On shewing cause to continue it, the first day of May 1734, not only the affidavit of the plaintiff which was read when the injunction was granted, but also an affidavit of Job Mills and of John Baldoch were read in support of it.

If affidavits were allowable in a case where a plaintiff may have satisfaction in some degree against a defendant by making him account for the profits, *a fortiori* there is reason to allow them to be read where no reparation in damages can be made, as for cutting down trees planted, or growing for pleasure, ornament, or shelter.

[65] MALLOCK v. GALTON.

18 April 1735. 2 Eq. Abr. 11, S. C. ; 3 P. Wms. 352, S. C.

The bill was brought to be let in to redeem, alledging that the money due on the mortgage was greatly overpaid by the perception of the rents of the mortgaged premises : the defendant pleaded in bar a decree for a foreclosure signed, and inrolled, under which the premises had been absolutely foreclosed. The plea, on argument, was allowed.

[Mews' Dig. tit. Estoppel, B, 2 ; Mortgage, N, 12, a.]

MORSE v. ROACH.

7 Geo. II. [1733–34]. 2 Stra. 961, S. C.

Upon hearing counsel for the devisee and for the Register of the Prerogative Court, it was ordered that on the devisee's giving security, to be approved by the Judge of the said Court, to return the will in six weeks from the delivery thereof, the will should be delivered to the devisee to be produced at the commission.

The like order in *Frederick v. Aynscombe*, 28th March 1738.

MENDES v. BARNARD.

23 May 1735.

This came before the Court on a demurrer to so much of the plaintiff's bill as prayed a commission, the bill only praying a commission to enable the plaintiff to go to law : it was ordered to stand over to [66] produce precedents. *Fornward v. Thompson*, 14th of March 1731 ; and another order in the same cause, dated 4th of May 1732, being produced, after hearing counsel on both sides, the demurrer was over-ruled.

MOORE v. MOORE.

28 June 1755. 2 Ves. 596, S. C.

A supplemental bill, in nature of bill of review, cannot be heard until a petition to rehear the original cause is presented, to come on at the same time ; and so it was laid down by the Lord Chancellor : for though the plaintiff should be relieved upon his supplemental bill, the decree cannot be altered, but on the rehearing.

[Mews' Dig. Practice, A, XIII, p. 3.]

SPETTIGUE v. CARPENTER.

(Reg. Lib. B. fol. 492.) 2 July 1735. 2 Eq. Abr. 93, S. C. ; 3 P. Wms. 361, S. C.
Submission bond under the stat. of 9 & 10 W. 3 not to be made an order of Court after the award is made.

Bonds of submission, dated 18th of September 1731. An award was made in consequence of them the 7th of October following. On the 9th day of November 1732

the bonds were made an order of Court. The plaintiff brought his bill to be relieved against the award charging that the same was obtained by corruption.

The cause was heard this day.

Lord Chancellor.—It is not within the statute of the 9th & 10th of King William the Third, c. 16, to make bonds of submission, an order of Court after the award is made. And, therefore, let the award be set aside, and the submission bond be delivered up to be [67] cancelled : and let all proceedings at law on the bond or under the order of the 9th of November 1732, be stayed.

THE KING *v.* HORNE.

(Reg. Lib. A. fol. 476.) 10 Aug. 1736.

Horne, a bankrupt, had been committed to Newgate by the commissioners in the commission against him, for not answering questions they put to him. On the above day he applied for a *habeas corpus*, stating that he was still in Newgate, but in that weak state of mind as not to be able to answer : and in regard he was entitled by virtue of stat. 31 Car. 2, to a writ of *habeas corpus*, it was prayed and ordered, that an *habeas corpus* should issue, but it was directed to the Keeper of his Majesty's Gaol of Newgate.

SMITH *v.* BARNES.

9 Dec. 1736.

Demurrer to bill allowed. The plaintiff afterwards applied to amend, which was refused, the Lord Chancellor saying, that, after demurrer to the whole bill was allowed, the bill was regularly out of Court, and there was no instance of liberty to amend it.

[68] DILLON *v.* FRANCIS.

(Reg. Lib. B. 310.) 12 May 1737.

On a certificate of the Master to whom it was referred, that the bill was not signed by counsel, the bill was ordered to be taken off the file, and suppressed ; and the plaintiff to pay the defendant costs to be taxed.

ATTORNEY GENERAL *v.* DUKE OF ANCASTER.

3 June 1737.

Injunction to stay a tenant in possession, not a party, from committing waste. [Mews' Dig. Injunction, A, 6 ; Waste and Timber, I ; K, 1. See *Mason v. Mason*, 1841, Flan. & K. 431].

RIDOUT *v.* EARL OF PLYMOUTH.

10 June 1737.

Persons named by the parties appointed receivers upon their own recognizance only. And so in *Countess of Carlisle v. Earl of Carlisle*, 21st December 1761, by Sir Thomas Clark. M. R.

SAMBROKE *v.* EKINS.

16 June 1737.

An attachment having issued against the defendant for want of his answer, it was executed, and the sheriff returned a *cepi corpus*, and thereupon the messenger was ordered to bring the defendant to the bar of the Court, but the defendant not being to be found, the Serjeant at Arms was ordered to go.

[69] JOHN BODICOATE *v.* ELIZ. STEERS WIDOW, AND OTHERS.

(Reg. Lib. B. 613.) 18 July 1737.

Decree for partition of an advowson.

The bill was to have a partition of the advowson of Westerham in Kent, by alternate presentations.

Per curiam.—Declare the plaintiff is entitled to have a partition of the vicarage

of Westerham into moieties to present by alternate turns, and decree a partition to be made thereof accordingly between the plaintiff, and defendant; and for the making of such partition, the plaintiff and the defendant are mutually to execute conveyances to each other, so that the plaintiff may hold one moiety of the advowson to him and his heirs, and the defendant the other moiety to her and her heirs, as tenants thereof in severalty respectively; and in such conveyance let a clause be inserted, that the plaintiff and his heirs, and the defendant and her heirs shall present by alternate turns; and the Master to settle the conveyance if the parties differ, and the expence and charge of the conveyance to be borne equally. And it appearing that John Steers, under whom the defendant claims, had presented upon the last avoidance, let the plaintiff present on the next avoidance, being the first turn from that time; and no costs on either side.

[Mews' Dig. Ecclesiastical Law, IX, 1, e.]

[70] BISHOP OF ROCHESTER *v.* KNAPP.

7 Aug. 1737.

The bill had been decreed to be taken *pro confesso*, under the act of the 5th of Geo. 2 [c. 25], to render process effectual against persons who abscond. The defendant, within the seven years, applied under the said act, and obtained an order for liberty to put in an answer, and to bring on the cause again to be heard on his paying the costs occasioned by his default: but he was first to give security to answer costs, to be approved by the Master.

The cause was again heard in Hil. T. 1737—38 (Reg. Lib. A. fol. 319).

[See Carr *v.* Paulett, 1834, 7 Sim. 142.]

PALMER *v.* MAYSENT.

7 Nov. 1737.

Lord Thurlow, C., having some doubt respecting the case as reported in 1 Atk. 505. by the name of Palmer *v.* Mason, I was directed by him to look into and send him a state of the case as entered. The decree not being entered, I extracted the following statement from the records of the bill and answers.—J. D.

Legacies to be paid at 21: if the infants die before, to the executor, who is appointed residuary legatee. The Court will not order the legacies to be raised and secured.

The bill states, the plaintiffs, John and Susanna, intermarried in 1720; that John Maysent, the father of Susanna, was seised of freehold and copyhold estates of £300 a-year, besides a large personal estate: that he settled those estates, and made a provision of £1000 for the said Susanna by some deed or will; that he had been induced by fraud and imposition to destroy or cancel those instruments, and to make a will *in extremis*, whereby he gave the said plaintiff Susanna, his daughter, £10 only, besides some furniture; to the plaintiff John Paysent Palmer the infant £500, to [71] be paid at twenty-one; and to the plaintiff Susanna Palmer the infant £100, to be paid at twenty-one, or marriage with consent. The bill prays, amongst other things, to have the said two legacies of £500, and £100 secured for the benefit of the infant legatees, and to have the interest applied for their maintenance.

The defendant by his answer admits the testator made a will, dated 8th of August 1723, whereby he gave £500 to the plaintiff John Paysent Palmer, to be paid at twenty-one; if he died before, he gave the said legacy to the defendant; and £100 to the plaintiff Susanna the infant, to be paid at twenty-one, or marriage with consent as therein mentioned; and £10 for mourning, and some furniture, to the plaintiff Susanna the wife, and appointed the defendant sole executor, and residuary legatee.

Admits he proved the will, and admits assets; and says he paid the £10 and delivered the things specifically bequeathed to the plaintiff Susanna the wife; but insists upon his right to keep the said legacies of £500 and £100 in his hands without paying, or being accountable for interest.

The cause came on to be heard before Lord Hardwicke, C., on the 7th of November 1737; and it appears by the minutes, his Lordship, as to the two legacies of £500 and £100 given to the two infant plaintiffs, ordered, they should be at liberty to apply

to the Court for raising and paying the same, and for further directions, when they should respectively attain the age of twenty-one years.

[Mews' Dig. Executor and Administrator, X. b. 1; Will. IX. k. 20, 22. S. C. 1 Atk. 505 (see note at head of case, Dick. 70). S. P. Starkie *v.* Smith. 1775, Dick. 520.]

[72] ROYAL EXCHANGE ASSURANCE COMPANY *v.* BARKER.

12 Feb. 1738.

A common injunction for want of an answer extended by order to stay trial on the answer's being filed: the defendant applied to discharge the order, the plaintiff alledged that the answer was insufficient, and that he had taken exceptions to it.

A question arose with respect to the course of the Court, whether the defendant might move to discharge the order before he moved to dissolve the injunction, or the plaintiff, of course, shew exceptions to prevent the defendant's from moving to dissolve the injunction. The Lord Chancellor thought the exceptions taken merely for delay, and therefore discharged the order.

COOPER *v.* THORNTON

[1736-38]

One Powel claiming to have a mortgage on an estate (of which a receiver was appointed by order of this Court.) prior to the plaintiff's right, by order dated 11 June 1736, entered Reg. Lib. A. 337, he was to come in, and be examined *pro interesse suo*, and the plaintiff was to exhibit interrogatories for the purpose.

The claimant neglecting to put in his examination, by order dated 10th February 1737, Reg. Lib. A. 67, he was ordered to put in his examination, and to procure a report in a fortnight. He put in his examination, and the Master made his report.

[73] Order, dated the 2d June 1737, to set the cause down for directions on the report.

On the 22d July 1738, entered Reg. Lib. A. 629, the cause came on to be heard on the report, when, after hearing the orders, report, and the proofs, and what was alledged by the counsel on both sides, his Lordship confirmed Powel's claim, and ordered the plaintiff to pay Powell his costs from the 10th of February last.

(There is not any order entered for the Master to look into the examination and depositions, and to certify what title the claimant had made out, as in the preceding case.—J. D.)

[Mews' Dig. Evidence, VII, 4, b.]

ASHBURNHAM *v.* KIRKHALL.

11 Dec. 1738.

A case was directed for the opinion of the judges. The facts to be stated in it were stated in the order by the Court, without referring it to the Master to settle the case.

The same was done in Harman *v.* Spotteswood, June 1773.

ATTORNEY GENERAL, AT THE RELATION OF THE MAYOR, &c., OF TENBY *v.* WATERS.

13 March 1739.

Upon motion alledging that a subpoena had issued to compel the relators to pay the defendant the sum of £19, 18s. 6d.: that Richard Williams Esq., the mayor, was on the 26th of February last personally served with the said subpoena, and a demand was then made of the said sum, which had not been paid: it was therefore ordered that a distringas should issue against the said relators, to compel them to pay the said sum of £19, 18s. 6d.

[74] DUKE OF MARLBOROUGH *v.* DUCHESS OF MARLBOROUGH.

April 1739.

On affidavit of the danger in bringing an infant who lived in town into Court to have a guardian assigned, a commission was ordered for the purpose.

SHEFFIELD *v.* DUKE OF BUCKS.

Mich. T. 1739. 1 Atk. 628, S. C.

Injunction granted to stay proceedings in the Spiritual Court, to invalidate a will, and to call in probate.

[Mews' Dig. Will, VII, e.]

WILKINSON *v.* COKER.

15 Nov. 1739.

Order fixing a time for the defendant to appear to the plaintiff's bill, pursuant to the act of the 5th Geo. 2. to render process effectual, &c.: the church at which it was to be fixed being pulled down to be rebuilt, the time was enlarged for three months.

ATTORNEY GENERAL *v.* MONTGOMERY.

A.D. 1739, 1740, 1741, 1742. 2 Atk. 378, S. C.

Elias Turner by his will devised his estates to Sawbridge and others, in trust for the particular purposes in his will. A bill is filed to establish it, and to have the trusts executed: the heir at law disputing the sanity of the testator.

[75] On hearing the cause, an issue *devisavit vel non* was directed, which was tried, and a verdict in favour of the will. Two new trials were granted, on each of which there was a like verdict.

The cause was afterwards heard on the equity reserved, and the will was established, and the trusts decreed to be performed, and executed.

The heir at law afterwards bringing an ejectment, the relators filed a bill for, and obtained a perpetual injunction.

The defendant Montgomery, the heir at law, afterwards intermarrying with the daughter of Sawbridge, the principal acting trustee, letters and other papers, which strongly proved the insanity of the testator, were put in the way of Mrs. Montgomery, and upon the discovery of this new evidence, the defendant Montgomery preferred a petition, and obtained leave to file a supplemental bill in nature of a bill of review. And upon another trial directed in the cause, the testator was found to have been insane, and his will in consequence set aside.

USBORNE *v.* USBORNE.

7 March 1740.

Mortgagor restrained from cutting down timber on the mortgaged premises.

The order of this date states, that the plaintiff, under an assignment, was entitled to a mortgage term of 500 years of two farms and premises, for securing £630 and interest from the defendant Usborne, subject to redemption: that Usborne had sold the timber standing and growing on the mortgaged premises to the defendant Bathurst: that he had entered on the mortgaged [76] premises, and cut down several trees, and threatened to cut down more, by means whereof the mortgage security would be lessened. It was therefore ordered that an injunction should be awarded to stay the defendants, &c., from committing any waste or spoil on the premises, &c., until answer and further order.

N.—A similar order in *Hopkins v. Monk*, A.D. 1742, and in *Uvedale v. Uvedale*, 7 March 1740; and by Lord Thurlow, C., in *Gross v. Chilton*, 25 April 1782, after a doubt and consideration, thinking it was the mortgagee's fault in permitting the mortgagor to continue in possession.

[Mews' Dig. Mortgage, F, 9, b. See *Harper v. Alpin*, 1886, 54 L. T. 383.]

READ *v.* WARD.

14 May 1740.

Though the affidavit on which an attachment is founded be not filed at the time of issuing the attachment; if it be filed before the return, it will not be irregular.

TUFFNELL v. PAGE.

East, 1740.

It was laid down by Lord Hardwicke, C., that the trust of a copyhold estate will pass by a will not attested according to the Statute of Frauds, as a copyhold estate surrendered to the use of a will will do; for equity ought to follow the law, and make it at least as easy to convey a trust as a legal interest.

[Mews' Dig. Charity, III, 1; Trust and Trustee, C, 3, c. ii; Will, IV, b, IX, k, 2, i.]

[77] GARNUM v. MARSHAL.

(Reg. Lib. A. fol. 9.)

6 Nov. 1740. 2 Atk. 70, under the title of *Smith v. Marshal*, 8 Nov. 1740.

Infants secreted to prevent their being served with a subpoena to appear and answer, service on their mother good.

Upon this cause coming on to be heard, it was objected, the three infant daughters of the defendant Mary Enoch were not parties. The cause was ordered to stand over with liberty to amend by adding parties, the said infants in particular. The plaintiff amended his bill accordingly, and endeavoured to serve the infants with a subpoena to appear and answer, and applied to their mother to learn where they were to be met with, which she not only refused, but said she had sent them into the country, and would not tell where. Upon affidavit of the facts, and of notice of the motion, the Lord Chancellor ordered, that service of a subpoena for the infants to appear, on the defendant their mother, should be deemed good service on the said infants.

[Mews' Dig. Infant, G, 2.]

[78] WILLIAM LAMPLUGH, Clerk, Plaintiff; JAMES HEBDEN Esq., SIR WALTER CALVERLEY, and WILLIAM WRIGHTON, Trustees in the plaintiff's marriage settlement, the Defendants; and ELIZABETH LAMPLUGH, the plaintiff's wife, and ELIZABETH LAMPLUGH, an infant, the plaintiff's only child, added defendants by amendment.

(Reg. Lib. B. fol. 158.) 27 Jan. 1741. 2 Eq. Ca. Abr. 170, S. C.; Barn. C. 371, S. C.

Cause ordered to stand over to make persons supposed to have an interest parties, who afterwards, on the further hearing, appeared not to have any.

The plaintiff was seised of lands in Lubberstone: by agreement, dated 29th of January 1738, between him and the defendant Hebden, the plaintiff, in consideration of £4950, to be paid before the 1st day of August then next, covenanted that he and his wife, and all claiming any estate in the said premises, would convey to the said defendant Hebden and his heirs, all the said premises, and deliver possession thereof on or before the 25th day of March then next.

In pursuance of the agreement, Hebden was let into the possession, and received the rents, and did acts of ownership.

The plaintiff applied to the defendant Hebden to perform the agreement, which he refused, insisting the plaintiff was not seised in fee simple of the premises, for that, by indentures of lease and release, dated 9th and 10th June 1737, made upon the marriage of the plaintiff with Elizabeth his now wife, part of the said lands were conveyed to the defendants Calverley and Wrighton, and their heirs, to the use of the husband for life, remainder to trustees to preserve contingent remainders; remainder to the wife for [79] life; remainder to the first and other sons in tail male; remainder to the daughters in tail general, with the ultimate remainders in fee to the plaintiff; and that by such settlement the plaintiff's wife had power to charge such lands with £500 in case she had no issue inheritable to the said lands. The plaintiff by his bill charged, that such settlement was subject to the following conditions: that if the plaintiff should settle other freehold lands of £100 a year, clear of all reprises, to the same uses, then all the estates before limited of the estate in Lubberstone should cease, and the defendants the trustees should be seised of the said lands in Lubberstone to the use of the plaintiff in fee; and that he had, by indentures of lease and release of the 8th and

9th of May 1738, conveyed to the said trustees several freehold lands, to the same uses as the Lubberstone lands were settled : and that the defendant Hebden had notice of such exchange before he entered into the articles for the purchase : and that by other indentures of lease and release, dated 5th and 6th of July 1739, he conveyed other messuages and lands to the said trustees, to the same uses as the Lubberstone lands were settled ; and that the estates conveyed or exchanged were of the yearly value of £130 beyond reprises : and therefore the plaintiff insisted, that he was enabled to convey the said lands in settlement to the defendant Hebden ; but that he still refused to perform the agreement : the bill therefore prayed that the defendant Hebden might be decreed to perform the agreement to pay the £4950, the consideration money.

The cause came on before Lord Hardwicke, C., the 6th of March 1740, when an objection was made, [80] that the defendant the wife, and the child, were not parties.

On the part of the plaintiff it was argued, that the plaintiff having the power to exchange the lands in settlement, and having so done, neither the wife nor her child had any interest in the Lubberstone estate, and that therefore they were not necessary parties. But Lord Hardwicke, C., held, that in fact they were interested to see that the lands settled in lieu of the Lubberstone lands were of equal value to those lands ; and if so, that these lands were settled to the same uses ; and therefore ordered the cause to stand over, with liberty for the plaintiff to amend his bill by adding parties, which he did by adding the defendants his wife and only child ; and by his amended bill prayed, that the several uses created by the settlement of the 10th of June 1737 might cease and determine, according to the condition therein mentioned, except the use therein limited to the plaintiff in fee : and that the settlement of lands comprised in the indenture of the 8th and 9th of May 1738, and 6th of July 1739, might be accepted and established in lieu thereof.

The defendant Hebden by his answer admitted the agreement, and that he had been let into possession ; and that he had dug clay on the premises : that the plaintiff had afterwards sent him the original settlement, but considering the nature of the plaintiff's title, he submitted whether he ought to be forced to proceed in his purchase.

The defendant the wife, by her answer admitted the original settlement and the subsequent settlements stated in the bill, and that she willingly consented to the exchange, and that the same was made with [81] her privity, and submitted to be bound by them, if the Court thought fit.

The defendant, the infant, by her answer submitted herself to the care and protection of the Court.

The Lord Chancellor referred it to the Master to see if a good title could be made by the plaintiff to the defendant Hebden, of the estate comprised in the contract, and reserved costs, and further directions.

The Master reported the plaintiff could make a good title.

On the 18th October 1742 (Reg. Lib. B. fol. 303) the cause came on to be heard on the report, and the contract ordered to be performed, and all parties to join, &c.

Ex parte BERRY, a bankrupt.

April 1741.

The petition stated, that about sixteen months before the commission of bankruptcy issued against the petitioner, he filed his bill against the defendant ; that his assignees not reviving, the defendant had obtained the common order to dismiss the bill for want of prosecution, with costs ; and therefore he prayed to be relieved from the costs.

The Lord Chancellor dismissed the petition.

MACKWORTH *v.* BRIGGS.

6 May 1741. 2 Atk. 182, S. C.

The Master reported the plaintiff's bill to be pertinent exceptions : to the report, for that he ought to have found it to be impertinent (without specifying the particulars in which it was impertinent),¹ allowed.

[82] KNIGHTLY v. DEACON.

17 July 1741.

If the answer is reported sufficient, and upon exceptions to the report is held by the Court to be insufficient, the defendant is not to pay 40s., the costs of an insufficient answer, as was said by Robert Holford Esq., the then senior Master, to be the course of the Court, and admitted to be so by the sworn Clerks in Court.

KING v. SMITH.

24 July 1741.

The plaintiff having obtained a verdict at law against the defendant, and the defendant threatening to leave the kingdom before the plaintiff could obtain judgment, the plaintiff filed his bill to have the benefit of the verdict, and immediately thereupon moved for a writ *ne exeat regno*: the Lord Chancellor said, there was not an instance of such a writ having issued, when it is not a mere equitable demand, and therefore denied the motion.

[Mews' Dig. Ne exeat regno, 2.]

LONG v. BURTON; BURTON v. LONG.

12 Nov. 1741. 2 Atk. 218, S. C.

Original bill is to be first answered, but if after a cross-bill filed, the plaintiff in the original bill amends it in matters material, he loses his priority.

The plaintiff in the original cause having taken exceptions to the defendant Burton's answer, while those exceptions were under reference, applied for and obtained an order for time to answer the cross-bill, until the plaintiff in that cause should put in a sufficient answer to the original bill. [83] The answer was reported insufficient, and then the plaintiff in the original cause obtained an order that the defendant might answer the amendments and exceptions at the same time. The defendant answered the exceptions, and the plaintiff amended his bill by adding forty-two sheets of new matter.

Upon an application by the plaintiff in the cross-bill to discharge the order obtained by the plaintiff in the original bill for time to answer the cross bill, until there was a sufficient answer to the original bill, a question arose, whether the original bill should retain its priority.

Lord Chancellor.—I am of opinion, the determination in the case of *Steward v. Rec.* 2 P. Wms. 435, is right, but this goes a step further: the plaintiff by his amendment hath lost his priority, and therefore let the order be discharged.

MAYOR OF LONDON v. SAUNDERS.

(Reg. Lib. B. 40.) 12 Dec. 1741.

The defendant being in contempt to an attachment for want of his answer; interrogatories ordered to be exhibited to examine him touching his contempt.

[84] WALMSLEY v. ELLIOT.

14 Feb. 1742.

It was laid down by Lord Hardwicke, C., as a rule, that the defendant cannot give rules to pass publication, until the plaintiff hath been in default one term after the cause is at issue.

PILKINGTON v. CITY OF YORK.

14 May 1742.

An injunction granted to stay proceedings on an indictment for a trespass: two bills having been filed by the plaintiff and defendant in this Court, to determine their right to the fishery in the present case.

BEDFORD v. WHARTON.

(Reg. Lib. A. fol. 287.) 3 May 1742.

Liberty given to the defendant to amend his answer by inserting and adding facts.

BENNET v. WADE; JONES v. WADE.

(Reg. Lib. A. fol. 515.) 28 June 1742. 2 Atk. 324, S. C.

Fraud vitiates a deed *in toto*, though persons in no wise privy to, or concerned in the fraud, are beneficially interested under such deed.

Sir John Leigh, Baronet, of Addington in Surry, was seised in fee of the manor of Addington, and other real estates in Surry, and also of other real estates in Middlesex and Kent, of the yearly value of £2700; and though not in such a state as to be found a luna-[85]-tic, yet his mind was so weak that he was easy to be imposed upon. The defendant Wade, who was a surgeon and an apothecary, and attended him and his family, took advantage of it, and having introduced his daughter, aged about sixteen years, to Sir John, who was then about sixty, and having made him drunk, in that state procured a Fleet pardon, to marry them, and then prepared a settlement in favour of his daughter, which he prevailed on Sir John to execute.

She dying soon after, he procured Sir John to execute a will in his favour, and to appoint him the executor, and also to execute indentures of lease and release, dated the 9th and 10th of September 1737, in corroboration, as he alledged, of the will. Sir John Leigh dying, Wade obtained probate of the will.

The plaintiffs John Bennet and Henry Spencer, who had married two sisters, the co-heiresses of Sir John Leigh, and whom Wade would never permit to see Sir John, having kept constantly a watch over them, took the necessary steps, and procured the probate to be recalled.

Upon this Wade set up the above deeds of the 9th and 10th days of September 1737, under which the defendants claim beneficially, and they entered on the estates: by which deeds Sir John is made to convey all his estates to the annual value aforesaid to trustees, to the use of himself for life; remainder to trustees to preserve, &c.; with remainder, as to one moiety of the Surry estates, to the defendant Francis Leigh for life; remainder to his first and other sons in tail male; remainder to his daughters in tail; and in default of such issue to the defendants Jasper Jones and Frances [86] his wife, for their respective lives; with remainder to their first and other sons in tail male; with remainder to their daughters in tail; and as to the other moiety of the said Surry estates, subject to a term of 500 years for raising £5000 for the portions of the younger children of the said Jones and his wife, the like limitations as the other moiety; and as to the estates in Middlesex and Kent (which were of the annual value of one moiety of the whole estates), after the death of Sir John Leigh, to the said defendant Wade in fee simple.

Sir John Leigh died the 16th of November 1737.

To set aside the deeds, the bill in the first cause was filed.

The bill in the second cause filed by the Jones' and their children, and the Leighs, was to establish the said deeds.

The causes came on to be heard on the 26th of May, and were in hearing the 19th, 21st, 22d, 23d, and 28th June 1742.

On the part of the plaintiffs in the second cause, and of the defendants in the first, it was argued, that whatever fraud or imposition had been practised on Sir John Leigh by the defendant Wade, they were not privy to, or in anywise concerned in it, and some of them could not, for they were infants; and it would be hard to involve the innocent with the guilty, and punish them by setting aside the deeds *in toto*.

On the part of the plaintiffs in the first cause, the co-heiresses and their husbands, it was argued, that the deeds were founded in fraud, and being so, it vitiated the whole.

[87] And Lord Hardwicke, C., was of that opinion, and declared that the deeds dated the 9th and 10th days of September 1737, were procured from Sir John Leigh by fraud, imposition, and circumvention, by means of the undue influence obtained by the defendant Wade over the weakness of Sir John Leigh, and that the same ought

to be set aside: and did order that the bill in the second cause should be dismissed, and did order and decree the deeds should be delivered to the plaintiffs in the first cause to be cancelled, with the consequential directions to account for rents &c.

[Mews' Dig. Fraud and Misrepresentation, VI.]

BIRT v. PITT.

27 June 1741.

Upon the cause being brought to hearing, the bill was retained, with liberty for the defendant to bring an ejectment, which was tried: this day a new trial was granted, upon payment of the costs of the former.

LEGARD v. SHEFFIELD.

27 July 1742.

The form of an issue to try who were the co-heirs of the late Duke of Bucks.

At the hearing, an issue was directed to try who was the heir at law of the late Duke of Bucks. The issue was, whether the plaintiff, and two of the defendants by name, were the only co-heirs of the late Duke of Bucks: and if not, then whether two other defendants by name, or any other, and what persons were co-heirs of the said Duke jointly with the before-named parties, or any and which of them, and in what shares and proportions.

[88] *TOMBES v. ELERS.*

(Reg. Lib. B. 510.) 5 May 1747.

Lord Hardwicke, C., took the care of the infant from her testamentary guardian, and ordered that she should not marry without leave of the Court.

[Mews' Dig. Infant, B, 4, a, D, 1.]

ROACH v. GARVAN.

(Reg. Lib. B. 32.) 16 Nov. 1748. 1 Ves. 157, S. C.

Lord Hardwicke, C., took the infants from their mother, and put them under the care of Mr. Potter, and ordered them not to marry without leave of the Court, and restricted them from receiving any letters, or message from particular persons named in the order.

WEBB v. LITCOTT.

7 Feb. 1743. 3 Atk. 25, S. C.

At the hearing of the cause, the defendant the heir at law, who was an infant, made default. The parties were to take such decree against him as they could sustain, with a day to shew cause: but as it was necessary the will should be declared to be proved, that the Lord Chancellor might so declare it, he ordered the proofs of the will to be read.

[Mews' Dig. Will, VIII, b.]

[89] *KENDAL v. BARON.*

9 Feb. 1743.

A *cepi corpus* being returned on an attachment against the defendant for his contempt in not putting in his answer, an *habeas corpus cum causa* issued to bring him to the bar of this Court to answer his contempt: but the High Bailiff of the West Riding of Yorkshire, after he had received such writ of *habeas corpus*, discharged the defendant under an Insolvent Act, which had passed.

Lord Hardwicke, C., declared him guilty of a contempt in discharging the defendant before he had cleared his contempt: and ordered the High Bailiff to stand committed, unless he shewed cause to the contrary, which order was made absolute on the 14th of March following.

C. L. 7—

BENNET *v.* LEIGH.

1743. 2 Atk. 487, 529, S. C.

An infant, who answered by his guardian, neglecting upon attaining twenty-one to apply for leave to put in a new answer,* when he did apply it was refused.

[90] ANNESLEY *v.* EARL OF ANGLESEY.

(Reg. Lib. A. fol. 18.) 13 Feb. 1743.

Affidavit before a Master Extraordinary in Ireland read in this Court ; but affidavit from the Plantations cannot, unless under Seal of the Island.

[Mews' Dig. Evidence, IX. i. c. See Johnson *v.* Smith, 1782, Dick. 592.]

VAUGHAN *v.* VAUGHAN.

14 Feb. 1743.

A receiver, on his being appointed, entered into the usual recognizance with A and B as his sureties. A procured himself to be discharged, and the receiver entered into a fresh recognizance ; but the time for inrolling being elapsed, it was ordered to be entered *nunc pro tunc*.

[Mews' Dig. Receiver, IV, 2.]

WARNER *v.* WARNER.

25 Feb. 1743.

The bill was by the husband against the defendant Warner his wife, and another for a discovery ; and to have effects delivered up by the defendants. The plaintiff and his wife lived together, and she had no separate estate. The defendants applied to dismiss the bill. But there being a charge in the bill, that the other defendant had placed the property out in trust for the wife, the Court retained the bill.

[91] CLARK *v.* GREENHILL *et Ux.*

16 March 1743.

Decree directed lands to be sold, and all proper parties to join in the sale. The estate being sold, upon the purchaser's paying his purchase money into the Bank, all parties were ordered to join in the conveyance, and the Master to settle it. All executed but Agnes, the wife of the defendant John Greenhill : he was served with a writ of execution of the order ; but she could not be seen to be served. After hearing counsel on both sides, it was ordered that service of a writ of execution of the order on the said John Greenhill, or on any other person belonging to the family, should be good service on the said Agnes Greenhill.

[Mews' Dig. Husband and Wife, XI, 2, c.]

VAN *v.* PRICE.

19 Dec. 1743.

An application, without notice to commit the defendant for a contempt in abuse of the process of the Court. He was ordered to be committed, unless he shewed cause to the contrary on personal notice.

On 25th February 1743-44, he was ordered to be committed.

The like order was made by Lord Hardwicke, C., in Morgan *v.* Jones, 14th June 1745, for beating, &c., the person who served the process.

* Instances in which the Court hath given leave to a defendant, late an infant, to put in a new answer on attaining the age of 21 years. Bennet *v.* Leigh, Hil. 1740 ; Tancred *v.* Annison, East. 1752 ; Ernth *v.* Lord Baltimore, Hil. 1754.

[92] JACKSON v. LEE.

11 May 1743.

A decree by default. The defendant on shewing cause against it, objected the want of parties.

His Lordship allowed the objection, and the new party was named in Court.

VALLANT v. DODMEAD.

16 May 1743. 2 Atk. 592, S. C.

William Bristow, one of the sworn Clerks of this Court, having demurred to being examined as a witness, his demurrer upon argument was over ruled: a subpoena being taken out as of course for £5 the costs, and he not paying the same, and being a prisoner in the Fleet, it was moved that he might be suspended: and he moved that the subpoena might be discharged, as having issued irregularly, there being no particular order awarding the costs, and this not within the general rule of the Court. Lord Hardwicke, C., was of opinion, the plaintiff was not entitled to £5 costs, as of course, or that a subpoena might issue without an order, and set aside the subpoena as irregular, but ordered the said Bristow to pay £5 costs.

[Mews' Dig. Evidence, V, 8, a; VI, 8, a, ii.]

WILLIAMS v. WILLIAMS.

4 June 1743.

The defendant on putting in his answer may examine witnesses *de bene esse*.

[93] NEAL v. BILLING.

17 Jan. 1745. Wilkinson v. Cockell, 18 March 1750, S. P.

In case of a report under a reference for the Master to enquire and certify his opinion, exceptions are not to be taken to the report, but it is to be brought before the Court on the report for the Court to judge, and determine.

VENEMORE v. VENEMORE.

22 June 1743.

Upon the cause coming on to be heard, the defendant appeared, and the cause going off until a further day, the defendant then made default, and the Master of the Rolls pronounced an absolute decree against him. Thinking he ought to have had a day to shew cause against it, he appealed to the Lord Chancellor: and on the appeal coming on to be heard, his Lordship was decidedly of opinion, that where a party had paid obedience to a writ, he was not amenable to any other process. His Lordship cited *Halsey v. Smyth*, 3d July 1729, Mosel. 186.

SAUNDERS v. GRAVES.

1 July 1743.

The testator had given a voluntary bond.

Bill filed for the payment of it.

Payment was ordered, but not till after all the debts of the testator for valuable considerations were paid; and then to be paid in preference to the legatees.

[94] HAMLYN v. LEE.

18 Oct. 1743.

The estate in question being sequestered, and Cave and his wife claiming an interest by virtue of a mortgage; by an order dated the 12th February 1742 (Reg. Lib. A fol. 194), on the application of the plaintiff, they were to be examined *pro interesse suo*, and the plaintiff was to exhibit interrogatories for that purpose. The examination being taken by order, dated 9th June 1743 (Reg. Lib. A fol. 519), the Master was to look into the interrogatories, and the examination, and certify whether Cave and his wife had made out any title to the premises or not.

On the 28th July 1743, the Master made his report, that the claimants had made out their title. The plaintiff took exceptions to the report ; for that the Master instead of allowing the mortgage, ought to have certified the same to be fraudulent.

The exceptions on the 17th and 18th days of October 1743 (Reg. Lib. A. fol. 722), came on to be argued before Lord Hardwicke, C., when after hearing counsel on both sides, and the exhibits and depositions read, his Lordship over-ruled the exceptions, and allowed the claim, and directed a computation of interest, and an account of what was due.

His Lordship said, the taking of exceptions was not the mode, and was improper ; it was not a report to which exceptions lay, but should have been set down on the report ; but as the exceptions were brought on, and the parties desired it, he would determine them.

[95] On the 13th March 1743-44 (Reg. Lib. A. fol. 688), the matter came on to be heard for further directions on the report ; and the same was likewise again set down on the exceptions, when the report was confirmed, and the claim allowed ; and the sequestrators were ordered to deliver possession, and the plaintiff to pay Cave and his wife their costs.

[S. C. 3 Swanst. 301 n.]

DEBAZIN *v.* DEBAZIN.

13 Dec. 1743.

The plaintiff having sued out a writ of *ne exeat regno* against the defendant, he entered into a bond with two sureties, for his not departing the kingdom. The cause was afterwards heard, and there was a decree against the defendant for the same matter, for which the writ of *ne exeat regno* issued. The defendant being in contempt, and in custody, for not performing the decree, the sureties applied, and obtained an order, that they should be discharged, and the bond as to them cancelled.

[Mews' Dig. *Ne exeat regno*, 3.]

ANSTY *v.* DOWSING.

17 Dec. 1743.

Bill for discovery, and relief, plea to both ; allowed as to the relief, over-ruled as to the discovery.

[96] JONES *v.* JONES.

16 July 1744. 3 Atk. 217, S. C.

Upon hearing the cause on the equity reserved after trial of an issue ; proper parties appearing to be wanting, liberty was given to file a supplemental bill for the purpose of adding a new party.

SMITHSON *v.* HARDCASTLE.

27 Oct. 1744.

At the execution of the commission for the examination of witnesses, one of the witnesses demurred to being examined. The commissioners returned the demurrer with the commission. The commission and return ordered to be delivered to the two senior Six Clerks, not towards the cause, who were to copy so much of the interrogatories as was demurred to, and so as not disclose any part of the depositions ; and then to seal it up, and deliver it to the Six Clerk in the cause.

COGAN *v.* CAVE.

21 Dec. 1744.

The bill delivered amounted to £49, 0s. 6d. It was taxed at £45, 5s. 11d. In regard only £3, 14s. 7d. was taken off, which was not a thirteenth part ; it was referred back to the Master to tax the solicitor the costs of the taxation.

[97] SIR CHARLES DALTON AND OTHERS, freeholders, owners, and proprietors of several messuages, lands, tenements, hereditaments, in the township of East Hawkswell, in the county of York, Plaintiffs; and BEILBY THOMSON Esq. AND THOMAS LASCELLES, AND OTHERS, Defendants.

(Reg. Lib. A. fol. 553.) 5 Feb. 1745.

The matter of the demurrer by the defendant Beilby Thomson to the plaintiff's bill, coming this day before the Lord Chancellor, the demurrer being to so much of the bill as sought relief; for that it appeared of the plaintiffs' own shewing, that the bill was exhibited for perpetuating the testimony of witnesses, and for relief; whereas by the rules of the Court, the plaintiffs were not entitled to have any relief decreed to them on a bill brought to perpetuate the testimony of their witnesses; and for that it did not appear the plaintiffs had ascertained their title at law, to the matters in question. And the counsel for the defendants also insisting at the bar, for further causes of demurrer, that the plaintiffs had not proper parties to the bill, they not having made the lord of the manor of East Hawkswell a party thereto.

After hearing counsel on both sides, and reading the plaintiffs' bill, his Lordship held the said demurrer at bar to be good, and allowed it.

[98] STONEHOUSE v. STONEHOUSE.

(Reg. Lib. B. 187.) 19 Feb. 1745.

Injunction granted to stay proceeding in the spiritual Court for payment of a legacy until the hearing, and the plaintiff to speed the cause.

ATKINSON v. BEDEL.

18 March 1745.

A writ of *ne exeat regno*, having issued against the defendant until answer, and further order, the defendant upon putting in his answer applied to discharge the writ. The plaintiff opposed it upon the ground there were other acts to be done, which the Court must necessarily direct to be done at the hearing.

His Lordship denied the motion, saying, though the writ was granted until answer, yet it was likewise until further order, and this Court will not discharge such writ in case it appears upon the merits, that there will be necessarily decreed things for the defendant to do at the hearing; such as to deliver deeds, &c. &c., to discover, to convey, &c.

PHILIPS v. DERBIE.

15 May 1745.

The plaintiff in a revived suit, may revive the original bill in the same manner as the original plaintiff might, had he been living.

The plaintiff's testator filed his bill against the defendant: the defendant answered: the original plaintiff died, whereby the suit abated: the present plaintiff revived, and obtained an order to amend, [99] and serve the defendant with a subpoena to answer the amendments. The defendant not answering, an attachment issued against him; on application of the defendant, it was referred to the Master to see if the issuing of the attachment was regular: the Master reported it to be irregular.

The plaintiff took exceptions to the report: and on arguing the exceptions, it was insisted for the defendant, that the amendment was more properly by way of supplemental bill; but Lord Hardwicke, C. held that as the amended matter was in existence at the time of filing the original bill, the same was proper, and the issuing of the attachment was regular, and allowed the exception.

SMILES v. CHAYTER.

(Reg. Lib. B. fol. 281.) 18 May 1745.

A commission having been executed, it was sealed, with the depositions by the commissioners, and delivered to a person to be brought to the Clerk in Court, but it

accident it was lost on the road, and picked up by two travellers, who brought it to Mr. Allen one of the Masters; upon their affidavit that they had not opened or altered the same, it was ordered that the depositions should be received, and deposited in the hands of the Six Clerk, and a rule to publish entered thereupon, as if the depositions had been regularly returned by the hand of one of the commissioners, or the person who received them from the commissioners.

[Mews' Dig. Evidence, VII, 13.]

[100] BROWN v. HEATHCOTE.

24 May 1745.

The original bill was brought by the assignees of the defendant Williams, a bankrupt; the cause was heard, and two of the defendants not appearing, the decree pronounced was, as to them, to be unless cause. Before it was made absolute, the then plaintiffs the assignees, were removed, and the present plaintiffs being chosen assignees in their room, they filed a supplemental bill in nature of a bill of revivor, and prayed a subpoena for the defendants the defaulters, to shew cause against the decree, without praying that they should do so: all the defendants answered the new bill, and when the cause came on to be heard, one of the defendants who made default at the former hearing, again made default; but no subpoena to shew cause against the former decree had been served, nor did the plaintiffs by the supplemental bill, pray that the defendants might shew cause against the former decree.

It was objected to the plaintiffs proceeding so as to pray that the former decree might be carried into execution, its not having been made absolute.

Lord Hardwicke, C., held the objection to be good, and did no more than to order the former cause to be carried on, and prosecuted; and gave liberty to the present plaintiffs, to serve the defendants the defaulters, with a subpoena to shew cause against the former decree.

[101] ON BEHALF OF THE CROWN.

17 July 1745.

Reference to a Master, to see if any of the persons named, were guilty of the contempt laid to their charge.

PACKINGTON v. PACKINGTON.

3 Aug. 1745. *Vid.* 3 Atk. 215.

Upon shewing cause for continuing the injunction, which had been granted to stay the defendant, who was tenant for life, without impeachment of, or for waste, from cutting down trees which were planted, or were standing, or growing in vistas, or for shelter, or ornament, &c.; the plaintiff was going to read affidavits: but Lord Hardwicke, C., said it was unnecessary, for that the plaintiff being the eldest son of the defendant, and the first in remainder after his death, under the defendant's marriage settlement, the defendant in stating his own rights must shew the plaintiff's, and for that instead of denying the acts sworn to have been done by him, he admitted them, and insisted on a right under his settlement; but notwithstanding the defendant by his answer says, that although he had threatened to cut down, &c., it was not his intention, and that he did not mean to cut down any more; yet having uttered those threats, and having done what he ought not, it behoved the Court to prevent his doing further waste or spoil, and therefore the Court continued the injunction.

[102] His Lordship in the course of his reasoning, put these questions: On shewing cause to continue an injunction to stay waste, is the plaintiff confined, as in an injunction to stay proceedings at law, to make out his case from the answer only; and may the plaintiff strengthen his case by affidavits?

His Lordship said the plaintiff might read the answer to shew his right, and might also read affidavits to make out the waste.

[Mews' Dig. Waste and Timber, A, 3, b, iv.]

HYDE v. FORSTER AND MYERS.

5 Aug. 1745.

Service of a subpoena to appear, and answer on the agent, or factor in England, of another defendant who lived in Jamaica, ordered to be good service.

The plaintiff married a widow, who had a son by a former husband, living at Jamaica: he comes to England: she, without the knowledge of the plaintiff her husband, lent her son £1000 upon his bond to pay her an annuity of £100 for her life: she also, without the knowledge of her husband, purchased chambers in Barnard's Inn, but took the conveyance in the name of her son: and he executed an assignment in trust, to pay her an annuity for her life: the wife eloped, and took the writings relating to the chambers, and deposited them in the hands of the defendant Myers: the plaintiff the husband, filed a bill for a discovery, and relief: the son was at Jamaica at the time of filing the bill: the defendant Myers answered, and admitted he was agent, or factor in England, for the defendant Forster the son, and that he was in possession and receipt of the rents, and profits of the chambers, in trust for the defendant Forster: [103] the plaintiff applied, that service of a subpoena to appear and answer on the defendant Myers, might be good service on the defendant Forster: which Lord Hardwicke, C., ordered.

[See note to *Hales v. Sutton*, Dick. 26.]

LLOYD v. GRIFFITH.

7 Aug. 1745. *Vid.* 3 Atk. 264.

After hearing Counsel on both sides, the Court directed the Master forthwith to make his certificate, or report of his approbation of the draft of a conveyance, which he was to settle, in order that the party might except thereto.

The like order made by Lord Hardwicke, C., in *Huggins v. York-Buildings Co.*, 26th June 1753.

SMITH v. KIRKPATRICK.

2 Oct. 1745.

A witness in England not understanding English, a person was appointed to interpret the interrogatories, and the depositions taken thereon: and to be sworn to the truth of such interpretation.

The like order made by Lord Hardwicke, C., in *Gason v. Wardsworth*, 26th May 1752, 2 Ves. 325, 336.

[*Mews' Dig. Evidence*, VI, 4; VII, 8.]

[104] HAMLY v. FISHER.

11 Nov. 1745.

One legacy charged on real and personal estate, if that legacy exhaust the personal estate, the other legatees shall stand in his place against the devisees of the land, *pro tanto*.

William Roberts by will, dated 13th November 1745, gave several specific and pecuniary legacies, and having two sisters, gave one estate to one sister and her children, with remainders over: and gave a leasehold estate in the same way as far as he might, and the residue of his personal estate, after payment of debts, legacies, and funeral expences, he gave to his two sisters, equally to be divided between them, and made one of them executrix.

By a codicil of the 11th of July 1746, he gave an annuity of £40 out of an estate in Kent, and confirmed his will.

By another codicil dated 4th March 1747, which he declared to be part of his will, he gave £3000 to Elizabeth Roberts, besides all other legacies given to her, which sum he directed his executrix to pay within six months after his death: and charged all his estates, real and personal, with the payment of the same, notwithstanding any bequest either of real or personal estates to the contrary, by his last will or any codicils: such bequests and devises, to be subject in the first place to the £3000.

The personal estate was much more than sufficient to pay the legacies in the will, which amounted to £470, but the said last-mentioned legacy of £3000 exhausting the whole, the question was, whether the other pecuniary legatees should stand in the place of the legatee of the £3000 for their legacies, amounting to £470; against the devisees of the real estate.

[105] 2 Ventris, 358; *Herne v. Merrick*, 2 Salk. 416. 1 P. Wms. 201; *Clifton v. Birt*, 1 P. Wms. 678, 3 P. Wms. 324, were cited.

Lord Chancellor.—All the arguments at the bar tend to confirm me in the apprehension I first had of the case, after the will, and codicils were read.

There are some things in the marshalling of assets which are clear.

First.—If there be debts by specialty, and legacies, and a real estate descends to the heir at law; if the specialty creditors exhaust the personal estate, the legatees shall stand in their place against the descended estate, so far as the personal estate shall be exhausted by them.

Secondly.—If a real estate be devised, the legatees shall not stand in the place of specialty creditors, against the devised estate; because it is as much the testator's intent, that the devisee should have the specific real estate, as that the personal legatees should have their legacies, and no intent appears to prefer the one before the other: so if there be specific and pecuniary legacies, they shall not abate in proportion, and a pecuniary legatee shall not stand in the place of a creditor against a specific legatee; also if a man die indebted, and having both land and personal estate, give general pecuniary legacies, and all the rest and residue to another person, and the specialty creditors exhaust the personal estate, the legatees shall stand in their place against the residuary devisee, because the residue is not given as a specific thing.

The case mentioned of a legatee's not standing in the place of a bond creditor against a devisee of land, is by a rule, and construction of equity; but here the testator hath expressly charged the lands [106] with the £3000: There being then neither want of words, nor intention to charge it in the present case, which doth not differ from that of an estate specifically devised, and charged with the payment of debts, if the simple contract creditors exhaust the personal estate, the legatees shall stand in their place against the devised estate.

This question hath been considered as divided, namely, upon the will, and upon the codicil; but I shall consider it as if the words of the codicil had been inserted in the will, and made but one instrument, in which case there must have been one uniform intent, drawn from the whole will considered together: and the testator by declaring that the codicil should be taken as a part of his will, it is the same as if he had actually confirmed the will; and the giving of the £3000 legacies to Elizabeth Roberts, over and above all legacies given her by his will, is a declaration of his intent, that the legacies given by the will should be paid; and amounts to a revocation of the devise of the land *pro tanto*: I am therefore of opinion, that the general pecuniary legatees shall stand in respect of their legacies, in the place of the legatee of the £3000 against the devisees of the land.

[Mews' Dig. Executor and Administrator, X. d. S. C. *sub nom.* *Hanby v. Roberts*, Amb. 127, and *sub nom.* *Hanby v. Fisher*, 2 Coll. C. C. 512; see *Mirehouse v. Scaife*, 1837. 2 My. & Cr. 699; *Tombs v. Roch*, 1846, 2 Coll. C. C. 507.]

HYDE v. GREENHILL.

4 Aug. 1746.

A sequestration had issued, to sequester the personal estate, and the rents and profits of the real estate, of the defendant. He died: the suit was revived against his residuary devisee, and legatee: he applied this day to discharge the sequestration.

[107] *Lord Hardwicke, C.*, said a sequestration covered the personal estate, and the Court would direct a sale for a duty; it also covered the rents, and profits of the real estate, but not the land. His lordship ordered the sequestration as to the real estate to be discharged, but the sequestration being for a duty, and the suit having been revived, his Lordship would not discharge the sequestration as to the personal estate.]

[Followed, *Pratt v. Inman*, 1839, 43 Ch. D. 175.]

SUTTON v. STONE.

17 Dec. 1745.

Sequestrators ordered to sell a leasehold estate, sequestered for a duty.

On a similar application, Lord Loughborough, C., refused it, saying, who is to make out the title?

JERNEGAN v. GLASS.

(Reg. Lib. A. fol. 155.) 24 Jan. 1747. 3 Atk. 409, S. C.

A writ of *ne exeat regno* against a feme covert executrix.

Order for a writ of *ne exeat regno* against the defendant Frances, the wife of the defendant Glass, until answer and further order, and to be marked in the sum of £1800.

The order states, it appears by the affidavit of the plaintiff, that the said Frances Glass, the executrix of Henry Jernegan, had possessed all his goods and effects, and had withdrawn herself from her late habitation, and had not given any account of them, or paid the plaintiffs what was due to them, for their [108] portions or maintenance; that the defendant John Glass her husband, had actually gone into parts beyond the seas, with part of the effects; and that she threatened to follow speedily, whereby it would be impossible to recover their demands; that there was due to the plaintiff Frances Jernegan, from the estate of her father, £624, 18s., and to the other plaintiff £1200, as they computed the same; that the defendant Frances Glass did, sometime in September last, declare that the plaintiffs, and the other creditors might make themselves easy, for that the testator had left assets to pay all his debts.

Upon reading the affidavit, the order was made.

A doubt being raised as to the propriety of granting a writ of *ne exeat regno* against a feme covert; Lord Hardwicke cited the case of Moore v. Meynel, *supra* [Dick. 30]

HAIL v. CAMP.

4 Nov. 1746. Before Mr. Baron Clarke, sitting for Lord Hardwicke, C.

Bill amended, and the plaintiff amends the defendant's copy of the bill; no occasion to serve the defendant with a subpoena to answer the amendment to put the matter in issue.

The plaintiff obtained the common order to amend his bill, amending the defendant's copy; the plaintiff amended his bill by adding a charge, but did not serve the defendant with a subpoena to answer the amendment; and goes to commission, and examines witnesses to support such charge.

When the cause came on to be heard, a direction was prayed in consequence of such new charge.

It was insisted on the part of the defendant, that the same was not in issue, as he had not been served with a subpoena, and that it was a surprise upon him.

[109] *Per curiam* after enquiring into the practice: The plaintiff did not serve the defendant with a subpoena; yet he amended his copy of the bill, whereby he had an opportunity of seeing the amendment; and he might have answered it had he pleased, and also have gone to commission with the plaintiff; and therefore I am of opinion the amendment is in issue, and that the proof in support of it should be read.

BAGSTER v. WALKER.

14 March 1746.

An injunction revived, upon the defendant's praying a *dedimus* to answer an amended bill; moved upon notice, and after hearing counsel on both sides.

HANKWITZ v. O'CARROLL.

1 May 1746.

A decree *nisi*: the defendant set down the cause in order to shew cause against it and again made default; and the decree was made absolute. The defendant shewed

an order to rehear the cause upon terms : the plaintiff applied this day to discharge the order ; but Lord Hardwicke, C., denied the motion, although he disapproved the delay.

[110] READ v. WARD.

11 June 1746.

Exceptions being frivolous, the exceptant was ordered to pay 20s. for every exception over-ruled, and 10s. for every exception waived.

BULLOCK v. PERKINS.

5 July 1746.

The cause at hearing went off for want of parties, with liberty for the plaintiff to amend. The plaintiff under the order struck out many charges in the bill which the defendant had answered ; ordered on application to be restored, that the Court might give the defendant the costs of such part of the bill as the plaintiff had waived.

The cause at hearing went off for want of parties ; and the usual order was made for liberty to amend the bill by adding parties, and the plaintiff to pay the costs of the day : the defendant accepted the costs : the plaintiff amended his bill by striking out several charges, which had led the parties necessarily into the examination of witnesses. The cause was again brought on to hearing, and the like objection was made for want of parties, and the like order as before for amending the bill. The plaintiff again amended his bill by striking out some further charges and adding new matter, and praying relief against the defendants generally.

The defendants, by Mr. Attorney General and Mr. Clark, their Counsel, the above 5th day of July moved to discharge the amendments as irregular, or to refer it to the Master to state whether regular or not.

Mr. Solicitor General and Mr. Brown, Counsel for the plaintiffs, could not conceive there was any difference between the plaintiff's striking out before, and waiving at the hearing such part of the bill, as he should be advised.

[111] *Lord Chancellor.*—The difference is very obvious ; because, if the plaintiff will waive any part of the bill at the hearing, the matter is then before the Court : the Court will direct the plaintiff to pay to the defendant the costs of such part of the bill as is waived ; but by striking out the plaintiff makes himself, as it were, his own judge, and by preventing that matter's coming before the Court, from which it is evident he could expect no relief, prevents the Court from doing that justice to the defendant which it otherwise would. And it would be a matter of great consequence, and of great injustice to a defendant, if a plaintiff should be permitted to act in this manner ; for a plaintiff might bring a vexatious bill, and put the defendant to great expence in taking a copy of it, in answering it, and examining witnesses ; and then, after publication is passed, upon seeing the depositions, and finding thereby that he hath no equity, might, under pretence of amending his bill, strike out such part as he cannot expect relief from, and thereby prevent the Court from doing that equity to the defendant (by ordering him his costs), which the plaintiff hath not in himself.

But as to the first amendment, the defendant, by accepting the costs thereof, and not complaining in time, hath estopped himself from making any complaint now.

As to the amendment under the second order, and the plaintiff's new charges, and praying relief generally against all the defendants, it must be considered against the original defendant in the nature of a supplemental bill, and therefore improper by way of amendment, and for that reason I hold the last amend-[112]-ment to be irregular ; and as the irregularity appears, the Court will not send it to a master to state it, but will order the last amendment, as to striking out some charges, and adding other charges against the original defendants, to be discharged, and the plaintiff's bill to be restored to what it was before ; and the plaintiff to pay the costs occasioned thereby, and of this application.

[See *Monck v. Earl of Tankerville*, 1839, 10 Sim. 285.]

LEE DICHER *v.* POWER.

5 July 1746.

Liberty given to sue out a commission to examine persons who were about to go abroad, *de bene esse*, and the defendant to accept four days' notice of the execution of the commission; after hearing counsel on both sides.

[Mews' Dig. Evidence, VII, 4, a, ii; 9.]

BINSTED *v.* BAREFOOT.

17 July 1746.

On an application by one Anderson (who was concerned as agent in London for a country solicitor), to discharge an order for taxing a bill of fees, and disbursements, Lord Hardwicke, C., declared, that agency business did not come within the act of parliament, and discharged the order.

[See Jones *v.* Roberts, 1837-38, 8 Sim. 401; *In re* Smith, 1841, 4 Beav. 313.]

JOBSON *v.* LEIGHTON.

20 May 1741.

Affidavit referred for scandal.

[113] PHILIPS *v.* MULLMAN.

6 Nov. 1746. 3 Atk. 391, S. C.

Affidavit referred for impertinence.

ATTORNEY GENERAL *v.* CARTE.

19 Nov. 1746.

Gilchrist *v.* Godfrey, 20 Jan. 1758, S. P.; Corbet *v.* Leighton, 14 Jan. 1759, S. P.

Costs decreed out of the estate, upon application, directed to be taxed, as between solicitor and client.

BAGSHAW *v.* BATSON.

Mich. 1746.

The plaintiff having obtained an order to amend his bill, amending the defendant's copy, and requiring no further answer from the defendant, amended his bill accordingly. On hearing the cause, directions were prayed on the amendment.

On the part of the defendant it was objected the amendment was not in issue.

Lord Hardwicke, C., said, as the plaintiff had amended the defendant's copy of the bill, he might have answered, and put it in issue, and therefore gave directions on the amendment.

[114] SKIPP *v.* HARWOOD.

(Reg. Lib. B. fol. 383.) 1746.

Vid. 3 Atk. 564. Receiver so appointed in Parsons *v.* Parsons, 26 July 1744, and in Bullock *v.* Bullock, East. T. 1771.

Receiver appointed of partnership stock in trade, goods, effects in the brewing trade, of debts due, and to accrue; and for him to act as broad clerk in the brewing trade, and to collect in debts according to the course of trade; and for him to pay the excise and other charges; and for him to bring actions in the name of the partners, or of the late partner.

FAIRLAND *v.* ENEVER.

(Reg. Lib. A. fol. 28.) 20 Nov. 1746.

Cash in the bank in the cause detained to answer the solicitor's bill of fees, and disbursements.

An injunction granted upon the plaintiff's paying the money sued for into Court; the parties afterwards settle the matter, and apply, without the knowledge of the

defendant's solicitor, to have the bill dismissed, and the money paid out of Court. This coming to the knowledge of Geo. Ward, solicitor for the defendant, the Court, on his application, ordered part of the money to be attached to answer his bill of fees, and disbursements.

[115] CANNON *v.* BEELY.

12 Jan. 1747.

Costs were directed to be paid out of the estate : the defendant in whom the estate was vested refusing to pay them, sufficient of the estate was ordered to be sold to pay the costs, as a subpoena would not lie against the defendant for them.

BOON *v.* COLLINGWOOD.

23 July 1747.

Ne exeat regno till answer, and further order. The defendant having put in his answer, he applied to discharge the writ, which was ordered, on his giving security to abide the event of the cause.

[Mews' Dig. *Ne exeat regno*, 5.]THOMPSON *v.* TOOK.

10 July 1733.

Depositions allowed to be read, though taken during an abatement.

Application to suppress depositions, for that they were taken during an abatement, upon reference to one of the Masters to enquire into the regularity.

He, by his report, dated the 13th June 1733, certified, that it had always been deemed irregular to execute a commission during an abatement, but as such practice must be fatal in some cases, and expensive in all, he hoped it did not so far prevail as to be the established rule of the Court, and therefore, as it appeared to him, the commission was regularly executed ; and that the conscience of the Court might be as fully informed [116] from the depositions of the witnesses taken under such commission, as if there had been no abatement ; that he could not see anything irregular in the execution thereof, or that the defendants had any reason to complain they were injured thereby, but that, on the contrary, the plaintiff would be greatly injured was he to lose the benefit of the witnesses examined under the commission upon a matter of form ; and therefore, and for the reasons mentioned in a case *Crew against Vernon*, determined by the Lord Keeper, assisted by four Judges, and reported in *Cro. Car.* fol. 97, he conceived there was no irregularity in the execution of the said commission.

Upon which report, after hearing counsel on both sides, Lord Talbot, C., allowed the depositions to stand.

[Mews' Dig. Evidence, VII, 14, b.]

PETERS *v.* ROBINSON.

12 Feb. 1747.

On a similar application, Lord Hardwicke, C., declared he thought it was greatly for the convenience of the suitor ; and as an authority was produced to him, he thought he was tied down thereby, and therefore allowed the depositions to be made use of.

POWEL *v.* FOLLET.

20 Oct. 1747.

Lord Hardwicke, C., held that if a party, or his attorney, having knowledge of an injunction's being granted, proceed at law, he is guilty of a contempt, though the injunction be not sealed.

[Mews' Dig. Injunction, C, 9 ; 10, b.]

[117] JOHN SWINISEN, executor of MARY the widow, and executrix of LEWIS SCAWEN, and also administrator *de bonis non* of the said LEWIS SCAWEN, with his will annexed. Plaintiff: DAME MARY SCAWEN, the widow and executrix of SIR THOMAS SCAWEN, and her two younger sons, the residuary legatees, Defendants.

(Reg. Lib. B. fol. 129.) 23 Feb. 1747, reheard 18 June 1748. 1 Ves. 99, S. C.

Interest at 5 per cent. decreed on a legacy for mourning under special circumstances.

Sir Thomas Scawen by his will, dated in July 1730, gave £200 to the said Lewis Scawen for mourning, and the residue of his personal estate to the defendants his younger sons, and appointed the defendant Dame Mary his wife executrix. In September 1730 the testator died, and his widow proved the will. His personal estate was very ample, consisting principally of mortgages and other securities.

The legacy not having been paid, the plaintiff in the aforesaid right file his bill for payment (amongst other things) of the said legacy, with interest at 5 per cent., stating that the testator's personal estate was greatly more than sufficient to pay his debts and legacies, and that it consisted of mortgages and judgments, carrying interest at 5 per cent.

The defendant Dame Mary Scawen admitted the will, and the death of the testator at the time stated; that she proved the will; and that the testator died possessed of personal estate more than sufficient to pay [118] his debts and legacies; but that, she being aged, and infirm, her two sons, the other defendants and the residuary legatees, had principally acted in the testator's affairs; that all the debts and legacies had been paid except the plaintiff's demand; and said, that the personal estate was out upon securities; amongst others, £12,000 upon one judgment, carrying interest at 5 per cent.; and another part upon a mortgage for a large sum, carrying interest likewise at 5 per cent.; that not being able readily to get in the mortgage money, she, with the consent of the residuary legatees, had, out of the personal estate, purchased the equity of redemption, but that it had been agreed that such purchase should be considered as personal estate; and said further, that when she could get in assets, she was willing and desirous to pay the plaintiff's said legacy.

Upon this case Lord Hardwicke, C., decreed payment of the legacy, with interest at 5 per cent.

(And indeed I do not see how the Court could do otherwise; for all the debts and legacies being paid except the plaintiff's, and the funds to pay it being out at interest carrying 5 per cent., the residuary legatees, were they to pay only 4 per cent., would be putting 1 per cent. out of the plaintiff's legacy into their pocket so long as they neglected to pay; and it being said at the bar, that it was usual for the Court, at the time the cause was heard, to give 5 per cent. interest on legacies; I searched the Minute Books for several years before, and since that period in Lord Hardwicke's time, and did not find any other decree for an account of legacies, that departed from the uniform language; for the Master to compute interest on the legacies from the end of one year after the testator's death, after the rate of 4 per cent. per annum, unless any other time of payment, or rate of interest is fixed by the will, and in that case, according to the will.—J. D.)

[119] MACKINTOSH v. OGILVIE.

10 March 1747.

The defendant, a creditor of the bankrupt, having arrested and received part of bankrupt's effects in Scotland, a writ of *ne exeat regno* granted against him.

The plaintiffs were the assignees of J. Aberdeen, a bankrupt, who had effects in Scotland: the defendant was a merchant in London, and a creditor of the bankrupt for £31. He arrested the bankrupt's effects in Scotland in the hands of the bankrupt's debtors, and obtained a decree or sentence according to the laws of that country for payment of the money, and received part; and being about to go abroad, the plaintiff, on the 24th February 1747, obtained an order for a *ne exeat regno*, till answer, and further order. The defendant on the above day applied to discharge the writ.

Lord Hardwicke, C.—Commissions of Bankruptcy extend to all creditors in England, and as the defendant is resident in this country, he is subject to the laws thereof, and therefore I will not permit any person to pass into Holland, or Scotland, where arrests are allowed, to gain a total satisfaction of their debt, in prejudice of the other creditors. For if he goes out of England, and out of the reach of the process of this

Court, his agents may recover the debt, and he can never be accountable here ; therefore let the writ continue.

SHELLY v. PELHAM.

[120] (Reg. Lib. B. fol. 194.) 7 March 1747.

Order on petition of a receiver, answered without an attendance, that he might distrain in the names of the trustees, not only for the arrears of rent, but as there should be occasion. But query.*

[Mews' Dig. Receiver, VIII, 6.]

KNIGHT v. EARL OF PLYMOUTH, *et c contra*.

(Reg. Lib. A. fol. 341.) 9 April 1747. 3 Atk. 480, S. C.

This matter came before the Court upon the petition of Thomas Lewellin, the receiver appointed in the first cause of the estates of Thomas Lewis, the testator, in the pleadings named, praying to be allowed a loss that had happened in remitting the rents received by him to town, through an unforeseen event : the petition stated, that the said Thomas Lewis died seised of estates in Wales of very large extent and great yearly value, on part of which he had created terms, and vested the same in trustees, for payment of £300 a-year to his wife for life, as a jointure ; and other part thereof he had devised, subject to debts, and legacies ; that he was greatly indebted, and particularly to the father of the present Earl of Plymouth, by mortgage in £25,000.

That the plaintiffs in the first cause had filed their bill to be paid their debts, and legacies, and that upon hearing the said cause a decree was pronounced, directing the necessary accounts, and ordering payment ; that [121] the petitioner had been appointed the receiver, under an order for that purpose.

That the plaintiffs in the second cause had filed their bill, to have the said £25,000 raised and paid ; which had been decreed, and a receiver was directed to be appointed of the said late earl's personal estate.

That by an order in the first cause, the petitioner was directed to apply the rents of the premises in mortgage, in keeping down the interest of the mortgages ; that the petitioner kept the rents distinct, and paid the balances as he was ordered.

That in February 1740 he set out from Cardiff for London, to pass his accounts from Michaelmas 1738 to Michaelmas 1739, and in order to pay such balances as should be found due from him ; he sent before him to Bristol £826, in order to procure bills to return to London, and carried himself to Bristol £350 for the same purpose ; that when he came to Bristol, which was later than he designed, he found the person by whom he had sent the £826 had carried it back to Cardiff ; that the petitioner as soon as he arrived at Bristol, applied to William Winsmore, who had before returned large sums to town, for and on account of the estate, whose bills had always been paid, and who was at that time in high credit, as the petitioner apprehended, for bills payable in London for £350, and thereupon Winsmore gave him a bill, dated the 4th of February 1740, on one Thomas Harris in London, for £350, payable to the petitioner or order, twenty-one days after date ; the petitioner also mentioned to him the accident of the £826 being carried back to Cardiff, and desired him to give a bill for it when returned ; and on the said £826 [122] being brought back and paid into the hands of the said Winsmore, in order to be returned to London, he gave to the petitioner's clerk two bills on the said Harris, both dated the 7th February 1740, one for £426, the other for £400, payable to the petitioner or order, one month after date ; the three bills were accepted, but before they were payable, Harris disappeared, and the petitioner protested the bills, and on the 3d of March, Winsmore became a bankrupt, and his estate and effects were assigned to his assignees.

The petitioner passed his accounts to Michaelmas 1739, and the balance found due from him was £910.

The petition then states, that the petitioner had received from Winsmore's estate a dividend of 2s. 9d. in the pound upon the said £1176, and that the proportion thereof in respect of the said balance of £910 amounted to £124, 4s. 10d., so that there was still due to him on account of the said balance £785, 7s. 6½d.

* In *Raincock v. Simpson*, 12 March 1764, Lord Northington, C., held that if the tenant had attorned to the receiver, he might distrain without an order.—J. D.

That the petitioner having passed his accounts up to Michaelmas 1744, of the respective estates, and balances being found due from him to the Earl of Plymouth, the executors and trustees in the will of the testator, and the testator's widow, applied by petition, that the said Mr. Lewellin the receiver, might pay the said respective balances; that by an order thereon, it was referred to the Master to enquire as to the fact of the said £1176 being remitted to London by the petitioner, and upon what occasion the remittances were made, and in what manner and at what times, and when Winsmore became a bankrupt, and how much of the said £1176 had been [123] received, and was likely to be received, out of Winsmore's estate; that on the 3d of August 1747, the Master reported that he found the money had been remitted to London at the times, and in the manner, and for the purposes before stated; that there had been a dividend of 2s. 9d. in the pound, and that it was thought there would be a further dividend of 4s. 9d.

And therefore the petitioner, Thomas Lewellin the receiver, by his said petition prayed, that he might be allowed out of the balances found due from him, what he had lost by Winsmore's bankruptcy.

(Thus far the case is stated from the book of entries.—J. D.)

On the 14th April 1747, the petition came on to be heard.

On the part of the petitioner, it was argued he was an officer of the Court, and acted under the directions of it; that he had always paid his balances, according to orders for that purpose; that the persons to whom he was ordered to pay his balances, being in London, the means he took to get so large a sum to town, was the only one he could with any degree of prudence think of; that there was no *mala fides*; that there had been no neglect, nothing wilful, in short, nothing had been, nor could be imputed to his conduct in the discharge of his duty; that as the loss had happened by his being ordered to pay his balances to persons who lived at such a distance, it was unreasonable he should be subject to the loss; it was unconscientious to attempt it.

On the part of the trustees, executors, and the infant, it was argued, that true as it was that Mr. Lewellin was an officer of the Court, yet that this was an office not imposed, but sought by him with a view [124] to gain; that the order under which he was appointed, directed an allowance to be made him for his care and pains; and that by his recognizance he was bound to account for and to pay what he should receive, as the Court should direct; that the Court had directed the manner, and to whom he was to make his payments; that it was by him the parties expected to be paid; and that it was no concern to them, by what means or in what manner he got his money to London; if it were attended with difficulty or trouble, he was paid for it; if with hazard, he could not but be sensible of it, before he accepted the appointment; that though they might feel for his loss, they were not to be affected by it; that they were trustees, and concerned for creditors and an infant, and whatever might be their feelings, and however they might be disposed, was it their own immediate concern, they could not without violating their trust, avoid insisting on his paying the balance found due from him.

Lord Chancellor.—The matter before the Court arises upon a loss occasioned by an unforeseen event, and the question is, by whom it is to be sustained; to determine which, it will be necessary to take a view of the history of the case, and the circumstances attending it.

Mr. Lewis the testator, was seised of very large and extensive estates in Wales, for the management of which, and to receive the rents, he employed agents; being greatly in debt, by his will he created several trusts, and appointed trustees to see those trusts executed; as it was an office that would of necessity be attended with great trouble, it cannot be imagined he meant they should do more than he did himself. [125] that is, superintend and examine the accounts of those they should employ to receive the rents, &c., and see to the application of the rents, according to the respective trusts. They accordingly did employ agents; and when they received the rents from them, they remitted the balances to town as Mr. Lewellin had, by bills drawn on persons in town, and some through the hands of Mr. Winsmore; to relieve themselves from that trouble and charge, the trustees upon filing the bill in that cause, applied for or at least assented to, an application to appoint a receiver of the said estates, which was ordered; and in consequence of it, Mr. Lewellin was appointed the receiver, against whose conduct there hath not been the least imputation; on the contrary, it appears he hath discharged his duty with great punctuality, having regularly every year passed

his accounts, and as constantly paid his balances. Having collected his money together to a large amount, £1176, he set out for London, in order to pass his accounts, and that he might pay the balance when his accounts should be passed, he paid the money into the hands of a person, by whom he had before remitted money, as the trustees themselves had before done; and took bills payable to himself or order at a future day in London; Mr. Winsmore, the drawer of the bills, was at that time in high credit, and there was not then the least suspicion of his circumstances, and had it not have been for the unforeseen event of the bankruptcy of Mr. Winsmore, Mr. Lewellin would have paid the balance due from him, as he had before constantly done; the method Mr. Lewellin took was highly prudent; it was well intended, and the only way he could take, unless he [126] had carried the same himself, in bills such as he could procure in that country, or in specie, the hazard of which would have been great: and if a loss had then happened, in my opinion, he would have been, if not answerable, highly blameable.

Suppose there had not been a receiver, but the trustees had been to receive and pay the money, is it to be thought the Court would expect them in person to bring up all the money they received in specie? Certainly not: for as it would have been attended with hazard, it would have been very imprudent in them, and they would have been blameable had they attempted it. What other means could they have taken to get their balances to town than the means pursued by Mr. Lewellin? And had the same loss happened to them, and through the same unforeseen event, as is the subject of the present question, can it be supposed the Court would have thrown the loss upon them? Most assuredly not.

Suppose a trustee, having in his hands a considerable sum of money, places it out in the funds, which afterwards sink in their value; or on a security at the time apparently good (which afterwards turns out not to be so), for the benefit of the *cestui que* trust, was there ever an instance of the trustee's being made to answer the actual sum so placed out? I answer, No. If there is no *mala fides*,—nothing wilful in the conduct of the trustee, the Court will always favour him. For as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble, and anxiety, it is an act of great kindness in any one to accept it: to add hazard or risque to that trouble, [127] and to subject a trustee to losses which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office. This is my opinion upon the case had the trustees themselves acted.

It hath been said Mr. Lewellin is an officer of the Court, and paid for his trouble. It is true he is so; but I look upon him to be something more.—I consider him as a trustee substituted in the place of the trustees (they having declined to act), *quoad* the receiving of the rents, and paying the balances. It appears, and indeed it is not denied, that from the time of his appointment to this moment he hath faithfully discharged his duty: the loss that hath happened was not through the least default or remissness in him; the precaution he took to get his balances to town was prudent, and justifiable: and as it is my opinion the trustees, under the like circumstances, would not have been liable, I hold Mr. Lewellin, as their substitute, is not. "And therefore let Mr. Lewellin the receiver be allowed out of the balances in his hands the sum of £785, 7s. 6½d., being the money which cannot at present be had out of the estate of the said Winsmore the bankrupt; and let the said Mr. Lewellin the receiver pay the residue of the said balance; and then let the executors and trustees stand in the place of the said receiver, to receive out of the estate of the said bankrupt such dividends as he would have been entitled to in respect of the said £785, 7s. 6½d."

[Mews' Dig. Receiver, X, 1.]

[128] ATTORNEY GENERAL *v.* BURROWS.

6 May 1747. Anon. 3 Atk. 485, S. C.; *Vid.* Countess of Strathmore *v.* Bowes, inf. [Dick. 673].

The defendant's denying he had committed waste since the filing of the bill, Lord Hardwicke, C. said was not an inducement to refuse an injunction; for as he admitted he had done waste, he might do further waste.

(Suppose it had been the first time a doubt had arisen respecting the admission

of proof in support of an injunction to stay waste, it is submitted whether the defendant, by taking notice of the affidavits upon which the injunction was founded, and saying they were almost wholly untrue, doth not call upon the Court to enquire what these affidavits are. The Court is concerned; for if untrue the Court was imposed upon, and misled to grant the injunction: it true, the same reason will hold for continuing, as there was for granting the injunction: and further, the defendant, by saying that part of the affidavits was untrue, is in effect admitting the other parts to be true; and that part may be such as to warrant the injunction.—J. D.)

[Mews' Dig. Waste and Timber, K, 1.]

BROMLY v. CHILD.

21 May 1747.

The plaintiff exhibited interrogatories before the Master pursuant to the decree, and examined the defendant. He afterwards applied for, and obtained an order, as of course, to exhibit new interrogatories. Motion on this day to discharge the order. Lord Hardwicke, C., said, this Court will not let parties exhibit interrogatories as of course, for it will occasion the lengthening of suits, and vexation, as for instance, amending bills. But on special application it may be done.

[Mews' Dig. Accounts and Inquiries, 12, c, d.]

[129] WILLIAMSON v. HENSHAW.

(Reg. Lib. B. 396.) 26 June 1747.

An order to confirm a report absolute in 1767. It appeared by the Minute Book to have been drawn up, but not entered. And the order being lost, liberty was given to redraw up the order, and to enter it *nunc pro tunc*, though to charge interest.

EARL OF DERBY v. DUKE OF ATHOL.

8 Feb. 1748. 2 Ves. 357, S. C.

The bill was to determine the right of the Isle of Man. Plea, amongst other things, to the jurisdiction of the Court: but the defendants by their plea not pointing out where the matter was proper to be determined, Lord Hardwicke, C., disallowed the plea; declaring, that in pleas of this nature it was incumbent on the defendant to shew what Court had the jurisdiction whereby he would bind himself: otherwise a defendant might object the same in every Court, and thus the plaintiff might be deprived of the relief to which he was entitled.

[Mews' Dig. Court, D, 1.]

LLOYD v. NANGLE.

2 Nov. 1747.

If a solicitor grossly neglects his client's concerns, this Court will exercise its jurisdiction in a summary way by attachment, as at law.

[Mews' Dig. Solicitor, J, III. S. C. 3 Atk. 568.]

[130] BENNET v. WALKER.

16 Nov. 1747.

The answer of one defendant read as evidence to support the plea of another defendant.

On arguing a plea, a question arose, whether the defendant could read the answer of another defendant, to which by the answer put in by him he referred, in support of his plea. The plea was, of his being a purchaser with notice: and by his answer he said he purchased of the other defendant, and believed such other defendant had notice before he purchased, but refers to the answer of such other defendant, which did not admit notice, or sufficiently deny it. Lord Hardwicke, C., permitted the answer of such other defendant to be read.

BARNESLY v. POWEL.

15 Dec. 1747.

Goods sequestered being insufficient to answer a duty decreed, the Serjeant at Arms revived.

The Serjeant at Arms had gone after the defendant, and on his return a sequestration issued for not performing the decree. The defendant being a barrister, and constantly going the circuits, and the effects sequestered being insufficient to satisfy the decree, the Serjeant at Arms was revived. This was opposed as a double execution, but after solemn argument allowed: the commitment being to answer the contempt, the sequestration *ad satisfaciendum*.

HILL v. ALLEN.

3 Feb. 1747-48. 1 Ves. 83, S. C.

If a master encourages his apprentice to go to sea, and he takes a prize, equity will not assist him to receive his apprentice's share of the prize money.

Bill by the master of an apprentice to be paid his apprentice's share of some prize money, the apprentice having eloped.

[131] *Lord Chancellor*.—In general the master is entitled to the earnings of apprentices; but yet if the master encourages him to go to sea, and to put himself in a different way, I should very much incline to relieve against that rule of law, in an action brought by the master, because it tends to encourage masters to seduce their apprentices to leave them; but in the present case (as the evidence is), the master has been so far from seducing the apprentice to go aboard a privateer (in which he took a prize), that he dissuaded him from it. His Lordship recommended it to the parties to agree, or otherwise said, he would let the parties go to law in an action, as he did in *Meriton* against *Hornby*. [1 Ves. 48.]

KEMP v. SQUIRE.

10 Feb. 1748. 1 Ves. 205, S. C.

The solicitor of the plaintiff an infant, having suffered the bill to be dismissed for want of appearing at the hearing, and the order of dismission to be inrolled; the inrolment was set aside after the plaintiff had attained twenty-one, and he was at liberty to rehear the cause.

The bill was brought in the name of the plaintiff an infant, to be relieved against a fraudulent assignment of his share of prize money; the plaintiff's solicitor served the defendant with a subpoena to hear judgment, but neglected to instruct counsel to appear for the plaintiff at the hearing (because, as he alledged, he could not get anything towards his bill of costs), in consequence of which the bill was dismissed. Three months after, no caveat having been entered, the decree was inrolled, and set up by the defendant, in bar of the plaintiff's right: the plaintiff having attained the age of twenty-one, he applied to have the inrolment discharged, which Lord Hardwicke, C., granted, upon the plaintiff's paying the defendant the costs occasioned by his not appearing, [132] and the plaintiff was to be at liberty to rehear the cause.

His Lordship cited *Robson v. Cranwell*, 18th December 1731, S. P.

HYDE v. FORSTER.

9 Feb. 1748.

Sequestration against a defendant on mesne process abates on the death of the plaintiff, but is revived with the suit.

The defendant was in contempt to a sequestration, for want of his answer: the suit abated by the death of the plaintiff: his representatives revived, and obtained an order for the clerk in Court to attend with the record of the bill, in order that the same might be taken *pro confesso*. The question was, whether there was not an end of the

contempt, as it was upon mesne process. After hearing counsel on both sides, Lord Hardwicke, C., declared, that as the suit and proceedings were revived, the plaintiff was regular : but the defendant alledging his answer was filed the morning the order was obtained, his Lordship, upon the defendant's paying the costs of his contempt, accepted his answer, and discharged the order.

[See *Wharam v. Broughton*, 1748, Dick. 137.]

ITHEL v. BEAN.

28 Feb. 1748. [1] Ves. 215, S. C.

The testator charged by his will his freehold estates with the payment of his debts : he had no freehold estates, but had copyhold, which he had not surrendered to the use of his will. Lord Hardwicke, C., directed the defect of the surrender, to be supplied for the benefit of creditors.

[Mews' Dig. Copyhold, G. 1. b. : c ; Will. IX. k. 2. i. See *Price v. Jenkins*, 1576, 4 Ch. D. 489 ; *Gale v. Gale*, 1877, 6 Ch. D. 149.]

[133] *Ex parte Ross*.

18 April 1748. *Vid. Spettigue v. Carpenter*, *supra* [Dick.] 66.

Application to remedy a mistake in making a bond of submission, an order of Court, after the award under it was made.

SAMSON v. OVERTON.

(Reg. Lib. B. fol. 152.) 18 May 1748.

The defendant the wife had appeared ; she afterwards absconded : process against the husband and wife, but to be stayed against the husband, and liberty given to sue out a commission of sequestration against the wife.

GOULD v. BARNES.

20 May 1748.

Bill for a discovery : the defendant answered : the suit afterwards abated ; held by Lord Hardwicke, C., it was not to be revived.

DUPONT v. WARD.

27 Jan. 1748.

The defendant is in custody for his contempt, in not putting a better answer : having put in an answer he applied to be discharged, which was ordered : no exception having been taken to the second answer.

The defendant was in custody for his contempt in not putting in a better answer, his former answer having been reported insufficient ; while in custody he put in another answer, and applied this day to be discharged, on paying the costs of his contempt. It was opposed by the plaintiff, who alledged it was upwards of twelve months before the defendant, [134] who was the well-known John Ward of Hackney, could be taken on the attachment which had issued against him for want of his answer : that the answer put in was before counsel ; that he was persuaded it was insufficient, and that he meant to take exceptions ; that the bill was for a discovery, and were the defendant to be discharged, the plaintiff would not be able to get an answer.

Lord Hardwicke, C., said, as to what or who the defendant is, this Court hath nothing to do with it ; here justice is to be distributed without favour or affection : the defendant being in contempt for want of his answer, an attachment hath issued : he hath been taken upon it, and is in custody ; he hath since put in an answer, and applies to be discharged, upon payment of the costs of his contempt. The answer until found otherwise, must be taken to be sufficient : no exception hath been taken, and to detain him until exceptions shall be taken, and it shall be seen whether the answer is sufficient, is contrary to every principle of justice. Suppose I should refuse the motion, and the plaintiff should take exceptions, and the answer should be found

sufficient, what recompence could be made to him : therefore let him be discharged out of custody, upon payment of the costs of the contempt to be taxed, and let the plaintiff deliver a bill in two days.

[135] ATTORNEY GENERAL *v.* SMITH.

10 Nov. 1748.

The defendant being in contempt for want of his appearance, and a prisoner in York Castle, Mr. Wilbraham on behalf of the plaintiff, to save the trouble and expence of bringing him up by *habeas corpus*, moved to take the bill of revivor *pro confesso* against him. Lord Hardwicke, C., said, the plaintiff must pursue the statute of the 5 Geo. 2 to render process effectual, &c., although it were once doubted, whether it extended to bill of revivor ; but it was now settled, that it did.

VANHATHEN *v.* SHUMAN.

14 Nov. 1728 [? 1748].

Application for an agent, the attorney of an executor (who lived abroad, and was in contempt to sequestration for want of an appearance), to pay £500 out of money received for the use of the executor, held by the Lord Chancellor and the Master of the Rolls, to be improper in that stage of the cause.

BENNET AND OTHERS *v.* BUTTON AND OTHERS.

13 Dec. 1748.

Sequestration made out following the title of the order, for the Serjeant at Arms, and the commission of rebellion, the titles of which were mistaken ; the mistake ordered to be rectified.

The defendant being in contempt to a sequestration for want of his answer, founded on a commission of rebellion, and return of the Serjeant at [136] Arms, *non est inventus*, he put in his answer, after which, a mistake is discovered, that the commission of rebellion is indorsed at the suit of Bennet plaintiff only, and so entered, and the order for the Serjeant at Arms is likewise so entitled, and entered ; but the attachment, and the attachment with proclamation, are indorsed at the suit of Bennet and Others plaintiffs. Upon application to rectify the mistake, Lord Hardwicke, C., said, the defendant had acquiesced by putting in his answer, and the first process being made out right, he would order it, which he accordingly did.

[Mews' Dig. Practice, A, XXII, b, 2.]

PARADICE *v.* SHEPPARD.

(Reg. Lib. B. fol. 20.) 3 Dec. 1745.

The plaintiff brought her bill, as administratrix of Susanna Harding, and obtained an order to sue *in forma pauperis* : the defendant applied the above day to discharge the order. Lord Hardwicke, C., said, the indulgence intended poor persons not of ability to sue for their rights *in forma pauperis*, extends only to persons suing in their own rights, and not as executor or administrator, and therefore discharged the order.

[Mews' Dig. Practice, A, II, h, 1. See *Oldfield v. Cobbett*, 1845, 1 Ph. 615.][137] WHARAM *v.* BROUGHTON.

17 Dec. 1748. 1 Ves. 180, S. C.

The defendant was in contempt to a sequestration, for not performing a decree ; the suit had abated by the death of the plaintiff, but had not been revived. Lord Hardwicke, C., declared, as in the case of *Hyde v. Forster* (*supra*, 102), that as the suit had not been revived, the sequestration had dropt ; but otherwise, if the suit had been revived.

Ex parte SAUNDERS.

13 July 1749.

The course of proceeding on a writ *de homine replegiando*, and writ *de Withernam*. The process is—First, a *capias in Withernam*, if *redel* returned, then an *alias capias—pluries capias—exigent*—outlawry. If the defendant appears, he must find security or stand committed: if he gives security, then the plaintiff must declare, and proceed to trial.

On the 13th day of July 1749, his Lordship was moved, that an order in this matter of the 16th March preceding, for a writ of *homine replegiando*, for replevying Susanna Barron, by the name of Susanna the wife of Thomas Saunders, and said to be detained by Matthew Fortescue, might be discharged: and that the writ *de homine replegiando*, *alias*, and *pluries*, issued pursuant to the said order, might be superseded.

Mr. Clark, afterwards Master of the Rolls, moved, and was opposed by Mr. Fleyer and Mr. Wilbraham, counsel for the said Thomas Saunders: upon which it was by consent ordered, that the defendant should put in bail, in the Court of King's Bench, to the writ *de Withernam*, already taken out by the plaintiff, within the first week of the next term, the defendant in £500, according to the course of that Court: and after the bail shall be given, the plaintiff is forthwith to deliver a declaration, and the defendant is to plead [138] *non cepit*, and traverse the marriage, and in the meantime, the plaintiff is to stay proceedings on the *capias in Withernam*.

An application this day was made by Mr. Attorney General and Mr. Clark, to discharge the order of the above 13th July and 16th of March, which was refused: but the Court by consent, enlarged the time for the defendant's giving bail.

FRENCH *v.* BARON.

(Reg. Lib. A. fol. 340.) 3 Feb. 1749. 2 Atk. 120, S. C.

Bill against the devisees in the trust, and the heir at law, to establish the will of the testator, and to have the trusts executed by sale of the estate: the bill suggested the heir at law could not be found, which was admitted by the defendants: the will was proved *per testes*. Lord Hardwicke, C., said he could not declare the will proved, there being no heir at law before the Court, but he directed the real estate to be sold. [Mews' Dig. Will, VIII, b.]

TRAVERS *v.* BULKLEY.

8 Feb. 1749. 1 Ves. 383, S. C.

A feme covert having obtained an order to answer separately, will be held to it: and so ruled by Lord Hardwicke, C., and the Master of the Rolls.

[139] EDWARDS *v.* DENNISON.

19 Feb. 1749.

The claim of the University of Oxford, of a suit in this Court, allowed.

An application by the University of Oxford, to have the cognizance of a suit commenced in this Court, under several grants from the Crown. It came before the Court on the 18th of December, and on the above day, Lord Hardwicke, C., ordered the claim of cognizance to be allowed, and the plaintiff's bill to be dismissed with costs, and that the claim should be filed with the Six Clerk for the defendant, and be recited *ad idem* in the order; and directed the order to be in the words of an order in Aldridge *v.* Stratford, 5th March 1712. His Lordship was attended with a draft of an order before it was delivered.

LLOYD *v.* BALDWIN.

19 March 1749. Sir John Strange, M. R., sitting for Lord Hardwicke, C.

By the decree it was referred to the Master to take an account of the testator's debts, and to compute interest on such of the debts as carry interest, after the rate they respectively carried interest; and likewise an account of the testator's personal estate, which was to be applied in a course of administration. The Master made his

report, that he had taken the accounts directed by the decree, and stated the amount of the debts, by specialty and simple contract.

Upon the cause coming on to be heard for further directions, it was referred back to the Master to compute subsequent interest on the debts, from the foot of his report.

[140] The Master proceeded to compute subsequent interest on the debts on which he had before computed interest from the foot of his report; but he refused to compute interest on the liquidated simple contract debts, although it was insisted by the simple contract creditors, that their debts being liquidated by the former report, their debts became judgments from the time of the confirmation of the said former report, and carried interest; and upon that ground the plaintiff and the other simple contract creditors took exception to the report. These exceptions were on this day argued, and over-ruled. (This was acquiesced in.—J. D.)

SUSANNA ELIZABETH VANHESEN, wife of CASIMIR ABRAHAM COUNT OF SHIPPENBECK, and the South Sea Company, Plaintiff; COUNT OF SHIPPENBECK and the SOUTH SEA COMPANY, Defendants.

(Reg. Lib. B. fol. 237.) 24 Feb. 1749–50. 1 Ves. 395, S. C.

The plaintiff in 1742 was a widow, and possessed of £3500 South Sea annuities. She and her present husband before their marriage, agreed by writing under their hands, that there should not be the least community of goods, effects, or estate, but that each should possess and enjoy what they possessed without the interference or control of the other; and the defendant the Count by the same instrument disclaimed any right in, or to the property of his said then intended wife. Differences afterwards arising between [141] them, they agreed to live separate; and the agreement was confirmed agreeably to the course in Holland.

The plaintiff finding a difficulty in recovering and getting in her property, preferred a petition to the proper Court in Holland; and the Court, on the 10th of December 1744, decreed the plaintiff solely, and without the assistance of her husband, to receive and dispose of her effects, and to do all acts necessary for the purpose.

The South Sea Company refusing to permit the wife to transfer the said £3500 South Sea annuities, her husband refusing to join with her, the plaintiff filed her bill against the defendants, to permit her to dispose of the said annuities. The husband living in Holland, and out of the jurisdiction of the Court, he was, by advice, served with a subpoena to appear, and answer, which he not doing, the usual line of process issued against him, the last of which was a sequestration; but being out of the jurisdiction of the Court, and not having been within the kingdom within two years preceding the bill, he did not come within the statute of the 5 Geo. 2, to render process effectual against persons absconding, &c.

In this state the cause came on to be heard, when Lord Hardwicke, C., after prefacing that the defendant the husband had been served with a subpoena to appear to answer the bill; and that a sequestration had issued against him for want of his answer, ordered the South Sea Company to permit the plaintiff to transfer the said South Sea annuities.

[142] BOWLES v. PARSONS.

(Reg. Lib. A. fol. 529.) 20 July 1749.

G. Finch, in pursuance of the decree was appointed receiver of the estates of the defendant Parsons. He applied to Thomas Harris, one of the tenants, to attorn, but he had before attorned to Samuel Gray, who claims to have a mortgage on the estate prior to the plaintiff's demands.

By an order, dated the 19th of December 1748, Gray was to come in, and be examined *pro interesse suo*, and the plaintiff was to exhibit interrogatories for that purpose, and the rents in the tenants' hands were to be paid to the receiver without prejudice. Interrogatories were settled by the Master, and Gray put in his examination.

By an order, dated 15th of March 1748 (Reg. Lib. A. fol. 241), it was referred to the Master to examine, and certify if Gray had made out any, and what interest in the premises.

The Master by his report, dated the 28th March 1749, found Gray had a prior right.

The cause was set down to be heard for further directions on the report, and came on to be heard before Lord Hardwicke, C., on the 20th of July 1749, when his Lordship ordered the receiver to be discharged as to the premises comprised in Gray's mortgage, and to pay Gray the rent he had received for the said premises, but gave no costs.^{*}
[Mews' Dig. Evidence, VII, 4, b.]

[143] LYNE *v.* ABLY.

13 Nov. 1749. On petition to Sir John Strange, M. R.

The defendant's examination was reported insufficient. The plaintiff afterwards died. The suit being revived by his representative, the Master was ordered to tax the costs of the insufficient examination.

CORPORATION OF WORCESTER *v.* BENNET.

19 Jan. 1750.

Lord Hardwicke, C., laid it down as a rule, that all motions for prohibitions are to be grounded on affidavit, not suggestion.

Ex parte WHITMORE.

Feb. 1750.

A writ of *ne exeat regno* granted, to prevent the husband from going abroad to avoid payment of alimony recovered, on the authority of Read *v.* Read, 1 Ch. Ca. 115.

LLOYD *v.* BASNET.

12 Feb. 1750.

Process of contempt stayed against the husband for want of his wife's answer, on affidavit that she had left him, and he had no power over her.

[144] DENNET *v.* COKER.

28 Feb. 1750. Mr. Howard's Minute Book.

The defendant Coker by deeds conveyed his estate to trustees to sell, to pay creditors mentioned in a schedule, amongst whom was one Philip Roderam. The bill was, to have the trusts of the deeds executed, which was decreed; and the Master was to advertise for the creditors to come before him, and prove their debts. Philip Mitchel, the executor of the said Philip Roderam, proved his debt under the decree. Having afterwards brought an action at law for the debt, he, by an order dated as above, was ordered to elect, whether he would come in under the decree, or proceed at law. If he elected to take the benefit of the decree, he was to be restrained from proceeding at law, and so *vice versa*.

He elected to proceed at law; but on his application his election was discharged, and liberty was given him to come in under the decree (Reg. Lib. A. fol. 208).

PRICE *v.* BRIDGMAN.

1 March 1750.

Depositions of a witness examined *de bene esse*, who was dead, published in order to be read at a trial at law.

Upon petition to Lord Hardwicke, C., answered without an attendance, it was by consent ordered, that the commission under which George Harris (who was dead) and others had been examined *de bene esse*, and cross-examined, should be opened by the clerks in Court for the plaintiff and defendant; and the deposition of the said George Harris, on his original, and cross-examination, should be published, copied, [145] and examined, in order to be used on a trial of an action of trespass brought by

^{*} It should seem that the plaintiff acquiesced in the examination put in by Gray, and did not enter into evidence; the examination of Gray, and the report being all that were read at the hearing.—J. D.

the defendant against the plaintiff's workmen and agents, for inclosing part of the common in question; and then the commission and depositions to be closed and sealed up again by the said clerks in Court, under their hands and seals.

[Mews' Dig. Evidence, VII, 4, v.]

CUNNINGHAM *v.* CUNNINGHAM.

17 May 1750.

Decree *nisi* for default of appearing made absolute: the defendant afterwards permitted to rehear the cause upon terms.

The defendant not appearing at the hearing, a decree *nisi* was pronounced against him, which was made absolute, after which the defendant obtained an order to rehear.

Upon application to discharge the order, Lord Hardwicke, C., said, the defendant should have applied to discharge the order for making the decree absolute, then have paid the costs of his default, and have shewed cause against the decree. However, his Lordship, to save expence, would not discharge the order, but directed that on the defendant's paying such costs as he would have paid for the costs of his default had he come to shew cause, to be taxed, and submitting to pay such costs for the proceedings subsequent to the decree, as the Court at the hearing should direct, he should be permitted to rehear the cause.

KINSAY *v.* KINSAY, 11th July 1754.—A similar case with these additional circumstances: the Master had made his report under a decree which had been absolutely confirmed, and the time thereby appointed for the defendant's redeeming had elapsed.

[See Booth *v.* Creswicke, 1841, 1 Cr. & Ph. 364.]

[146] POTTER *v.* CHAPMAN.

(Reg. Lib. B. fol. 321.) 26 May 1750.

Injunction granted on filing the bill, to prevent the defendant from being inducted to a living. *Vid.* Ambl. 98.

Dr. Potter, late Archbishop of Canterbury, by his will, gave all options which should fall to the defendants Chapman and others in trust, to present his son the plaintiff in the first place, and the other persons named in his will. A vacancy happening, the defendant Chapman procured himself to be presented for installation, and induction. The plaintiff filed his bill to be presented, and for an injunction to prohibit the bishop from inducting the defendant Chapman, or any other person, to the said vacancy. Upon filing the bill, and before the defendants had appeared, an injunction was granted as prayed, till answer, and further order.

[Mews' Dig. Ecclesiastical Law, IX, 1, a; b; 3: Injunction, A. 7: Trust and Trustee, B, 7, a; Waste and Timber, K, 1. See Walsh *v.* Bishop of Lincoln, 1875, L. R. 10 C. P. 534.]

EVELYN *v.* EVELYN.

(Reg. Lib. A. fol. 94.) 14 Jan. 1753. 3 Atk. 762 [Ambl. 191], S. C.

Grandfather not entitled to share the intestate's personal estate with the brother.

The cause stood this day for judgment.

Lord Hardwicke, C.—The bill is to revive a former decree on the death of the plaintiff's brother John Evelyn, who died an infant, and intestate, and of whom the plaintiff Charles Evelyn claims to be the representative, and entitled to his whole personal estate: and the question is, whether the personal estate of the intestate shall go to the plaintiff his surviving brother, or whether the defendant Sir John Evelyn his grandfather shall share with him.

[147] The defendant the grandfather insists he is in the second decree of consanguinity, by the civil law, and by the Statute of Distributions entitled.

This hath been determined twice in favour of the surviving brother. Poole *v.* Wilshaw, 9th July 1708, in the Court of Exchequer, by the unanimous opinion of the five barons; and Norberry *v.* Richards, 20th November 1749, at the Rolls. And although by the civil law the grandfather and brother are in equal degree of consan-

guinity, yet executors, and preferences are let in; and the civil law is not part of the law of England further than it is received here (*Collingwood v. Paine*, 4 Vent. 413).

By the computation of degrees of consanguinity according to the law of England, brother and brother make one degree (*Blackborough v. Davis*, 1 P. Wins. 41). And it is unreasonable the provision for a child dying should ascend to the grandfather, but among brothers and sisters there is a kind of *spes accrescendi*; and I am of opinion that the plaintiff is entitled to all his brother's personal estate, and that the defendant the grandfather hath no right.

[Mews' Dig. Executor and Administrator, XI, b.]

MIGLIORUCCI v. MIGLIORUCCI.

19 Oct. 1750.

If the plaintiff states in the bill he lives abroad, and the defendant obtains an order for time to answer, the Court will not order the defendant to give security to answer costs.

The plaintiff by his bill stated he lived abroad: the defendant being served with a subpoena, obtained an order for time to answer. On the above day he applied for further time, and that the plaintiff might give security to answer costs. Lord Hardwicke, C., said, as the plaintiff by his bill stated he lived out of [148] the jurisdiction of the Court, the defendant, by praying and obtaining an order to answer, had submitted to the bill, that it was now too late to make the plaintiff give security: that it was meant by the defendant as a dilatory, when he found himself pressed: his Lordship therefore denied that part of the motion, which prayed the plaintiff might give security to answer costs.

[Mews' Dig. Practice, A, X, d, 3. S. C. 2 Ves. 24.]

PHILIPS v. LANGHORN.

29 Nov. 1750.

When a plea is allowed, on application, an injunction will be dissolved absolutely, because it is to be considered as a full answer.

The plaintiff had obtained an injunction until answer and further order. The defendant put in a plea to the whole bill, which, on argument, being allowed, he applied to dissolve the injunction absolutely. It was opposed by the plaintiff: but Lord Hardwicke, C., said it was proper, and agreed to be the practice, for that a plea allowed was to be considered as a full answer.

OATS v. CHAPMAN.

8 Dec. 1750. 1 Ves. 542, 2 Ves. 100, S. C.

The demurrer, upon argument, was over-ruled, and the costs of the demurrer were paid. Upon re-arguing it was allowed; and on application the plaintiff was ordered to refund the costs he had received.

[149] MITCHEL v. DUKE OF MANCHESTER.

15 Feb. 1750.

The plaintiffs the infants ordered to return to the University to pursue their studies.

CORNISH v. ACTON.

1 May 1751.

A defendant, after he has been examined before the Master upon the account, may be re-examined upon new interrogatories without an order.

The defendant had been examined before the Master on the account decreed. He was afterwards re-examined upon new interrogatories without an order. Lord Hardwicke, C., held, the Master might regularly do it, as in the course of the cause new matter might arise, and it was in his discretion, the decree giving it to him: the words are, "the parties are to be examined upon interrogatories, as the Master shall direct."

XIMENES *v.* FRANCO.

15 May 1751.

On application for an injunction to stay the defendant from disposing of diamonds, &c., Lord Hardwicke, C., said, that persons who come into this Court to prevent the disposition of goods, &c., must shew a specific right in the property, and that the same are in danger of being lost.

[150] CHICOT *v.* LEQUESNE.

4 June 1751.

By the decree, all parties were to account, and to produce books, and to be examined before the Master : the plaintiff was a merchant at Amsterdam, and sent books ; but the defendant insisting the plaintiff should come in person to make the usual affidavit, it was on motion ordered, that the affidavit to be made should be sworn before a notary public at Amsterdam, with the intervention of a proper magistrate, if necessary by the law of Holland, to the administration of the oath.

LUMBROZO *v.* WHITE.

15 June 1751.

Affidavit in one cause of a defendant not being to be found, not sufficient to ground an order to serve a clerk in Court in another cause, although between the same parties ; but there must be an affidavit in the cause in which the application is made.

ROWE *v.* BANT.

15 June 1751.

Sale of a moiety of a debtor's real estate, decreed for satisfaction of a judgment, and costs.

The bill to have the benefit of a judgment obtained against the defendant's testator, was, on hearing on the 6th day of June 1746, retained for twelve months, and the plaintiff in the meantime was to be at liberty to revive his judgment in an action of detinue against the deceased, and to compel delivery.

[151] The plaintiff accordingly revived his judgment by *scire facias*, and executed a writ of enquiry, and ascertained damages at £204, 11s. 9½d.

On hearing the cause on the equity reserved, the Court decreed the plaintiff satisfaction out of the testator's personal estate ; and if the personal estate should not be sufficient, to have liberty to apply for satisfaction out of the real estate.

The master having reported the personal estate insufficient, the plaintiff brought on the cause against this day, for satisfaction out of the real estate of the defendant's testator.

Lord Hardwicke, C.—A, B, C, creditors by judgment : A sues out an *elegit*, and the sheriff puts him into such possession, as entitles him to a perception of a moiety of the rents, and profits of his debtor's real estate, till his debt is satisfied ; he may afterwards take out another *elegit*, for a moiety of the remaining moiety, and so on ; but B in the mean time sues out an *elegit* on his judgment, and gets into perception of a moiety of the remaining moiety of the debtor's estate, and so according to the diligence used by either.

In case of a decree in this Court for a sale, the directions are for payment of the creditor's whole demands, according to their nature and priority : so that B the second judgment creditor may be totally defeated, in case the judgment should not be sufficient for satisfaction of both.

The judgment until the *elegit* sued out and possession, is but an equitable judgment ; but if a judgment creditor hath sued out an *elegit*, and gotten possession, whereby he hath a specific lien ; the Court can—[152]—not put him on a level with another judgment creditor, who hath not sued out an *elegit* : if there are two judgments, though neither of them hath sued out an *elegit*, the prior judgment shall be first satisfied here, because though the prior creditor hath not sued out an *elegit* so as to have a specific lien, yet neither hath the second judgment creditor sued out any, and till then, as neither hath sued the utmost legal diligence, and as either of them might, the Court will suppose, the prior creditor would, were it not to favour the debtor.

His Lordship decreed a sale of a moiety of the real estates, for satisfaction of the plaintiff's judgment, and costs.

RASHLEIGH v. BULLER.

3 Aug. 1751.

A sequestration *nisi* against a peer or member of parliament for want of his answer, if he answer, and the answer be reported insufficient, the plaintiff must move again for a sequestration *nisi*.

A sequestration *nisi* had issued against the defendant a member of parliament, for want of his answer. The defender put in an answer which was reported insufficient: the plaintiff thereupon moved to make the sequestration absolute, as an insufficient answer was no answer, and in such case the plaintiff was to go on with process where he had left off.

It was first moved on the 1st of August, and stood over to this day, when, Lord Hardwicke, C., cited Lord Clifford's case, 2 P. Wms. 385, and said, as in that case, that it was a hardship upon a peer, or member of parliament, that a sequestration, which is in the nature of an execution is the first process: so when a sequestration *nisi* is granted against a peer, or member of parliament for want of an answer, it is good cause against such order, to shew an answer is put in, and which must be allowed for cause: and [153] where the answer is reported insufficient, the plaintiff must move again *de novo*, for a sequestration *nisi*: and his Lordship further said, as he found that to be the practice, he would not alter it.

[Mews' Dig. Execution, H. 3, a. Cf. *Crawley v. Clarke*, 1791, 3 Bro. C. C. 373.]

RASHLEIGH v. BULLER.

11 June 1752.

Injunction granted of course, upon a demurrer to the bill being over-ruled.

BLINKEHORNE v. FEAST.

26 Oct. 1751.

Costs where the heir at law brings a bill to dispute a will: or a bill is brought against him to establish a will.

If a devisee brings his bill to perpetuate testimony, and prays no relief, the defendant is entitled to costs, if he hath not examined, or only cross-examined the plaintiff's witnesses; but if the defendant examines witnesses on his own part, he is not entitled to costs.

Where a devisee brings his bill to perpetuate testimony, and prays relief: and brings the cause to a hearing: and the defendant, the heir at law, insists on a trial, and the will is established: on such trial, the Court hath in many instances given costs to the heir, both in this Court and at law, where he hath not been vexatious, nor guilty of tampering; because he can never afterwards dispute the will.

If a bill is brought by an infant heir to dispute a will, and the bill is dismissed, the plaintiff should pay costs, because he may, notwithstanding, bring a bill on coming of age, or ejectments; indeed it is not certain, whether another *prochein ami* may not bring a bill.

[154] COLEBROOK v. JONES.

21 Nov. 1751.

The plaintiff was consul abroad: the defendant applied, that he might give security to answer costs, according to the course of the Court. Lord Hardwicke, C., said, he must consider the plaintiff as a land, or sea officer in the service of his Majesty, and therefore would not grant it.

[Mews' Dig. Practice, A. X, d. 1, h. See *Stanley v. Hume*, 1817, 1 Hag. 12. *Evans v. Chippendale*, 1839, 9 Sim. 497; *Cocking v. Alexander*, 1841, 4 F. & R. 391.]

WENTWORTH v. PRINCE.

5 Dec. 1751.

A decree for establishing the rights of the lord of the manor.

BROCKER v. HAMILTON.

13 Dec. 1751.

The bill was, to be paid a sum of money on a note of hand from the defendants : the plaintiff obtained a writ of *ne exeat regno* ; upon putting in their answer, they applied to discharge the writ. Lord Hardwicke, C., said, he would not have granted the writ had the application been made to him, for the Court will never grant the writ, when the demand is at law ; but said, this Court will grant it, in case of alimony recovered in the Spiritual Court (*Vid. ex parte Whitmore, supra* [Dick. 143]), and the party is suspected to be going abroad to avoid payment ; and accordingly discharged the writ.

[Mews' Dig. Ne exeat regno, 2.]

[155] WYBOURN v. BLOUNT.

18 Dec. 1751.

Liberty given to a woman defendant, charged by the bill to be married to another of the defendants, to answer separately, but without prejudice to any question, as to the validity of the marriage.

The bill was brought against Catherine Wybourn, and against John Blount, who pretended, as the bill charged, to be married to her, to establish a will against the said Catherine, as the heir at law of the testator : John Blount by his answer, insisted on the marriage ; Catherine insisted by her answer she was not married, and that if married, the marriage was null and void. On an application to answer separately, Lord Hardwicke, C., ordered, that the said defendant Catherine, should be at liberty to answer separately from the said John Blount, in the bill charged to be married to her, but without prejudice to any question, as to the validity of the marriage.

HAWKINS v. DAY.

17 Jan. 1753, or 1752.

Where payment of a simple debt without notice of specialties, is held a good administration.

This cause stood this day for judgment.

Lord Hardwicke, C.—Two questions arise in this cause : the first is, whether payments made by an executor before any breach of condition of the specialty in question, either of debts of an inferior nature, or of legacies, ought to be allowed as a good administration against the specialty : The second is, whether payment made of debts of an inferior nature, or of legacies, before the executor had notice of the specialty, on which the plaintiff sues ought to be held as good payment, or administration, against the plaintiff.

[156] If there are many cases, in which executors are liable to dangers, it is not reasonable to increase, but rather to deliver executors from them.

As to the first question, it is established in case of a bond on statute staple, with condition for performance of covenants, and the obligor or cognizor dies indebted by simple contract, and his executor before notice of the covenants being broken, pays debts by simple contract, that is a good administration.

As to the doubt, at what time any breaches of the conditions were made, and from what time they ought to be computed, it is said, no breach is committed until the account of the principal in the bond is taken, but that is too broadly stated : it is true, it could not be shewn how much was due, till the account was taken ; but if he is at any time guilty of a breach of his covenant to behave with fidelity, that is a breach of the condition of the bond, and in point of law, the penalty is forfeited ; and that would bring it to the question, how many of the simple contract debts were paid before, and how many after that time.

But as to the payment of legacies, after notice of the bond, and before a breach, I apprehend, that would not be a good payment.

For there have been cases where the Master hath been directed to set apart a fund to indemnify an executor, though not against common covenants; but it is reasonable where a man hath been surety for an office of great trust.

And on the first question I am of opinion, that as to the payment of the debts by simple contract by executors before breach of the condition, they are good payments.

[157] As to the second question, I am of opinion, with regard to the debts in general, that the payment of debts by simple contract by an executor in a reasonable way, and without fraud, or laches on his part before, and without notice of debts by specialty, is a good administration in point of law.

His Lordship then cited some considerable authorities for that purpose, *Davis v. Monkhouse*, in C. B. Hil. T. 2 Geo. II. & 3 Lev. 113, Vaugh. 94, and 1 Mod. 174.

The distinction made, that if an executor is sued by a simple contract creditor, and judgment is obtained against him, he having no notice of specialty debts, and for that purpose the judgment is *in invitum*, his administration is good, is an unsound distinction, and it will lead to this, that no executor will dare to pay a debt by simple contract, without being sued for it, though he cannot plead the specialties, having no notice thereof, and he must pay costs for it; therefore I am of opinion, that as to the payment of debts before notice of a demand by specialty, they are to be considered as good payments; and that the case of the New River Company against Brownjohn, is a strong authority, and concurrent with the afore-mentioned opinions.

As to the legacies I should have much doubt, but I will not enter into that part of the subject; as to the question, if notice of the bond to two of the co-executors, will affect the third, without sufficient notice, I am of opinion it will not; it would make an executor liable for the devastavit of the others.

I think further, all these cases, cases of hardship: here a man is employed as a clerk to a partnership, [158] wherein the parties ought to state accounts monthly; and on this foundation, the principal enters into a bond with surety for performance of covenants, and the obligees having two good sureties, state no accounts for eight years together; and this hardship is an ingredient in the case of the executor.

[*Mews' Dig. Executor and Administrator*, II, i, 1; III, d; Will, IX, k, 21.

S. C. Amb. 160.]

GRAYSON v. WILKINSON.

17 July 1752. 2 Ves. 454, S. C. *Vid. Str.* 1109.

A will not signed by the testator in the presence of witnesses, but acknowledged by him to the witnesses to be his signing, held to be good as to land.

The bill in this cause was for execution of the trusts of the will of Thomas Gotes; the heir at law controverting the will: it appeared the same had been attested by three witnesses, in the presence of the testator, but that the testator had not signed the same in the presence of the three witnesses, but had only acknowledged that his name set thereto was his handwriting.

Mr. Solicitor General for the plaintiff, insisted the will was duly executed according to the statute, and cited 2 Chan. Cases, 109; *Cook* against *Parsons*, *Precedents in Chan.* 184; *Lemain* against *Stanley*, 3 Levins, 1; *Smith* against *Cawdron*, 7th July 1752, by Sir Jos. Jekyl, Master of Rolls; *Stonehouse v. Evelyn*, 3 P. Wms. 252; and *Jones v. Lake*, Hilary 1742, in B. R.

Mr. Wilbraham cited *Hoyle v. Clark*, 3 Mod. 218.

No cases were cited for the defendant.

Lord Hardwicke, C.—This is a question at law, but may be determined here on evidence, at the request of the defendants; and I will consider it on the clause of the statute, touching the execution of wills, and [159] then how far that clause is varied by the clause touching revocations.

Suppose a bond or deed be signed, and the witness is called in, and the party acknowledges his hand thereto, if the witness signs it, it is an attestation of the act: yet an acknowledgment of sealing, and delivery is not sufficient evidence of sealing, and delivery.

Further in case of a note, or declaration of trust which do not require the solemnity

of a deed : the witness declaring the party did acknowledge his hand, it would be evidence of the party's signing.

Therefore, I conceive, upon the first clause in the statute, if the testator having signed his will, did before witnesses declare it to be his hand, it would answer the purpose of the first clause : and the cases import a testator may sign his will, in the presence of the three witnesses, at three different times.

I will now consider how far the clause relating to revocations ought to be coupled in construction with the first-mentioned clause.

And upon that I am of opinion, the clause relating to revocations, doth not operate on the first clause ; and I hold, a will may be revoked by another will executed according to the direction of the first clause, and that the words, " signed in the presence of three or four witnesses," refer to some other writing of revocation to be executed by the deviser, and not to his will.

Upon the whole, on the perusing of the act, and on the authorities, I am of opinion the will is well executed.

It afterwards appearing, the third witness, who resided in Holland, had not been examined, the Court [160] ordered the cause to stand over, and the heir to give an answer, whether he would submit to the will, or try it at law.

[Mews' Dig. Evidence, IV, 7, f ; Will, IV, A, 1.]

JONES v. CHAMPION.

Hil. T. 1752.

Lord Hardwicke, C., held that a wife cannot be taken in execution for costs ; for costs are personal, and *de bonis propriis*, and a wife hath no property.

BRANDON v. KNIGHT.

1 Feb. 1752.

One Wardlow was ordered to stand committed for marrying a ward of the Court without permission ; a warrant was made out to apprehend him, but he could not be found ; afterwards it was discovered he was a prisoner in the Marshalsea for debt : his contempt being criminal, not of a civil nature, he could not be charged in custody, especially as this Court hath no jurisdiction over the Marshalsea. After consideration, Lord Hardwicke, C., ordered an *habeas corpus cum causis* to issue, directed to the Marshal of the Marshalsea, or his deputy there, to bring the said Wardlow to the bar of this Court, to answer his contempt.

[Mews' Dig. Infant, B, 4, a.]

[161] HUMPHREY v. TAYLOR.

5 Feb. 1752. Ambl. 136, S. C.

Residue devised to executors in nature of joint tenants, the will is revoked by a codicil as to one, the other shall take the whole.

The testatrix by her will gives many legacies, and then to persons her nearest of kin, one shilling each, and the rest, and residue to the defendant Taylor, and Andrew Wachin, and makes them executors ; this, though not expressed, was admitted in consideration of law, to constitute them joint tenants ; and by a codicil she revoked her will as to Wachin.

The plaintiffs brought their bill as next of kin of the testatrix, against the defendant Taylor for an account, contending that the revocation was a revocation of the whole gift of the personal estate ; or if not of the whole, still it was a revocation of a moiety, that would have vested in Wachin.

Lord Hardwicke, C.—There is no doubt but in point of law, an executor takes the whole personal estate, therefore the Ecclesiastical Court cannot distribute.

This Court considers executors as trustees for the next of kin, and liable to distribute here, but always subject to this ; where any thing appears to shew the executor was intended to have it, he shall take. And what doth the gift of one shilling to the

next of kin amount to ? It is always understood they shall have no more, and that the defendant may take, as executor, and the devise to the next of kin rebuts their equity of a resulting trust.

But supposing the defendant would not take as executor, I am of opinion he is entitled to the whole, by the devise ; the whole of the estate was given to both, and when one dies, or is removed, that would [162] share it, the other takes (Luttrell, sect. 280). If there be a devise to two persons, one capable, one not, the rule of law is, the one capable shall take the whole : and this is admitted in Lord Bridgman's argument. In cases of redemption also the law is the same (Davis, Kemp, 1 Eq. Cas. Abr. 216 ; Carter, 4, 5). And so in case of revocation ; for it is absurd to say, where the whole is given any part should be distributable (Hunt v. Birtles, by Lord King).

Suppose instead of making a codicil she had struck out the name of Wachin, the defendant would have been entitled. She hath done the same in words, therefore let the bill be dismissed.

[Mews' Dig. Will. IX, k, 16, a. See Alexander v. Alexander, 1755, 2 Ves. 640. Discussed. In re Kerr's Trusts, 1877, 4 Ch. D. 600. Held applicable, Nand Singh v. Sita Ram, 1888, L. R. 16 Ind. App. 44.]

SAVERY v. DYER.

Hil. 1752.

A personal annuity *pur autre vie* not determined by the death of the annuitant.

Bill to be paid the arrears of an annuity given by the testator to A, during the life of his executrix. A was dead, having made his will, and the plaintiff his executor, to whom he devised his real and personal estate. The annuity was not charged on the real estate, but was considered as a personal annuity, it being classed with the legacies.

The question was, whether the annuity was not determined by the death of the annuitant in the lifetime of the *autre vie*.

Lord Hardwicke, C.—I am of opinion the annuity is not determined ; for if a man gives a personal thing to another, it wants no words of limitation ; and if it is a thing that hath duration after the death of the executor, it is transmissible ; though if a personal annuity is given to A, it shall go to him for life only ; [163] and if a rent is given out of land to A during the life of B, that shall determine by the death of A, in the lifetime of B ; for it cannot go to the executor, being a realty, and it cannot go to the heir, being no fee : and his Lordship cited 1 Roll's Abr. 831, pl. 5 ; Gosley v. Gifford, 2 Vern. 35.

[Mews' Dig. Annuity, I, 8, a. Followed, Blewitt v. Roberts, 1841, Cr. & Ph. 274 ; Distinguished, Bent v. Cullen, 1871, L. R. 6 Ch. 237.]

GALWAY v. EARL OF BARRYMORE.

12 March 1752.

A debt within the Stat. of Limitations taken out of the statute by words in an answer.

A Bill brought by the plaintiff for satisfaction of a debt due from the defendant the Earl of Barrymore.

The defendant the Earl prepares a draught of his answer in his lifetime (which was proved), and therein says he will do what is right and just, but before the answer is put in, he dies : the defendant his representative insists the plaintiff's demands are barred by the Statute of Limitations.

Lord Hardwicke, C., on appeal, was of opinion, that the words, *I will do what is right, and just*, take it out of the statute, and therefore decreed satisfaction out of the assets.

Where a man creates a trust for payment of his debts, a debt barred by the statute shall be paid.

[Mews' Dig. Limitations (Statute of), A, VII, 1, a.]

FISHMONGERS' COMPANY v. EAST INDIA COMPANY.

18 March 1752.

Application for an injunction to restrain building, so as to stop up lights, not being ancient lights, refused.

The plaintiffs moved the Court this day, that the brick wall built by the defendants close to the wall of the yard or terrace belonging to the plaintiffs' house in Fenchurch Street, so far as the same obstructed, [164] darkened, or obscured the plaintiffs' ancient window lights, might be taken down, and removed, and for an injunction.

The Counsel for the plaintiffs proposed a trial, what damage it would be to have the intended erection carried higher than their house.

But the defendants' Counsel declined it, and insisted, that as there was a space of seventeen feet between the plaintiffs' house and their buildings, it could not be considered as a nuisance, there being many streets and lanes in London not so wide; though they admitted it might in some measure obscure the plaintiffs' lights: And they also contended for a right to build on their own ground.

Lord Hardwicke, C.—With respect to granting trials, it is never done but by consent of parties, or with their acquiescence; and here the defendants decline a trial, therefore the question is, whether the plaintiffs' case is such as entitles them to an injunction. As to the necessity of this case there is no ground for an injunction, there being no immediate mischief likely to ensue. And as to the question whether the plaintiffs' messuage is an ancient building, so as to entitle them to the right of the lights, and whether the plaintiffs' lights will be darkened, I will not determine it here; for if it clearly appeared that what the defendants are doing is what the law considers as a nuisance, I would put it in a way to be tried. If the house were built on the old foundation, it would entitle the plaintiffs to their lights as an ancient messuage: but if on the new foundation, then the party must shew a new agreement, or something to import one. The evidence as to that is not clear.

[165] But I am of opinion it is not a nuisance contrary to law; for it is not sufficient to say it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the city; and here will be seventeen feet distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground.

Therefore, take nothing by the motion.

[*Mews' Dig. Easements and Prescription, C. 2, c. iii.* See *Soltan v. Du Held*, 1851, 2 Sim. N. S. 149; *Jackson v. Duke of Newcastle*, 1864, 10 L. T. 635; 10 Jur. N. S. 688.]

WILKIE v. HOLME.

20 April 1752.

A defective execution of a power decreed.

A question arose, whether a will executed in the presence of two witnesses only was a legal execution of a power to charge land; and if not a strict execution of the power at law, whether the defect ought to be supplied in a Court of Equity.

Sarah Roddam, who survived her husband, by her will (without reciting the power given to her by deed of the 14th May 1744), charged her estate with the payment of the debts of her, and her husband. The will was executed in the presence but of two witnesses, and was not a legal execution of the power.

Lord Hardwicke, C.—I am of opinion this Court ought to aid the defects in the execution of a power, where it is for a valuable consideration, as for the payment of debts, or younger children's portions.

I thought at first it was dangerous, that there should be a different rule of determining property here, and at law; but where a will operates by way of appointment, there is no danger in it; yet it is true at law [166] that a power to be executed by will concerning lands, must be executed according to the statute; and here, in like manner, where the same is voluntary.

His Lordship cited *Smith v. Ashton*, 1 Ch. Cas. 263; *Tollet v. Tollet*, 2 P. Wms. 489; *Earl of Carlisle v. Duke of Marlborough*, Mich. 1750; and decreed for the execution of the power.

[*Mews' Dig. Powers, XII, b, 4.*]

TYSSEN v. WARD

30 April 1751.

Service of a subpoena for costs, the clerk in Court being dead, and the suit abated, and no other proceeding to be had, but to recover the costs, on the solicitor for the surviving defendant, ordered to be good service.

The defendants were ordered to pay the plaintiffs their costs. The costs were taxed, and a subpoena for the costs was sued out; but before the costs were paid, Elizabeth Ward, one of the defendants, died: the other defendant secreted himself, and his clerk in Court being dead, and there being no other proceedings to be had in the cause than to endeavour to recover the costs, and the surviving defendant not naming a new clerk in Court, it was ordered, that service of the label of the subpoena on the defendant's solicitor personally, and leaving the body at the defendant's place of abode, should be good service on the defendant.

NEWPORT v. MOORE.

(Reg. Lib. B. fol. 312.) East. T. 1752.

An infant, sent by his mother to Doway in Flanders. The allowance for his maintenance ordered to be stopt. He was afterwards brought to England, and carried to his mother's abode in the country, from [167] whence he wrote to the Lord Chancellor and the solicitor in the cause, craving protection. His Lordship ordered the messenger to bring the infant into Court, which he did; and his Lordship referred it to the Master, to approve of a proper person to be appointed guardian of the infant, and in the meantime, to remain with the messenger.

BANKS v. FARQUHARSON.

(Reg. Lib. A. fol. 337.) 15 May 1752. Bank v. Farques, Ambl. 145, S. C.

At the hearing of this cause the preceding Friday, the defendant produced a declaration of trust of ten Sun-Fire shares, executed by William Watts, since dead, and a bankrupt, of whom the plaintiff is assignee, and witnessed by James Sterling of Hills, in Scotland, and John Bland, since dead. The defendant not having proved the death of Bland, and that Sterling lived in Scotland, he was not admitted to prove the hand-writing of the said William Watts to the declaration of trust, and the same was not admitted to be read in evidence. The cause was put off until the first day of the next term.

Mr. Solicitor General, and Mr. Wilbraham on behalf of the defendant alledging the above facts; and that the said declaration of trust was proper evidence on the part of the defendant, applied this day for liberty to exhibit an interrogatory to prove the hand-writing of the said William Watts, and the hand-writing of the said James Sterling, and John Bland the witnesses, inasmuch as Bland was dead, and Sterling lived out of the jurisdiction of the Court; which was ordered.

[Mews' Dig. Evidence, IV, 7, c; Will, VIII, d, 2.]

[168] TANNER v. IVIE.

27 July 1752. 2 Ves. 466, S. C.

The bill was brought on behalf of an infant; and dismissed with costs. The *prochein amy* was allowed the costs he paid.

MENDES DA COSTA v. DE PAZ.

4 July 1752.

Order for placing out an infant apprentice to a particular person named, and paying the apprentice fee, without a reference, the Counsel for the father alledging, he thought it proper.

ATTORNEY GENERAL *v.* BERRYMAN.

(Reg. Lib. A. fol. 148.) 12 June 1755.

The King's sign manual directed to be applied for, to dispose of £500 of a testator's estate given to a trustee to dispose in charity in his discretion, which he never executed.

Humphry Chetham, by his will, gave £500, to be paid in twelve months after his death, to be disposed in charity at the discretion of Dr. Berryman. He never exercised it, but by his will directed, in case he should not receive the £500, his brother should, and dispose of it at his discretion, and appointed his wife executrix. She proved the will. The executors of Humphry Chetham being advised they could not pay the £500 with safety, instituted this suit for the direction of the Court. The defendant Berryman, the brother of the above Dr. Berryman, by his answer said, the testator Chetham used to go to daily prayers at the parish Church of St. Andrew Undershaft, and [169] that he had discoursed with the said testator about leaving some legacy towards the support of such daily prayers, and that Dr. Berryman had written with his own hand on the back of a recommendatory letter the name of some persons he declared he intended to be partakers of the charity.

On the 11th February 1752, the cause was heard, when Lord Hardwicke, C., held the legacy to be a good and subsisting legacy; but as Dr. Berryman had not executed the trust reposed in him, it rested with the Crown, and therefore recommended it to the parties to apply to his Majesty to dispose of the legacy.

The executors of the testator Chetham and the defendant Berryman applied for and obtained his Majesty's sign manual, authorising and requiring his Attorney General to make a motion to the Court of Chancery for the payment of £465 to Richard Cotton, one of the executors of the testator Chetham, and to the defendant Berryman, to be disposed by them to the several persons, and to the uses following, viz. to the trustees of the parish of St. Andrew Undershaft, London, or to the trustees of the said parish for the time being, in trust for the better support of the daily prayers in the said church, £200; to Thomas Bathurst, £80; to Eliz. Wood, £20; to James Wagstaff, £10; and to divers other persons, some £2, 2s.; others, £1, 1s. each.

On the 12th June 1755, the said legacy was ordered to be applied agreeably to the sign manual.*

[170] HORNE *v.* LANOY.

15 July 1752.

An infant was arrested and thrown into prison for necessaries: an *habeas corpus* was granted to bring him into Court to have a guardian assigned. It was attempted by petition, which was thought by Lord Hardwicke, C., improper, and therefore it was moved for.

WARD *v.* TURNER.

21 July 1752. 2 Ves. 431, S. C.

Donatio mortis causa.

The plaintiff, as representative of John Mosely, brought his bill to have a transfer of £600 new South Sea annuities, and several specific parts of the personal estate of William Fly, delivered to him; and to have an account of what was due to Mosely for services done to Fly.

It appeared, that Fly in his lifetime had expressed great kindness for the plaintiff's testator: and in the presence of one Mounsey, a witness, had taken three transfer receipts for £600 South Sea annuities, and declared he would give them to the plaintiff's testator: and in the presence of one Greentree, another witness, taking the key of his scrutore, took out three papers, and said, "Here Mosely, I give you these three

* Isaac *v.* Gompertz, 23 July 1792. Legacy given to a Jewish charity not being permitted to take place, the legacy paid in moieties, pursuant to his Majesty's sign manual; one moiety to the Magdalen Hospital, the other moiety to the London Infirmary.

papers : these are for South Sea stock, and will serve you, when I am dead ; and in the presence of one Taylor declared, he gave the plaintiff's testator all the goods and plate in his house, save his sword, gun, and books.

[171] *Lord Hardwicke, C.* Suppose the facts above sworn to were well proved, what is the law arising on these facts ?

First, as to any part of the things given, except the £600 South Sea annuities, I am of opinion the gift is not good, there being no pretence of any delivery, and it is too general. If they prove any thing, they must prove a nuncupative will.

Then for argument's sake, take the gift of the £600 South Sea annuities, as an independent donation : the question is, whether it be such a gift as the law of England will allow as a *donatio causa mortis*. And first the fact of the gift is proved only by Greentree ; whereas the civil law requires five witnesses, and limits it in point of value. *Vide* Justinian's Institutes. The express gift sworn by Greentree is of the three receipts only, which the plaintiff would construe as a gift of the South Sea annuities.

The question that arises is : whether the delivery of the thing, given by way of *donatio causa mortis*, is necessary ; and if necessary, if this delivery of the three receipts is a sufficient delivery. I am of opinion a delivery is necessary, and that the delivery of the three receipts is not sufficient to validate this act.

In the Roman law there are three kinds of *donatio mortis causa* : First, where the property in the thing doth not vest, until the death of the donor ; Second, where the property immediately passes, but is defeasible, in case the donor recovers ; Third, where the donor moved with present danger, doth not think it so immediate as to give the party a vested interest in them, but only to take effect, when the donor dies.

[172] Now as to the second, the civil law requires a delivery ; but as to the first, and third, not an absolute delivery, because the property doth not completely pass till the death of the donor.

But the civil law is not binding in this county, farther than it hath been received, and allowed here, and that must be determined by authorities ; and the result of the authorities is, that the civil law hath been received in England, only so far as the gift had been attended with delivery (*Swinburne*, Part 1st, sect. 6 ; *Drury v. Smith*, 1 P. Wms. 404 ; *Lawson v. Lawson*, *ibid.* 441 ; *Jones v. Selby*, *Precedents in Chanc.* 300 ; *Hedges v. Hedges*, *ibid.* 269 ; *Snellgrove v. Bailey*, March 1744 ; 3 Atk. 214. *Miller v. Miller*, 3 P. Wms. 356).

Then I come to the question, whether the delivery of the three receipts is a delivery of the thing : I am of opinion it is not, and find no authority for it ; the delivery of the thing given, is what is relied on in all the cases ; the only case where a symbol was held good, was in *Jones v. Selby* ; the key of the trunk wherein the thing was kept (*Exchequer Tallies*), but I am of opinion that amounted to a possession in the donee of the tallies, for the donor was restrained from making use of them, without the consent of the donee, and the donor could not rightfully come at them, without the key.

I think in like manner, as to a key of a warehouse for goods, or of a wine cellar.

But as to the delivery of the receipts for the stock, it amounts to nothing ; they being of no use after the acceptance of the stock, and are seldom kept.

Suppose a mortgage, and a separate receipt taken for the consideration money, and the receipt is deli-[173]-vered over, it could not be a delivery of possession.

Upon the whole I am of opinion this gift is not valid, without a transfer, or something that amounts to a transfer, and it being unaccompanied with a delivery is merely legatory, and amounts to a nuncupative will, and allowing it would be a breach of the Statute of Frauds (see sect. 19, 20, 21, and 22 of that statute). Therefore let the bill be dismissed as to the gifts claimed.

[*Mews' Dig. Will*, III. See S. C. Wh. & T. L. C. 7th ed. vol. i. p. 390 ; *Moore v. Moore*, 1874, L. R. 18 Eq. 474 ; 43 L. J. Ch. 617 ; 30 L. T. 752 ; *Re Harcourt, Danby v. Tucker*, 1883, 31 W. R. 579.]]

FERRAR v. FERRAR.

26 July 1752.

When a defendant hath obtained an order for time to answer he cannot refer the bill for impertinence ; but scandal may be referred at any time.

The defendant having obtained an order for time to answer, he applied and obtained another order to refer the bill for impertinence : on application to discharge the last order, Lord Hardwicke, C., said, the general rule of the Court is, that where a defendant hath obtained an order for time to answer, he cannot apply to refer the bill for impertinence, but he may for scandal at any time, the honor of the Court being concerned, to see there is no blot in the record, and cited *Doughty v. Heathcote*, 15 June 1738.

WHITE v. HAYWARD.

25 July 1752. 2 Ves. 461, S. C.

Suit may be revived for costs after they are taxed, costs taxed being a judgment.

Lord Hardwicke, C.—In this case upon hearing the cause, the plaintiff's bill was dismissed with costs, which were taxed ; the plaintiff did not pay them, but stood out process of contempt to a proclamation, whereon he was taken, and is now in the Fleet Prison ; since which the defendant to whom the costs were to be paid is dead, and the prisoner applies to the Court to be discharged, on a supposition, that by the defendant's [174] death, the cause is out of Court, and his imprisonment being for a contempt in not paying costs only, the suit is at an end by the defendant's death, and cannot be revived against him. But in the present case, the costs are taxed, and become a certain duty, and remain such, notwithstanding the death of the defendant, which distinguishes this case from such cases, as where according to the rule of *actio personalis moritur cum persona*, they are considered as a tort, or punishment, and by the death of either party, before the recovery, they drop, and are gone.

The prisoner, therefore, is to be considered in execution for a certain debt, or duty ; the costs, which he is ordered to pay, being actually become such ; and in order to determine the question, whether the prisoner may be lawfully detained on this process, wherein he is in custody, I shall consider how far the process of this Court is like that at common law : the process of this Court for contempt, being supported by its analogy to that of common law. And there the process goes *in personam, et rem*. Suppose a judgment obtained by the defendant against the plaintiff : the statute gives him costs, and he hath a right to take out execution for them ; or suppose a plaintiff hath a judgment for debt and costs, and he takes out a *capias ad satisfaciendum*, and the defendant be in execution thereon, and the plaintiff afterwards dies, the defendant will have no right to be discharged.

There is a great difference between original and judicial writs ; the death of the party will abate the former ; whereas the latter are not so abatable, but the person in execution must so remain till satisfaction [175] made of the debt, or duty, for which the writ was sued out, though the party suing out be dead.

It was indeed formerly held, and Lord Hobart was of that opinion, in *Foster v. Jackson*, Hobart 52, that where the party taken in execution died, the debt was thereby satisfied, and no remedy might be had against his representative, or estate for the debt ; but at the same time, Lord Coke was of a contrary opinion, and to reconcile this difference, the stat. of 21 James the 1st, ch. 4, was made, whereby a new execution is given against the estate, and effects of the party so dying.

I do not know any case in the books which hath a greater affinity to the present than *Clerk v. Withers*, 1 Salk. 323. The administrator sued out a *fieri facias* on a judgment, which was delivered to the sheriff the 1st of August, who seized the defendant's goods, and afterwards, viz. the 9th of September, the administrator died ; the sheriff returned, that he had seized goods to the value, but they remained in his hands, *pro defectu emptorum*, and on the 29th of September that sheriff was removed, and a new one sworn in ; and the defendant sued the old sheriff to have his goods again, and judgment being against him in the Court of Common Pleas, error was brought here ; and it was objected for the plaintiff in error, that the execution was abated, and nobody could perfect it : not the executor of the administrator, because he came

in *in autre droit* ; and the administrator *de bonis non*, could not, for he was *per amicum* ; and that this was not within the stat. of 17 Car. 2, ch. 13, for that only regards cases after verdict : but *per curiam*, this *scire facias* against the sheriff is not maintainable, and several resolutions were made in the case, the first of which is, that [176] the plaintiff's death did not abate the *fiery facias*, and that the sheriff, notwithstanding that, might proceed in it, because he had nothing more to do with the plaintiff, for the writ commands him to levy and bring the money into Court, which the plaintiff doth no way hinder ; besides an execution is an entire thing, and cannot be superseded after it is begun. This was a determination in the time of Lord Chief Justice Holt, and it hath never been contradicted ; and it hath been resolved, that where a *capias ad satisfaciendum* was taken out, and delivered to the Sheriff, who took the party thereon, and returned a *cepi* on the writ, although the plaintiff were dead at the time of the actual taking, the executor or administrator, without any new process, or revival, hath a right to have the body of the defendant in execution, which the law gives him as a pledge for the debt.

The writ of *capias ad satisfaciendum* directs the sheriff to take the body *ad satisfaciendum* the plaintiff's debt. The satisfaction is the end of the writ, which attaches him from the instant it comes into the hands of the sheriff ; and the plaintiff hath no further act to do, but to receive satisfaction ; nay it was formerly held, that executions attached from the time the writ bore teste.

In the case before me, the plaintiff is in execution ; but that makes no alteration in the reason of the thing, because a defendant may be considered as an actor to a particular purpose with equal propriety, as a plaintiff originally so called.

I think a sequestration in this Court hath the nearest analogy to a special *capias utlegatum*. Disobedience is the ground of both processes : but although this [177] sort of process issues for contempt, it is likewise for a debt or duty ; and where the sequestration is solely for a contempt, it dies with the party who sues it out, which makes the essential difference between that, and the process in the present case, where it is in nature of a *capias ad satisfaciendum* a certain debt.

In answer to the objection, that if in the present case, there is no representative of the deceased defendant before the Court, and the cause be out of Court, perhaps the prisoner may remain perpetually where he is : if the deceased defendant hath made no will, and nobody would take out administration to him, and so a considerable time should run, and the prisoner made application to the Court for his discharge, and at the same time offered to pay the costs, for which he is in custody : the Court would, in case no representative came before the Court, on the best notice that could, in such a case, be given, and proof thereof laid before the Court, exercise its discretion, and perhaps discharge the prisoner ; but that is not now the case ; and the Court will give a proper time for the defendant's representative to come in, and revive, and not at this time discharge the plaintiff, who is imprisoned not for contempt, but is to be considered in execution for a debt : And on the other hand, no representative appearing before the Court, to whom the satisfaction for which the prisoner is detained, may be made, it will be very hard to render him a perpetual prisoner, and therefore the prisoner must be remanded ; and let the representative of the deceased defendant revive on or before the last day of Michaelmas term, otherwise, let the prisoner be discharged from his imprisonment.

[See *Troup v. Troupe*, 1868, 37 L. J. Ch. 392.]

[178] ROWE v. BEAVIS.

20 Nov. 1753.

Rents and profits of a real estate descended, are to be accounted for, and applied, before the inheritance is sold, and applied.

BEDFORD v. COKE.

(Reg. Lib. A. fol. 121.) 29 Oct. 1743. *Vid.* 2 Ves. 116. In May.

Arrears of annuity, and simple contract debts, though liquidated by the report, do not carry interest.

Philip late Duke of Wharton, being indebted by mortgage and otherwise, by indentures of lease and release dated 19 and 20 March 1691, conveyed estates therein

mentioned, to the Honourable A. Denton, Gibson, and others, in trust, to sell any part thereof for payment of his debts, &c. On hearing the original cause, the 19th of August 1723, on a bill filed by the creditors for the purpose, the trusts of the deeds were decreed to be executed, and the estates to be sold, and the purchase money to be paid to the trustees, to be applied, first, in payment of the mortgages and incumbrances according to their priority, and then of the other creditors, and the surplus to be paid to the Duke.

The Duke afterwards went abroad, and was outlawed, and attainted of high treason; and dying so outlawed, and attainted, his estates became forfeited to the Crown. While in Spain, he married a Spanish lady, and by indentures of lease and release, dated the 13th and 14th of Aug. 1726, after reciting his marriage, and that by articles of agreement previous thereto, he had agreed to settle on her £500 a-year by way of pin-money, and £1200 a year, as and for [179] her jointure, and in lieu of dower, he, in pursuance of the agreement, conveyed his estates in Bucks, Westmoreland, Cumberland, York, and Middlesex, and all his lands, &c., to trustees, upon trust, out of the rents and profits, or by lease, to pay those annuities, in lieu of dower, and reciting, that the Duke's said estates were incumbered, and that he thought himself bound in honour to secure the said annuities, he confessed a judgment to secure the said two annuities, in case the Duchess should be evicted from the estates.

The Duke being dead, by letters patent, dated 24th of April 1733, the Crown granted the Duke's estates to the same trustees, upon trust, to sell the same, or any part thereof, for payment of the Duke's debts, and to apply the surplus to the use of the Lady Jane Coke and Lady Lucy Morris, his sisters, and co-heiresses at law: Lady Lucy Morris afterwards died intestate; and Lady Jane Coke who survived her, became entitled the whole surplus.

Part of the estates were sold in 1738, pursuant to the decree in the original cause, and the mortgages and incumbrances were paid according to their priorities.

The Duke having contracted fresh debts after the execution of the trust deeds, and difficulties arising from the claims of the Duchess, and other creditors, respecting the priority of their demands; the present suit was instituted to carry into effect the former decree, and to settle the priorities of the different claimants.

Upon hearing the cause, the 25th, 27th, 28th, and the 29th October 1743, the Lord Chancellor declared, that the £500 a-year to the Duchess for pin-money, [180] was to be considered as satisfied, to the time of the death of the Duke, and that from that time there was to be taken an account of what was due in respect of it, and likewise for the £1200 a-year; and the Master was also to take an account of what was due to all the other creditors of the Duke of Wharton, and to compute interest on such of their debts as carried interest, according to the rate of interest they carried; and the Master was to carry on the accounts directed by the original decree of the trust estates in the deeds of 1691, and state the surplus; and the Master was to inquire, what other estates there were of the late Duke, not comprised in the deeds of trust, and they, or so much thereof as was necessary, were to be sold, and the money applied in payment of the debts, etc.

Upon taking the account of what was due to the Duchess under the decree which is dated 29th Nov. 1743 (Reg. Lib. A. fol. 121), under the title of Bedford v. Gibson, in respect of the said annuities, it appeared by the report, which is dated 4th August 1750, that there was due on account of it £22,848, 11s. 1¾d., and the annuity not having been regularly paid, and being her principal support, she was under the necessity of taking up money at interest, to maintain herself.

A motion was this day (7 Dec. 1752) made by Mr. Solicitor General, Mr. Noel, and Mr. Wilbraham, on behalf of the Duchess of Wharton, to be paid interest for the arrears of her annuity from the confirmation of the Master's report liquidating the arrears.

A similar application was also made on behalf of the simple contract creditors, upon what was due to them respectively, although the consideration of in-[181]-terest was not reserved, nor any direction relating to interest given by the decree.

Mr. Attorney General and M. Ord were counsel for the plaintiffs.

Lord Hardwicke, C.—The question in this case, is, whether, where a decree directs an account of the principal money, and not interest, and doth not even reserve interest, the liquidated sum upon the account taken shall carry interest from the confirmation

of the report. The case is hard, and if I could come at it agreeably to the rules as acknowledged, I would do it.

Here interest is not even reserved by the decree, and interest for the arrears of an annuity is not strictly due, but depends upon the circumstances of the case.

Sometimes there may be a legal remedy for interest, but where there is no legal remedy, the Court hath, at its discretion, given it.

The first question, therefore is, whether the Duchess is intitled to it by the strict rule of the Court, as a *rem judicatum*? If not, secondly, whether the Court hath a discretionary power to give it?

As to the first question, whether the Duchess is entitled to interest by the rule of the Court, I am of opinion, she is not; for at law, where there is no penalty, you can have no interest, yet where there is a penalty, you may levy the whole. But it is true you have another method to come at it, if instead of taking out execution, you bring an action of debt on the judgment. So it stands at law.

How is it then in this Court? If a decree is made for a sum of money, and there is a delay in payment, I do not know the plaintiff can come, and pray interest: [182] But the method where a decree is made for an account, and the Master is to compute interest, is this: the Master in computing subsequent interest, computes it on the liquidated sum from the confirmation of his report.

I do not recollect an instance, and have not heard one cited, where the Court hath gone the length of what is now prayed: If any can be found to warrant me in doing it, I shall be pleased: therefore let the motion stand over, and let precedents be searched.

It stood over from time to time for four months; search was made by Mr. Howard and the other Registers, and by gentlemen at the bar; but none were met with, and the motion dropt.*

[Mews' Dig. Annuity, III, 6, c. See *Grosvenor v. Cook*, 1757, Dick. 308; *Booth v. Leicester*, 1838, 3 My. & Cr. 459.]

JOYCE v. BARKER.

18 Dec. 1752.

On application that the plaintiff might elect to proceed in this Court, or at law: liberty was given to make a special election to proceed in this Court for the two years' rent in question, which had incurred before the defendant came into possession, and at law, for the rent accrued in the defendant's own time.

BRADLEY v. CRACKENTHORP.

1752.

Deposition of a witness examined *de bene esse*, directed to be published in order to be used at a trial at law, the witness being aged, and infirm, and unable to travel.

[183] MANLY v. EYTON.

23 Jan. 1753.

On application that the tenant might pay his rent, it was referred to the Master to take an account of what was due from him for rent. The Master having made his report, on affidavit of service of the report, and of demanding what was reported due, and that the tenant had not paid, he was ordered to stand committed without appearing a day for it.

GARTH v. COTTON.†

5 Feb. 1753. 3 Atk. 751, S. C.; 1 Ves. 524, 546, S. C.

Lord Hardwicke, C.—The end of the bill is, that the defendant may account, and make satisfaction to the plaintiff for all such sums of money as he hath received by a fall of timber upon the estate in question in the year 1714, with interest.

The case is this: Richard Garth Esquire being seized in fee, by will devised to Richard Bovey, father of the plaintiff, for ninety nine years, if he should so long live.

* *Vid.* *Morgan v. Morgan*, *infra* [Dick. 643]; *Cotton v. White*, 17 June 1752. Mrs. White was directed to be paid arrears of an annuity with interest from the confirmation of the report. *Vid.* also *Anon.* 2 Ves. 661, and *Signal v. Biddell*, *infra*. [Dick. 278].—J. D.

† This case was copied from Lord Hardwicke's written argument.—J. D.

without impeachment of waste, voluntary waste excepted, on condition he took upon himself the surname of Garth; and from and after the forfeiture or determination of that estate, to the use of trustees during the life of the said Richard Bovey, in trust to preserve contingent estates, but nevertheless to permit the said Richard Bovey, at and after his full age of twenty-one years, to receive the rents, issues, and profits thereof during his life, with remainder to his [184] first, and other sons in tail male. After this there are remainders to Avery Garth and his sons in like manner (all which determined soon after the testator's death), with the ultimate remainder to Sir John Hind Cotton, the defendant's grandfather, in fee simple.

Of this will the testator made Catherine his wife executrix.

On the 18th July 1700 the testator died.

On his death the plaintiff's father entered upon the estate, and performed the condition of taking on himself the surname of Garth.

Sir John Hind Cotton, the defendant's grandfather, died, whereby the remainder in fee descended to the last Sir John Hind Cotton, his son and heir, and in whom the remainder of inheritance was become vested.

On the 12th February 1713, the plaintiff's father executed a letter of attorney to Reginald Marriot, authorising him to come to an agreement with Sir John Hind Cotton, the remainder man in fee, for a fall of timber on the estate.

On the 16th of July 1714, articles were entered into between the plaintiff's father, by Mr. Marriot his attorney on the one part, and Sir John Hind Cotton, the defendant's father, on the other part; reciting, that the plaintiff's father was seised for life (which is not true, for his estate was only for ninety-nine years, determinable on his life), with remainder to all his sons in tail male, with remainder to Sir John Hind Cotton in fee; that the plaintiff's father had then no issue male; that he had desired Sir John Hind Cotton to consent to the cutting down, and selling [185] part of the timber then standing, and growing upon the premises.

Upon these recitals, it is agreed that some person authorised by the plaintiff's father, and some person authorised by Sir John Hind Cotton, should view, and mark what timber trees were then fit to be cut down. That then the parties should agree, and appoint by writing under their hands, how many of the trees so marked should be cut down, and sold for the best prices that could be got.

That Sir John Hind Cotton should not take any advantage of the cutting of the timber, nor should it be esteemed waste, nor any advantage taken thereof on pretence of its being waste.

The first trust of the money to arise by sale of the timber is, that it shall be applied to pay all such debts as were owing by the testator at his death, together with the legacies by him given, which have not, nor shall be paid out of the personal estate, (although it is admitted, by the answer of the original defendant Sir John Hind Cotton, the defendant's father, that the estate devised was not subject to the payment of the testator's debts): that the residue of the money arising by the sale of the timber should be divided into moieties between the plaintiff's father, and the late Sir John Hind Cotton.

The articles then take notice, that there was a sum of £1787, 5s. 6d. then in the hands of one of the Masters of this Court, being the produce of timber sold off the estate by Sir John Hind Cotton, the defendant's grandfather, which was claimed by both parties; and it is agreed that the money shall be paid out of Court, [186] and applied to the same purposes as the money to arise by the timber then to be felled.

It is further agreed that the death of the plaintiff's father without issue male, or his having issue male on the death of Sir John Hind Cotton, should make no alteration in the terms thereby agreed on, but that the parties, their executors or administrators, should, notwithstanding any death or alteration, have the like share and benefit of the wood and timber to be felled, and cut down, as if all such wood and timber had been felled and cut down, and the money divided and paid between the plaintiff's father and Sir John Hind Cotton, before such death, or alteration.

Then follows a clause for applying the testator's personal estate, in the first place, to the payment of his debts and legacies.

Sir John Hind Cotton, the original defendant, admits by his first answer (which is not replied to) that he received about the sum of £1000 for his share of the money for which the timber was sold.

At the time of entering into these articles, and when the timber was felled and disposed of, the plaintiff was not born, but his father was then married to Mary Pullen his first wife; and it is sworn by the first answer, that he had been married to her for several years without having any issue, and was not then likely to have any by her.

In September 1716, she died without ever having had any issue, and some time after the plaintiff's father intermarried with Elizabeth Emerson.

[187] On the 26th of May 1724, the plaintiff was born, which was about ten years after entering into the articles.

On the 11th of January 1727, the plaintiff's father died, leaving the plaintiff, his only son, an infant, who then became entitled to the estate as tenant in tail in possession.

On the 26th of May 1745, the plaintiff attained his age of twenty-one years, and in Trinity Term following suffered a recovery of the estate to the use of himself and his heirs.

On the 20th of May 1748, the original bill was brought by the plaintiff against Sir John Hind Cotton, who dying before a determination, the suit hath been revived against the defendants his executors, and the same relief is prayed out of his assets. And assets are admitted.

Upon this case the general question is, whether the plaintiff is entitled to satisfaction for so much as Sir John Hind Cotton the father received out of the inheritance by the fall, and sale of timber before the plaintiff came *in esse*, and consequently before he had any estate in him in the land, and whilst the remainder, which vested in him afterwards, rested in mere contingency, or possibility.

This hath been admitted at the bar on all sides to be entirely a new question, upon which there is no precedent, and which hath never been brought into judgment before.

It hath been admitted also, that the plaintiff can have no remedy at law, either in his own name, or in the names of the trustees, to preserve contingent remainders, but that his only possible remedy is in a Court of Equity.

This made it necessary for the Court to proceed with great deliberation before a decision was made, which would be the first precedent after the invention of trustees to preserve contingent remainders, now about a hundred years since, and which may have extensive consequences as to other cases that may arise.

In order to determine whether the plaintiff is entitled to the relief he prays, it will be necessary to take several matters into consideration; to lay down some that are plain, and to clear and establish others that appear more doubtful.

First, That the stripping of this estate of the timber was a wrongful act, is clear from the nature of the limitations.

The plaintiff's father was only tenant for years, punishable for wilful waste, and had no present right to or interest in the timber, other than the mast, and shade, and necessary botes.

The defendant's father had no present right to cut it down, but in his turn, according to the order of limitation. It is true, the inheritance was vested in him subject to open, and let in the contingent remainder when a son should come *in esse*; and in that quality the timber part of the inheritance was vested in him; but he had no present right to take and use it. The trustees, who were seised of the freehold, might have restrained him in this Court by injunction; and the plaintiff might have brought an action of trespass against him, for his entry, and tortious act.

[189] Further, it was the duty of the plaintiff's father so to have done, not only in respect of the trespass upon himself, which he might have waived, but in respect of the privy which was in expectancy between the tenant for years, and the contingent remainder man, when he should come *in esse*; for between the tenant for years and the lessor, or the remainder man of the inheritance, there is a privy. And before the Statute of *quia emptores terrarum*, a tenure arose, and this makes a tenant for years a kind of fiduciary for the lessor, or the remainder man, who stands in his place.

As this act was wrongful both in Mr. Garth the plaintiff's father, and the late Sir John Hind Cotton; so this wrong was committed collusively between them: when I say collusively, I do not mean an injurious intention, for they might mistake their right; but that will not vary the case in respect of the right of others. This appears

by the whole frame of the articles, which are an agreement to do what neither of them alone, nor both together, had a right to do. In order to this, the plaintiff's tather is recited to have the freehold, which he had not: A colour is given to the transaction as if it were for payment of the debts of the father, to which it is admitted the estate was not liable: And it is expressly stipulated, that even in case the plaintiff's tather should die, leaving issue male, before all the timber should be felled, and the money divided, the parties to these articles, *i.e.* the tenant for years, and the remote remainder man, should have the same shares, as if all the timber had been felled, and the money divided before such death, or alteration had happened.

[190] Can there be a stronger proof of collusion than this? The tenant for years enters into an agreement, not only contrary to his general privity and trust (if I may so speak), but both the parties bind themselves in plain terms to injure the remainder man, even after his estate should become vested, if that event should happen before this destruction was completed.

The next thing which is plain, and self-evident is, that this wrongful collusive transaction hath turned to the damage and loss of the plaintiff.

The next enquiry is, whether the plaintiff is entitled to any remedy in this Court upon the principles of equity.

At law it is admitted, as I said before, that he can have none: And it must be admitted further, that if the limitation to trustees to preserve contingent remainders had been out of the case, he would have had none in equity.

Indeed, as the plaintiff's father was made only tenant for years, if there had not been such a limitation to the trustees, all the contingent remainders would have been void, for want of an estate of freehold to support them; and Sir John Hind Cotton would have had the immediate freehold, as well as the inheritance in him, which would have given him a clear right. But if the plaintiff's tather had been tenant for life, and there had been no such limitation to the trustees, the plaintiff could even then have been entitled to no remedy, because his whole use in the land, whilst it remained in contingency, would have been in the power of the tenant for life to bar by fine, feoffment, or surrender to the remainder man vested. And there [191] could have been no pretence for this Court to interpose to preserve, or restore to him part of that inheritance, the whole of which was in the power of the tenant for life.

Therefore the stress and foundation of the plaintiff's equity depends entirely upon the estate limited to the trustees to preserve the contingent uses, and the consequences from thence.

In order to determine concerning the force and operation of this in the present case, I will consider—

First, What is the intention, and use of creating limitations to trustees for preserving contingent remainders.

Secondly, What estate such trustees take in point of law, and what actions they may maintain at common law.

Thirdly, What is the nature, and extent of this trust in equity, and what remedy they may pursue in this Court.

Fourthly, How far, and in what cases such trustees may be charged in equity for a breach of trust, or any other person be affected by their acts, or laches in breach of their trust.

First.—The intention of limitation to trustees to preserve contingent uses, took its rise from the determination of two great cases, reported by Lord Coke in his first volume; Chudleigh's case, Hil. 31 Eliz. [1589–95, 1 Co. 113 b]; and Archer's case, Mich. 39 Eliz. [1597, 1 Co. 63 b]; though it was several years after those resolutions before that light was struck out, and it was not brought into practice amongst conveyancers till the time of the usurpation, when, probably, the pro-[192]-viding against forfeitures for what was then called treason, and delinquency, was an additional motive to it.

Let us see, then, what were the claims, and defects which wanted to be filled up and remedied in consequence of those two judgments.

The grand dispute in Chudleigh's case was concerning the power of feoffees to uses created since the stat. of 27 H. 8, chap. 10, to destroy contingent uses by fine, or feoffment, before the contingent use came into being.

In order to determine this, the Judges entered into very refined and speculative reasonings, some of which I speak of with reverence are not very easy to comprehend.

They all agreed, that where there is a conveyance to uses :—to the use of the feoffee for life : remainder to his first, and every other son in tail, with remainders over ; in all those cases no estate at all is left in the feoffees, but the whole estate is divested, and drawn out of them by the Statute of Uses.

But then came the question respecting the contingent uses to the sons not *in esse*. On the one side, though they admitted there was no estate left in the feoffees, yet they said there was a *scintilla juris*, a power of entry to preserve the contingent uses, if by reason of disseisin, or disturbance of the estate, there should be occasion : for, say they, no use can be executed by the statute, unless there be a person seized to the use, and also a *cestui que use*. And if any disseisin, or disturbance of the estate should happen, the right to the use cannot be executed within the statute ; therefore, lest these contingent uses should be destroyed, and not [193] executed, there must, by construction of the statute, be such a power of entry left in the feoffees, and their heirs.

This was the opinion of the greater part of the Judges.

Others of the Judges were of opinion, that there was not only no estate left in the feoffees, but no power, or right to enter, nor any thing to do with the land ; but that they were at first only conduit pipes, and the estate that was in them, was by the statute wholly transferred to serve the uses which were *in esse* with a pregnancy and prospect to the contingent remainders, if they should arise in their due time.

It must be observed, that one thing which weighed much with the majority of the Judges to be of opinion for leaving a right of entry in the feoffees to preserve the contingent uses, was their fear of perpetuities, and of having contingent estates by way of use in persons not *in esse*, if they should not be destroyable by the feoffees ; for this doctrine, as it left it in the power of the feoffees to preserve the contingent uses, so it put it into their power to destroy them, if they pleased.

The reason of which was, that at that time the law was not settled that the destruction of the particular estate by the feoffment, or conveyance of the *cestui que use* for life, before the contingent remainders became vested, was a destruction of the contingent remainders : but afterwards came Archer's case [1 Co. 63 b], in which case this point was solemnly settled, and they were relieved from their apprehensions : for though Archer's case is placed in the reports before Chudleigh's [1 Co. 113 b] case, it was not determined until some years afterwards.

[194] The clearest summary of the reasoning in those cases is stated by Mr. Pollexton in his argument of the case of Hales against Risley, in Pollexton, 385, from whence I have taken it.

From this deduction you will see what were the chasms and defects to be supplied.

Here was then understood to be a power in the general feoffees to uses either to preserve or destroy those uses *ad libitum*, and here was a power in the *cestui que use* for life to destroy them.

How were those defects to be supplied and filled up ? By vesting a limitation in certain trustees *eo nomine*, upon an express trust to support them. But how to support them ? By preserving the whole inheritance to come entire to the *cestui que use* in contingency, in like manner as trustees to uses ought to do before the Statute of Uses, when they were but trusts to be executed in this Court. And as things then stood, such trustees having the whole legal estate, might and ought to preserve the entire inheritance, whether consisting of the lands, mines, or timber, for the benefit of all the *cestui que* trusts in remainder, either vested or contingent.

Secondly.—Consider, in the next place, what such trustees take in point of law, and what actions they may maintain at common law.

It hath formerly been attempted to be brought in question, whether upon such a limitation to trustees after a prior limitation for life, they took any estate at all in the land, or only a right of entry on the forfeiture, or surrender of the first tenant for life, by reason, that the limitation being only during his life, could not commence or take effect after his death.

[195] But this was soon settled on the authority of Chelmondeley's case, 2 Coke 500, where it is held that if there is a lease to A for life, remainder to another during the life of A, this is a good remainder : for by possibility the remainder may take effect in case a tenant for life makes a feoffment in fee, or commits any other forfeiture, and

so in the book 41 E. 3, Fitzh. title Waste, 83 ; and this is followed by the late case of Duncomb against Duncomb, Hil. 7 Wm. 3 C. B. 3 Lev. 437, which was one of the first cases wherein the operation of such limitation to trustees to preserve contingent uses came into question.

If this be so upon such a limitation, after a prior estate for life, it holds much more strongly when limited after a prior estate for years only, determinable on the life of the first tenant, because in the last case, it comes the first estate of freehold to the trustees, as was rightly reasoned by Lord Chief Justice Lee, in the case of Smith and Dormer, and Packhurst, Mich. 14 Geo. 2, B. R.

It is plain, therefore, that these trustees had the immediate freehold in them, an estate *pur autre vie* ; and at law they alone could maintain, or defend any action concerning the freehold.

If a disseisin was committed, they must bring the assize, and they must defend in all preceipes : for the possession of the tenant for years was, in law, their possession : for this reason, they had in law an interest in the timber ; not, indeed, to cut down or destroy, but in respect of the enjoyment by their tenant for years, and of the expectancy of its coming into their actual possession by the determination of his estate, as part of their freehold.

[196] Notwithstanding all this, it is certain that they could maintain no action of waste : the reason of which is, that the common law gave the prohibition of waste only to an owner of the inheritance ; and the Statute of Gloucester gave the writ of waste to the same persons. But in this respect, such trustees are in no other condition than all other remainder men for life.

Thirdly.—Consider, in the next place, what is the nature and extent of their trust in equity, and what remedies they may pursue in this Court.

And I hold it to be agreeable to natural justice, and in support of right to construe their trust in the most liberal manner. In the case of Mansell against Mansell, [2 P. Wms. 678 ; 2 Eq. Ca. Ab. 747] which must be more particularly mentioned by and by, it was expressly laid down by Lord Raymond, as I took it from his own mouth : "It is only positive law, that tenant for life may destroy contingent remainders, and therefore it was a very considerable invention to create these trusts to preserve them : they are the creature of the Court, and properly under its direction, and controul."

The first trust is declared to preserve the contingent estates therein-after limited. How to preserve them ? To preserve the inheritance as entire as possible, to go according to the succession established by the testator, which inheritance consists of the land, timber, and mines, and cannot be preserved entire without preserving all three. In many estates the timber is the most valuable part, in more the mines ; and the destruction of the one, or the exhausting of the other, might take away, or be an alienation of the best part of the inheritance.

[197] But it hath been objected, that this relates only to the preservation of the legal estate of the use, and not to the timber, or mines, because the estate of the trustees cannot support any action of waste.

This might in many instances be to preserve the shell, without the kernel, and brings it to the question, what remedies they may, in virtue of this trust, pursue in this Court.

These trusts are equally declared to make entries, and bring actions as the case shall require. Here it is expressly to do all, and every such lawful act, and acts by entry, or otherwise, as shall be requisite for that purpose, and end.

But whether the expression be the one or the other, it comes to the same thing, and comprehends all remedies both in law and equity. For the course of equity is a part of the constitution of the law, and judicial proceedings in this kingdom.

Therefore, if after a forfeiture committed, and an entry made for that forfeiture, such trustees wanted any assistance of a Court of Equity in support of their trust, and not to break in upon the right of the tenant for life to receive the rents and profits, they might, undoubtedly, by force of this trust, have their remedy here.

As they may do this, I am clearly of opinion, that they may bring a bill for an injunction to stay waste, although no precedent in point is produced for it.

In the present case, they were remainder men *pur autre vie*, and immediate owners of the freehold in law. In the case of Dayrell against Champneys, 1 Abridgment of Cases in Equity, 400, Trin. 1700, a remainder man for life was admitted to maintain

such a bill, [198] without making the owner of the inheritance a party : and although it was observed upon that case by Mr. Clarke, that it appears by the state of it in the book, that the plaintiff had the first remainder in tail vested, yet that doth not appear by the recitals of this decretal order ; and if it had, the objection could not have been made.

If the trustees could do this as remainder men of the legal estate *per autre vie*, surely their trust, which affects their conscience, and, according to Lord Raymond's opinion, makes them creatures of this Court, would not make their case the weaker here.

But the books go further, and say a bill may be brought for an injunction to stay waste on behalf of an infant *en ventre sa mere*. And so is Musgrave against Parry, 2 Vern. 710 ; which is liable to much more difficulty, for that must be as *amicus curiæ* on the unborn child's behalf.

I, therefore, hold most clearly, that the trustees might have brought such a bill, and obtained an injunction to stay this waste, both against the plaintiff's father and the late Sir John Hind Cotton.

Pursue this then into its necessary consequences.

Suppose after such an injunction granted, the timber had been felled. This had been a contempt of the Court, and the contemnor must have stood committed.

Then arises the question which Mr. Solicitor General (afterwards Lord Mansfield, C. J.) very properly put in his argument :—On what terms should they be discharged ? This Court could not have fined them : therefore, certainly only on the terms of making satisfaction. That satisfaction could not have been made by setting up the trees again, and, [199] therefore, it must have been by paying the value. Who must have had that value ? Not the tenant for years, for he had no pretence to it : nor the remote remainder man in fee, for he had no right to take it : and this would have been to reward them both for their contempt and collusion. The consequence is, it must have been laid up, and secured to attend the contingent uses. Without this, Justice could not have been done.

Fourthly.—It comes next to be considered, how far and in what cases, such trustees may be charged in equity for a breach of trust, or any other person may be affected by their act, or laches in breach of trust.

Notwithstanding the saying of Mr. Pollexfen, *arguendo* at the bar (Poll. 250), "that trustees to preserve contingent remainders, were never punished in equity, when they broke their trust" (which, by the way, is a kind of contradiction in terms), that is now exploded, and settled to the satisfaction of mankind to be otherwise.

It was first broken in upon by Lord Harcourt, in the case of Pye against Gorges (Prec. Ch. 308 : 1 P. Wms. 128 : 2 Salk. 680 : 1 Bro. P. C. 359), Mich. 1719, where he declared, that "when such trustees were appointed, whether by marriage settlement or will, and they, before the birth of a son, joined in a conveyance to destroy the contingent remainders, this was a plain breach of trust, and the persons taking under such a conveyance, if voluntary, or having notice, should be liable to the same trusts" : and he said, if there was no precedent in the case he would make one.

Then came Tipping against Pigot (1 Eq. Ca. Abr. 385 : Gilb. Eq. Rep. 34), in Mich. 1711, before the same Lord Chancellor : and he ad[200]hered to the same doctrine : and said, it would be dangerous for such trustees themselves to make the experiment : Thus it stood till the great case of Mansell against Mansell, which was first decreed by Sir Joseph Jekyl, at the Rolls, in January 1731, and afterwards by Lord King, assisted by Lord Raymond and Lord Chief Baron Reynolds, 12th December 1732 (2 P. Wms. 678 : 2 Eq. Ca. Abr. 747).

Here it was first solemnly settled, by the concurrent opinion of all those great men, that the trustees themselves shall be liable in equity to make satisfaction for such a breach of trust, and also that a voluntary alienor, or a purchaser for a valuable consideration, with notice of the trust, shall be decreed in equity to restore the estate : and in that case it was decreed accordingly.

Thus it stands determined, that for a breach of trust in aliening the inheritance, the trustees are liable, and other persons are affected by their act done in breach of this trust.

On this I build : suppose these trustees had consented to the felling and sale of the timber ; had joined with Mr. Garth and Sir John Hind Cotton in the articles,

and expressly covenanted that they would bring no bill for an injunction ; would the trustees in that case have been liable ? Clearly so ; for it was agreeing to alien part of the inheritance, and it plainly follows from the principle on which the Court founded itself in *Mansell against Mansell* : Lord Raymond said, "it was strange in natural reason to say, that where a man hath created a trust to preserve his estate, the trustees may break that trust, and give away the estate with impunity, and that there wanted [201] no particular precedent for it, because it is founded on all the general rules of trust."

If the trustees had joined in the articles thus to break their trust, would Mr. Garth the father, or the late Sir John Hind Cotton, have been affected by this express act done in breach of their trust ? This to me is also as clear ; for then they would have had notice of this breach of trust, and have reaped the benefits of it, which is expressly within the rules of *Mansell against Mansell*. And here I cannot help repeating some remarkable words of Lord King, who was not disposed to amplify the jurisdiction of this Court. "If it is," said his Lordship, "a breach of trust, and the trustees convey the estate over, a Court of Equity is not to sit still, and let others profit by the spoil."

This position is very apposite to the present case : all the difference is, that here is no positive act of the trustees, but only a laches, or neglect in not performing their trust, and bringing a bill for an injunction to stop this waste.

This may excuse the trustees, if they had no notice of the scheme, or attempt to strip the estate of the timber ; but how will it excuse the others, who, as Lord King expressed it, have profited by the spoil ? By no means.

In all cases of alienations the alienees are not affected merely by the act of the trustees, but by notice of the trust : And here all parties had actual notice of the will, claim under it, and have expressly recited it in their articles. Therefore, in this case the actual notice of the trust operates to make the laches of the trustees affect them as much as their express act would have done in the other : and it would be [202] strange to say that the plaintiff's and defendant's father would have been liable for the timber if the trustees had concurred in the destruction and sale of it, but shall be in a better condition because they did not. What is the justice that results from hence, but restitution ? Just as in the case of an alienation with notice, the justice would have been a re-conveyance. Indeed, it plainly follows by analogy from thence.

Suppose an estate with valuable mines in it unopened, settled in this manner, and the trustees to preserve contingent remainders had joined in an alienation with notice. Afterwards such a purchaser with notice opens the mines, and exhausts them, putting a great sum of money into his pocket. Then a son is born who is tenant in tail : the tenant for life dies, and the son brings a bill for a re-conveyance : if, according to the authority of *Mansell against Mansell* [2 P. Wms. 678 ; 2 Eq. Ca. Abr. 747], the Court had decreed a re-conveyance, would the justice have been complete without decreeing satisfaction for so much of the inheritance as was carried off by exhausting the mines ? Clearly not. It would be a necessary, unavoidable consequence of equity, that satisfaction must be made to the owner of the inheritance. And yet this is liable to the same objections as have been made in the present case at the bar. It was done at a time when the contingent remainder man had neither *jus in re* nor *jus ad rem* before he was in *rerum natura* ; and no wrong can be done to a person non-existent. But these are colourable objections only : for if equity ought to wait, and expect the vesting of the estate for his benefit, and restore him that estate, it ought to do it completely.

[203] I have chosen to go through the general reasoning (which hath, upon the maturest consideration, convinced me, that the plaintiff ought to be relieved in this Court), before I state the objections made on the part of the defendant, the rather because the clearest answer to these objections will arise from the right application of that reasoning.

First objection : That the interposition and allowance of trustees to preserve contingent remainders was not intended, nor has been suffered, to alter the legal rights of the tenants for life, and the first remainder man of the inheritance vested, either in respect of the timber, or other property of, or powers over, the estate.

Answer :—This objection assumes too much ; for I have already proved, and it is demonstrable, that the very intention of interposing this new invented limitation was to alter and abridge the legal rights both of the tenant for life and the first remainder man vested ; to abridge the legal right of the former, to defeat and destroy

the contingent use of the inheritance, whilst it remains contingent, and eventual to abridge the legal right of the latter, to destroy it by accepting a surrender of the estate for life; all which are as much legal powers as the cutting down of timber, or the opening or digging of mines.

I admit the instance which was put, that if (where there is tenant for life, or for years, subject to waste) timber is blown down by accident, or cut down by the act of a stranger, or of the tenant for life alone, the owner of the first remainder of inheritance vested, shall have the benefit of it; so was the case of the timber blown down on the late Duke of New-[204]-castle's estate, and the case of *Whitfield against Bewit*, 2 P. Wms. 240 (and 2 Eq. Ca. Abr. 589); but the ascertaining of the ground of these resolutions is sufficient to distinguish them from the present case.

The common law doth not, nor can consider contingent uses as having existence till they happen; therefore, according to *Lewis Bowles's case*, 11 Co. 79, and *Udall against Udall*, *Alley's case*, 81, an estate in contingency is as no estate till the contingency happens. And when the trees are severed, the property must vest immediately in somebody, and that can only be in the first remainder man of inheritance vested; and on the foundation of that property he may maintain trover for them.

This is his right at law; and there is in the cases put of trees fallen by accident, or merely by the wrongful act of a stranger, or of the tenant for life, no ground of equity to take it from him.

But here comes in the force, and operation of the collusion in this case. This destruction being made by contrivance and collusion with the remainder man, and affecting his conscience, obliges this Court to pursue its known maxims in laying hold of it either by restraining the act before it be completed, or decreeing satisfaction for it afterwards. For, in all cases where a legal right is acquired, or exercised by fraud, or collusion, contrary to conscience, it is the office of this Court to enjoin it, or decree a compensation.

Second objection:—That the relief sought by the bill is contrary to all rules of law, which allows no remedy for waste to any person who hath not an immediate reversion, or remainder of inheritance vested at the time of the waste committed.

[205] Answer:—This is true in general, though it admits of some exceptions even at common law. But if it were true at common law in the latitude with which it was laid down, it would not govern this case, which depends upon principles of equity arising from the collusion and covin between the tenant for years, and the remote remainder man, which is an established ground of relief in this Court, even beyond, and sometimes contrary to, the rules of law.

However, as I always incline to adhere, as near as justice will admit, to the rule *equitas sequitur legem*, I will endeavour to shew how far the opinion I have given coincides with, and is supported by, the reason of some cases concerning waste.

It is clear, that when there is a tenant for life, with remainder over in fee, or tail, and tenant for life commits waste, the remainder man in fee or in tail can have no action of waste. The reason is, because the plaintiff in the action must recover the place wasted, and that would be an injustice to the remainder for life, which is not forfeited; and if it should be recovered by the owner of the inheritance (being under a limitation of the party), it would never go back again.

But notwithstanding that, he may have another action, of trover for the trees, and therein recover satisfaction for the wrong done to the inheritance; nay, in case the remainder man for life dies, leaving the remainder man of the inheritance, he may then bring an action of waste for the waste done during the continuance of the remainder for life.

Further, if there be a tenant for life, with an immediate remainder, or reversion in fee, and the remainder [206] man, or reversioner in fee, grants over his remainder or reversion to A for the life of A; then the tenant for life commits waste, and afterwards the grantor of the remainder or reversion for life dies; this remainder man, or reversioner in fee, may maintain an action of waste, though he had parted with his remainder or reversion for that time by his own voluntary act.

All this appears by *Paget's case*, 5 Co. 76 b, and the case of *Udall v. Udall* [Al 81], and I shall make a further use of it by and by.

But such is the abhorrence of the common law to waste and destruction, that it hath extended its remedies in some special cases beyond the strict principles on which they were originally founded: and therefore, though it be requisite in general that

the inheritance should be vested in the plaintiff at the time of the waste done, else he cannot lay it to his disherison : yet, if the estate were out of him by wrong, and then come into him again, he shall maintain the action of waste. Thus, if lessee for life make a feoffment in fee upon condition, the feoffee does waste, and afterwards breaks the condition, and the lessee for life enters for the breach, though the reversioner had nothing in the reversion at the time of the waste done ; yet, as it was out off him by tort, when it is revested, he shall have this remedy (Co. Litt. 356a).

But there is another case at law, the reason of which seems to me to be more analogous to the present case : as that of a bishop, after the restitution of temporalities to him and his successors in right of his church. When he dies during the vacancy, the right is in the King ; and when a new bishop is invested in the temporalities, the fee is in him. Suppose then a tenant for [207] life, or for years, by demise of the predecessor, commits waste during the vacancy ; the successor shall have the action for this waste, though he had nothing at all in the land at the time the waste was done (Co. Litt. 356 ; Fitzherberts, N. Br. 112).

I shall be told, perhaps, that that is by particular statute, and therefore is no proof of the reason of the common law, and that the statute of Marl. ch. in 29, against depredations upon the possessions of ecclesiastical persons, gave this remedy ; and for this some countenance may be drawn from what Fitzherbert says, in the place cited.

But I beg leave to deny this to be law, and to hold that that statute doth not include bishops, or their possessions ; and of this opinion is Lord Coke in his reading on the statute of Marl. 2d Inst. 151, his words are, " This act extendeth only to abbots, priors, and other prelates, that be religious and regular, and not to bishops and other ecclesiastical persons being secular ; for in the second clause of this act, *hujusmodi religiosorum* is mentioned for the distinction between religious and secular ; and the reason of this diversity is, that the abbots, and priors, and other religious persons are dead persons in law, and have capacity to have lands and goods only for the use and benefit of the house, and cannot make any testament ; and therefore the church or religious house is holden always one ; in respect whereof, the succeeding abbot shall have an assize for disseisin done in the lifetime of his predecessor ; and an action of waste for waste done in his predecessor's time ; but so shall not a bishop, dean, archdeacon, or the like, who are ecclesiastical persons [208] secular, because the church by their death hath an alteration, and is not always one."

That the opinion of Lord Coke was, that the action is not founded on the statute of Marl. is clear by other cases ; for if bishops were within the statute, then they as well as abbots might have an action of waste for waste done, not in time of vacancy, but in their predecessor's time, which as to ecclesiastical persons regular, is clearly within the statute ; but it hath been settled that they cannot (39 Edw. 3. 15 ; 2 Henry 4. 2 ; 2 Rolls Abridg. 8, 24 Pla. 3, 4, 5, 6, 7). From hence I infer, that this remedy was given not by particular statute, but by the policy of the law, which would not permit an estate, which it allowed to be created, and whilst it was in *gremio legis*, as it were, to be destroyed, or stript, without giving a remedy to punish it, though by an extension of its common principles.

But still I must resort back to this, that if there was not so much countenance from the reason of some cases at the common law for this opinion, yet that would not govern this case, which depends on principles of equity ; and equity hath always gone further to restrain waste and destruction, than the common law hath done.

Therefore the case already put, of an intermediate remainder for life, though the law allows no action of waste, this Court sustains a bill for an injunction, and this *ab antiquo*, according to the case in Moore, 554 ; where Lord Ellesmere says, he had seen a precedent for it, so long ago as in the reign of Richard the 2d (1st Rolls Abridg. 377 ; 1 Vern. 23), and many cases in practice.

[209] And although the tenant in tail, after possibility of issue extinct, is at law dishonourable for waste, by reason of the inheritance, which was once in him, yet Lord Chancellor Nottingham was clearly of opinion, to grant an injunction, to restrain a tenant in tail from committing waste in timber, which grew for the ornament of a mansion-house. *Abrahall v. Bubb*. 2 Freeman, 53, and 2 Shower, 69 (and 2 Eq. Ca. Abr. 757). In the same book there is the like case before Sir John Trevor, M. R., 2 Freeman, 278, Hilary, 1704, and this hath been followed since by several cases of tenant for life without

impeachment of waste generally, who have attempted to pull down a mansion house, or to cut down timber growing for shelter, or ornament of the mansion house.

But this Court hath gone still further, and in the case of *Abraham v. B. Ab.* Lord Nottingham cites the case of a Lady Evelyn, where there was tenant for life remainder to the first son for life without impeachment of waste, with remainders over, and the first son by leave of the lessee of the tenant for life, came upon the land, and pulled timber, which was not under the description of trees growing for shelter or ornament, and this Court granted an injunction against him, though no action whatsoever could be maintained at law : And upon the same ground, I did the like in the case of *Fleming* against the late Bishop of Carlisle and others : there the bishop was tenant for life, remainder to his eldest son for life, without impeachment of waste, with remainder over in fee : the eldest son, by permission of the bishop, entered, and began to cut down the timber, and the reversioner in fee, brought a bill for an injunction, and [210] I granted it, because he was not to be allowed to exercise his power of doing waste by anticipation, and before the estate, to which this privilege was annexed, came into possession ; and this in reason comes near to the case of the late Sir John Hind Cotton's bringing himself by collusion, into possession of the timber, before his time.

The case of *Robinson* against *Lytton* (3 Atk. 209 : 2 Eq. Ca. Abr. 528) went still further than the common law : That cause was heard in this Court, the 12th of Dec. 1744, there was a devise to the defendant and his heirs, and if he should die before his age of 21 years, leaving no issue, then to the testator's first, &c., daughters in tail ; remainder to the testator's own right heirs : but if the defendant should live to attain the age of twenty-one years, then the estate should be sold, and the money to be applied for the benefit of the testator's daughters. The defendant, being under the age of twenty-one years, began to commit waste, and the daughters brought their bill in this case ; and though the defendant had the inheritance in him in point of law at the time, yet by reason of the contingent executory limitation, the Court granted an injunction, and at the hearing of the cause after it's being fully argued, made that injunction perpetual.

Third objection :—That suppose a bill might have been maintained by the trustees to support the contingent remainders to stay this waste, before it was committed, yet it will not follow from thence, that after that is over, a bill may now be brought for an account, and that the jurisdiction of this Court to decree an account of the value of the timber, is only incident, and concomitant to the jurisdiction of granting an injunction.

[211] Answer :—It is true, that the general run of the cases, is of bills for an injunction, because that is a preventive suit, and the most remedial to the party : but that affords no conclusive argument that a bill for such an account cannot be maintained, without praying an injunction.

In support of this notion, only one case was cited, *Jesus College* against *Bloome* (3 Atk. 262), which was before me, November 13, 1745 : the lessee of the college had during his lease, cut down some trees, and taken away some stones, and materials of the premises, and converted them to his own use : the term was expired, and a new lease granted to a stranger, and the college brought their bill for an account, and satisfaction of the waste. At the hearing of the cause, I doubted amongst other things), whether such a bill in equity was maintainable, without praying an injunction to stay the waste, and it stood over to another day, and produce precedents : none were produced, and the bill was dismissed without costs : but the point was not absolutely determined, nor was that the only ground of the dismissal, but I was of opinion, that at the utmost, it was in the discretion of the Court, and if the College had a right, they might clearly bring an action of trover at common law, and it being a matter of small value, I did not think fit to countenance such bills in this Court, after the lease expired.

This is widely different from the present case, in all its circumstances, and particularly, that it is admitted, that the plaintiff here, though greatly damaged, can have no remedy at law, which is a substantial difference.

[212] Fourth objection :—But it was objected further, that if such a bill for an account, not incident to an injunction, can be maintained, yet there is no present use of decreeing the value of the timber to be secured, and laid out in land for the benefit of the contingent remainder man : and this could not be done even upon a bill by trustees to preserve contingent remainders before the waste completed, and for this the case of *Whitfield* against *Bewick* (2 P. Wms. 240 : 2 Eq. Ca. Abr. 589) was read in

Answer :—This objection hath been already answered in the course of my argument, and to that I will refer without repeating it. The sound distinction between this case and that of *Whitfield and Bewick*, is the collusion, and covin between the tenant for years, and the remote remainder man in fee ; whereas in that case the remainder man in fee was entirely innocent, and had done nothing contrary to conscience to come at his legal property in the timber when severed ; but it was solely the tortious act of the tenant for life ; and I think I have proved that in some cases of destruction of contingent remainders, or alienations of part of the inheritance to the prejudice of the contingent remainder man, such an account, and compensation must be decreed in order to attain adequate justice.

On this I rely for an answer to that objection.

Fifth objection :—That the demand is made after a great length of time, and that ought to be allowed as a bar in this Court.

Answer :—But though there is length of time in the case, no Statute of Limitations stands in the way, nor is there any laches to be imputed to the plaintiff.

[213] It is true the articles were entered into in 1714, and the timber was felled soon after ; but the plaintiff was not born till May 1724 : his father lived till 1727, and he did not attain his age of twenty-one years till May 1745 ; and this bill was brought in May 1748, within three years after his coming of age.

As to the inconvenience objected to arise from this length of time, how is that inconvenience greater than the common law's allowing an action of waste to be brought by a remainder man in fee after the death of a mesne remainder man for life, for waste done in his lifetime ? That life may have lasted forty, fifty, or sixty years afterwards, and yet this the law allows. Besides, in this case the plaintiff submits to accept the value on the foot of the defendant's answer, which avoids the difficulty of an account.

Sixth objection :—Another objection hath occurred to me in considering this case, which was not mentioned at the bar ; and that is, that by suffering a recovery in 1745, the plaintiff hath altered the state of the remainder, which was in him by the will, and gained a new use. That this might have been a bar to a proper action of waste at law for waste done precedent ; and, by parity of reason, ought to take away his remedy in this Court.

Answer :—This objection, though it may strike at first, yet receives a clear answer.

I admit that in *Co. Litt.* 53 b, Lord Coke lays it down, that after waste done, there is a special regard to be had to the continuance of the reversion in the same state, that it was at the time of the waste done ; for, if after the waste done, the reversioner granteth it over, though he taketh back the whole estate, yet is [214] the waste punishable. So, if A grant the reversion to the use of himself, and his wife, and of his heirs, yet the waste is punishable, and so of the like ; because the estate of the reversion continueth not, but is altered, and consequently the action of waste for waste done before, which consists in privity, is gone.

This is undoubtedly law ; but the difference is, here is no use, or new estate created. The use of this recovery is declared only to the plaintiff himself, and his heirs, whereby his estate tail is turned into an estate in fee, which, in *Lord Derwentwater's* case before the Judges, and Delegates, Hil. 6 Geo. 1, was solemnly determined to be the same use and the same fee, only delivered from the fetters and restraint laid upon it by the statute *de donis* ; and this was agreeable to the resolution of the case of *Abbot against Burton*, 2 Salk. 590 (and 11 Mod. 181 ; Com. Rep. 160), Trin. 7 Ann. C. B., and to the case of *Martin ex dim. Tregonwell against Strachan*, adjudged in B. R. Hil. 16 Geo. 2, and affirmed in the House of Lords in February 1743 (2 Stra. 1179 ; 1 Wils. 2, 66 ; 4 Bro. P. C. 486).

But I go further still, and hold that even in cases where the state of the reversion would be so altered by the act of the reversioner as to preclude his proper action of waste, yet still his property in the timber severed before would remain, and he might maintain trover for it, which is sufficient to take off the force of this objection as applied to the present case.

Seventh objection :—I shall mention but one objection more, and that arises recently from the present state of the cause, as it comes before the Court upon a bill of revivor against the representative of Sir John Hind Cotton, the original defendant. That an action of [215] waste dies with the person, and if the plaintiff had in other respects been in a condition to maintain waste against Sir John Hind Cotton, the party to the

articles, it had been gone by his death : That the law is the same as to the action of trover : *pari ratione* he hath lost his equitable remedy for the waste.

Answer :—I admit the law to be clear, that an action of waste dies with the person ; and I also admit, that I cannot find any authority, or precedent for maintaining an action of trover against an executor upon a conversion by the testator in his lifetime. Though as to this point I give no opinion ; for thus much is certain that an action of trover will lie for an executor upon a conversion by the defendant in the lifetime of the plaintiff's testator, for which there are many authorities ; and it seems difficult to be reconciled to reason, and justice, that these remedies should not be mutual even at the common law.

However, I will admit for argument's sake, that the action of trover for the timber was, as well as the strict action of waste would have been gone at the common law ; but notwithstanding that, I am of opinion that the plaintiff is entitled to the same relief in this Court.

There have been several determinations in this Court, where, by force of the rule, *actio personalis moritur cum persona*, the remedy at law hath been extinguished, yet equity hath given the like satisfaction.

It is well known that at common law, before the statute of 30 Car. 2. Ch. 7. and 4 & 5 Wm. & Ma. Ch. 24, sect. 12, no action, or remedy could be had against the executor of an executor for a devastavit [216] committed by the first executor of the goods of the original testator. But notwithstanding this, equity did not scruple to get the better of this artificial maxim, and decreed an account, and satisfaction against the representatives of such a wasting executor, out of his assets.

This is laid down as a rule in equity by Lord Chancellor Nottingham, in the case of Price against Morgan, 2 Ch. Cas. fol. 215.

His words are, "Although, by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here, and the common law will come to it at last ; and therefore whatever estate of the wasting executor is come to his representative, which his testator wasted, the personal estate of such wasting executor in the hands of his executor, shall answer."

When Lord Nottingham said, the common law would come to it at last, he was a true prophet ; for this case was decided in the 28th of Car. 2 ; and the law was altered by act of parliament in the 30th of Car. 2.

1 Ch. Cas. 121 (and 1 Eq. Ca. Abr. 32), Eton College against Beauchamp and Biggs : The Provost and Fellows of Eton were possessed of a rent, or pension of £1. 14s. per ann. granted by King Henry VI. to that College, issuing out of the lands : The defendant Biggs was executor of the tenant. And the bill was brought for a satisfaction of the arrears of rent incurred in his testator's lifetime, and suggested that the College did not know the lands out of which the rents were issuable, and so could not distrain, and though the person of the terre-tenant was not chargeable with the rent at law, but only the land [217] by way of distress ; yet, forasmuch as the testatrix held the land, and did not pay the rent, it was said, that thereby the testatrix's personal estate was augmented, and therefore the Master of the Rolls, Sir Harbottle Grimstone, decreed the executor to pay the arrears, as far as he had assets of the testatrix.

In 2 Mod. 293, Anon. Error, Hil. 29 Car. 2, in the Exchequer Chamber, before the Lord Chancellor, and Lord Treasurer, assisted by the two Chief Justices. The case was, the plaintiff had declared against the defendant as executor of Edward Nicholls, who was executor of the debtor : The defendant pleaded, that the said debtor died intestate, and administration of his goods was granted to a stranger *absque hoc*, that Edward Nicholls was ever executor, but did not say by his plea, or ever administered as executor, for in truth he was executor *de son tort* : The plaintiff replied, that before the administration granted to the stranger, Edward Nicholls possessed himself of divers goods of the debtor, and made the defendant executor, and died : And to this replication the defendant demurred. Judgment was given for the plaintiff in the Court of Exchequer, but reversed in the Exchequer Chamber : for an executor of an executor *de son tort* is not liable at law ; though the Lord Chancellor Nottingham said he would help the plaintiff in equity.

These authorities would be sufficient to establish the point I am now upon. But I go further, and hold, that in all cases of fraud the remedy doth not die with the person ; but the same relief shall be had against an executor out of the assets of his testator,

as ought to [218] have been given against the testator himself. For, as equity disclaims the maxim, that a personal remedy dies with the person, wherever the demand is proper for that jurisdiction; this Court will follow the estate of the party liable to that demand, and out of that, decree satisfaction. Now, collusion between two persons to the prejudice, and loss of a third, is, in the eye of the Court, the same as a fraud; and you have observed, that one principal ground of the judgment of the Court in this case, is collusion appearing upon the face of the articles set forth in the answer.

I have now gone through the arguments, and objections arising upon the particular case, and the authorities of law, and equity.

One general argument remains, of which the counsel on both sides did in their turns, endeavour to avail themselves; I mean the argument *ab inconvenienti*, which undoubtedly is of weight, especially in a new case.

On the side of the defendants, were urged, the inconveniences that would arise, from making such a precedent, which would tend to lock up the timber of the kingdom, from coming to market; would create questions between possessors of estates, and contingent remainder men springing up at a great length of time, and there would be no knowing where to stop.

But let these inconveniences be compared with the inconveniences that must follow, on the other hand, from laying it down, that a contingent remainder man cannot possibly have any remedy in such a case; I say, let them be compared, and the former [219] will weigh nothing, in the opposite scale against the latter.

Thus far the law allows settlements of estates to go, and no further, and it hath been found to be a convenient medium between perpetuities, and too flux, and unstable a condition of things; most of the family estates in this kingdom, are under such settlements, and it frequently happens, that the first remainder man of the inheritance vested, is a remote relation; remote in blood; and remote in the prospect of succession, perhaps after fifty years contingent limitation of that inheritance.

If what has been done in this case, should be determined to be done *impune*, without any possible recompence in a Court of equity, what havock would it make, and what a licence would be proclaimed! Every remainder man in fee, though after ever so many contingent limitations, might by collusion with the tenant for life, or years in possession, or perhaps of his under-tenant, strip the estate, and convert the value of it to their own use: suppose an estate in the great timber countries of England, in the north, or in Cornwall, where the principal value may consist in timber, or mines, all that value may be exhausted and dissipated before a first son is born, and when he is born, he may find nothing but the shell of what was intended for a lasting support of a family of honour.

It will be no answer to this, to say, the trustees to preserve contingent remainders may bring a bill for an injunction to stop this mischief; the mischief may be completely executed, before they know of it, nay [220] possibly before they can know, whether they are trustees, or not; for it most frequently happens, that trustees to preserve contingent uses, are inserted in settlements, and wills, without their being made acquainted with it.

From hence it is evident, that this will be but a shadow of a remedy, unless the Court goes further, and builds a more adequate relief upon the same principles.

And here, I cannot help adding, that this becomes of the greater importance, from the practice, and abuses of the times, into which we are fallen: when so many new inventions, and contrivances daily show themselves in Courts of Justice, to supply, or to tempt, or to impose upon the extravagance, and necessities of tenants for life, to the destruction of their families.

These considerations bring to my mind the last reasoning of the Judges, in Fermer's case, 3 Co. 79, and with that I will conclude.

That resolution was quite new, and of the first impression, and was contrary to the letter of the statute of the 4th of Henry 7th, chap. 24, but the book says, "Lastly the Judges in this resolution, did greatly respect the general mischief, which would ensue, if such fines, levied by practice, and covin of persons who had particular interests, should bar those who had the inheritance."

The result of the whole is: I must decree satisfaction to the plaintiff, for what the late Sir John Hind Cotton, received, out of his assets; and if the original limitations had been still subsisting, I must have directed this money, to have been laid

out in lands, to the same [221] uses; but as these are now barred, and the plaintiff is tenant in fee, the money is his own.

In this, the question of interest is material, and I have considered it. The principal money is reckoned by the answer at £1000; the cause being heard on bill, and answer, and the plaintiff having at the bar, prayed interest from the time it was received in respect of the possible growth of timber.

But there being no proof, it does not appear, what was the condition of the timber, whether by the time the plaintiff's father died, in 1727, it might not have been decayed, and of little value; what might have been exhausted in repairs, or destroyed by tempests, or accidents; or what young timber may have grown up in its place in the mean time: From these considerations, and as this is a new case, I do not think fit to give interest further back than the filing of the bill.

[Mews' Dig. Fines & Recoveries, 4; Waste and Timber, C. See S. C. Wh. & T. L. C. 7th edit. vol. ii. p. 970; Bagot v. Bagot, 1863, 32 Beav. 519; Sawyer v. Goodwin, 1867, 36 L. J. Ch. 582; Birchwolf v. Birchwolf, 1870, L. R. 9 Eq. 699; Phillips v. Homfrey, 1883, 24 Ch. D. 473.]

Ex parte INGMAN.

Hil. 1753.

Cursitor to make out an original in trespass, *quare clausum fregit*, and the party not to apply to the Filazer.

An application that the Cursitor of Middlesex make out an original in trespass, *quare clausum fregit*; the Cursitor objected he was not warranted so to do, unless the cause of action were shewn, and if the real cause of action were in debt, or on the case, they ought to apply to the Filazer, and insisted the order of Lord Clarendon, directs an affidavit to be produced to the Cursitor; and further that it was of consequence to the King's fines, which ought to be paid in proportion to the demands.

To this the party's counsel alleged he was entitled to an original this way; and further, that the debtor [222] had absconded, and therefore he did not intend to proceed against his person, but against his goods, by way of *pone* and *distringas*; and cited Byas v. Lyel in Mr. Barnes's book.

On this application, the Master of the Rolls, who assisted the Lord Chancellor, was of opinion, that as the writ is demandable, *ex debito iustitie*, and made out of course, it seemed to lie on the Cursitor, to shew his reason for refusing it, whose reason was, that this method of coming to the Cursitor in the first instance, was not the usual practice, for that he ought to take a *capias* from the Filazer.

In answer to this, his Honour was of opinion, that if the plaintiff chose to take out an original, first, to warrant his subsequent proceedings, and not to proceed by way of *capias*, his taking out a *capias* in the first place was unnecessary, and a waiver of the *pone*, and *distringas*, and was therefore of opinion, this was no reason for the Cursitor's refusing the writ.

Another reason given by the Cursitor was, that it was contrary to the statute for preventing frivolous, and vexatious arrests; but to this it was sufficient to say, that the office of the great seal in instances of legal writs, was considerable as *ex officio breviarum*; and that such writs were to issue on demand of the party, and that they were considerable in the Court in which they were returnable, and that the trust was to that Court, which held this method of proceeding regular; and the party takes it at his peril, and therefore there was no reason, why the Court should not issue it.

Lord Chancellor was of opinion with his Honour, and cited Rastal, title in Trespass, 669, as a clear precedent, to shew that at common law in trespass *et al* [223] *et al*, the plaintiff hath his election, to proceed either by *capias* against the person, or by *pone*, and *distringas* against the goods of the defendant; and declared, that in this respect, Lord Clarendon's order had not been observed, and was disused, and that the act of parliament against frivolous arrests, had not taken away the method of proceeding, by *pone*, and *distringas*, and ordered the Cursitor to make out the writ.

MACNAMARA v. MACQUIRE.

8 Feb. 1753.

Common injunctions do not stay proceedings in the Spiritual Court, but are to be moved specially, as was said by Lord Hardwicke, C., to be laid down in 1 P. Wms. 301, and that the same rule holds in respect to proceedings in the Admiralty.

LOUBIER v. CROSS.

(Reg. Lib. B. fol. 228.) 19 April 1753. *Vid.* Moore v. Moore, *supr.* [Dick.] 66.

A defendant in the original cause had filed a supplemental bill in nature of a bill of review, without leave, and without making the usual deposit; the application was to set the mistake right, which the Court ordered, by giving the defendant leave to make the deposit, and to have it considered as made before the bill was filed.

[224] STEVENS v. AVERY.

1 May 1753. At the Rolls, Sir John Strange, M. R.

A party restrained from paying any part of the bill of fees, &c., due to her solicitor, until the clerk in Court, employed by him in the cause, was fully paid his bill.

The defendant Avery employed Mr. Gandy, as the solicitor in the cause, who employed Mr. Cholwich as the clerk in Court, for the said defendant in this cause; and was upon account, indebted to the said Mr. Cholwich; the cause having been heard, Mr. Cholwich delivered in a bill of his fees, and disbursements.

Gandy afterwards dying insolvent, and Joel his widow, having obtained administration to him, Mr. Cholwich applied this day, and obtained an order, to restrain the defendant Avery from paying to the said Mrs. Gandy, any part of the fees, and disbursements, due to Mr. Cholwich; and Mrs. Gandy, from receiving the same, until Mr. Cholwich, should be fully paid his bill of fees, and disbursements.*

This was moved specially upon notice.

WARBURTON v. HANKEY.

15 May 1752. So in *Gibbon v. Gibbon*, 23 June 1757, and *Plunket v. Duke of Bedford*, 24 April 1759.

Answer taken off the file, the same respecting the bartering for boroughs.

[225] ELLIS v. SMITH, *et e contra*.

18 May 1753. 1 Ves. jun. 11, S. C.

A will established as to land, acknowledged only by the testator in the presence of three witnesses; and held also to be a revocation of a former will of land.

The bill in the first cause, was filed by the residuary devisee, and legatee, in the will of Captain William Ellis, to establish his will, dated the 11th of February 1739, and to carry the trusts into execution; to have his real estate sold, and the purchase money applied in aid of the personal estate, and the surplus paid to the plaintiff.

The bill states, that the said William Ellis, being seised of manors, lands, and hereditaments, on the 11th day of February 1739, duly made his will, as by law is required, for passing real estates, and thereby directed his debts to be paid, and charged, and made subject, all his real estates, with the payment thereof; and devised, and bequeathed, the residue of his real and personal estate to the plaintiff William Ellis, and appointed him sole executor.

The testator afterwards went to New York, and as the defendant alledged, made another will there, all of his own writing, dated the 6th day of Aug. 1743, in part as follows: "I William Ellis, of the West Riding, Yorkshire, Esq. do to avoid controversies after my decease, make this my last will, and testament, revoking all others that have

* In *Jesse v. Hill*, 19 March 1753, similar order made by Sir Thomas Clarke, M. R., and in *Chaloner v. Chaloner*, 3 April 1758, and in *Harris v. Chevely*, 1775, by Lord Bathurst, C. *Vid.* also *Ballard v. Hobbs*, *infra* [Dick. 333].

been made by me to the date hereof"; the testator then gives several pecuniary legacies, adding, "my debts and funeral expences to be paid by my executor William Ellis"; the plaintiff in the first cause.

This will was proved at New York.

The defendants, the heirs at law, by their answer, insist, that the will of the 4th of February 1739, was revoked by the will of the 6th of August 1743; and by [226] their cross bill, pray an account of the personal estate, and the rents, and profits of the real estate, and to have sufficient of the real estate sold, to make up the deficiency of the personal estate, and the surplus declared to belong to them as co-heirs.

William Ellis, the residuary devisee, by his answer to the cross bill, admitted the testator made such will of the 6th of August 1743, as before stated, but insisted, that although the said will might be good, and valid, as to the personal estate, yet that the same was not duly executed, so as to pass lands of inheritance; and consequently did not revoke the first will, for that although it might appear on the face of the will, that three persons subscribed their names as witnesses thereto, yet the testator did not sign his name, or set his seal to the said will, in the presence of all, or any of the persons, who appeared to have subscribed their names as witnesses thereto.

This cause came on to be heard the 6th of June 1749, before Lord Hardwicke, C., when a case was directed for the Judges of the Court of King's Bench, upon the pleadings, and proofs, relating to the execution of the will of the 6th of August 1743; and the question thereon was to be, whether the said will was duly executed by the said William Ellis, according to the statute made for preventing frauds, and perjuries.

A petition for re-hearing having been preferred, these causes came on to be re-heard before his Lordship, assisted by Sir John Strange, Master of the Rolls, Sir John Willes, Lord Chief Justice of the Court of Common Pleas, and Sir Thomas Parker, Lord Chief Baron of the Exchequer.

[227] And on this day they severally delivered their opinions.

Lord Chief Baron Parker.—The question is, whether a will brought ready signed and sealed, and acknowledged by the testator, to be his handwriting, in the presence of three witnesses, and those three witnesses, subscribing their names thereto in the presence of the testator, is a good will, and amounts to a revocation of the first.

By the fifth clause of the Statute of Frauds, three things are required; first, the will to be writing; secondly, to be subscribed by the testator; thirdly, to be subscribed by three witnesses in the presence of the testator.

If this had been *res integra*, I should have had great doubt whether the testator's acknowledging his hand, had been sufficient; but after the former determinations, I must consider myself as bound by them.

In *Lemayne v. Stanley*, 1 Levinz, 3 (1 Eq. Ca. Abr. 403, S. C.; 1 Freem. 538, S. C.), the case was this: the testator had not signed at the bottom of the will, but his will, being all of his own handwriting, his name was in the body, and then it is to be presumed the will was produced ready drawn.

In an anonymous case, *Skinner*, 227, Lord Jefferys seemed to think, an acknowledgment would be within the statute.

In *Peate against Ougley* (Com. Rep. 197; 2 Eq. Ca. Abr. 761), Lord C. J. Trevor was of the same opinion.

In *Dormer v. Thurland*, 2 P. Wms. 506, Lord Talbot, C., said, it had been determined in this Court, that where a testator had signed his will, and afterwards declared it to three witnesses, and they signed in his presence, it was a good will; and Lord King seemed [228] of that opinion, in *Lee against Libo*, in *Carthew*, 35, where there was one witness to the will, and two to the codicil, so that neither was according to the statute.

In *Stonehouse v. Evelyn*, 3 P. Wms. 252, Sir Joseph Jekyl, M. R., was of opinion, that the testator's acknowledging his hand was sufficient; and was of the like opinion in *Smith v. Cawdron*, 7th July 1732.

In the cases of *Grayson v. Wilkinson* (*supra* [Dick. 158]), 17 July 1752, and *Spencer v. Moore*, the heir had liberty to try the wills.

But the cases that allow of witnesses subscribing at different times, are stronger than the present, and they are *Cook v. Parsons*, Prec. Ch. 184, and *Jones v. Lake*. In the last no stress was laid on the testator's running his pen over his name.

And as to *Lodge v. Jennings*, Rep. in Eq. 255, out of Lord Gilbert's Reports, the

took the hint from what Lord Keeper Wright said in *Precedents in Chancery*, where it was determined, that witnesses might attest at different times.

It has been insisted, that the sealing of a will in the presence of witnesses, is signing within the statute ; but I cannot think so : and in cases where a person hath been authorised to sign for the testator, the testator was unable through distemper, to sign himself. It is said in *Lemayne v. Stanley*, the Judges were of opinion, that sealing was signing within the statute. In *Warneford against Warneford* (Stra. 764), Lord Raymond ruled, sealing a will was signing, within the statute. But I do not think this so settled a point.

As to the question, whether the second will amounts to a revocation of the first ; this depends on [229] the sixth section of the statute ; and I take it, a revocation may be by any other will, or codicil executed by the testator, with the solemnities required by the statute : and in conformity with that opinion is 3 *Modern*, 118, and as to *Hylton v. King*, 3 *Lev.* 86, where a will was signed by the testator, and a revocation written on the same paper, but not signed by the testator, but only subscribed by four witnesses : that was held no revocation, because it was neither a will, nor codicil.

And in the second will, in the case now before the Court, there are express words of revocation.

And therefore I am of opinion, that the second will is executed according to the *Statute of Frauds*, and doth amount to a revocation.

Lord Chief Justice Willes.—If this had been a new case, I should have prayed time to consider, because I own I am not quite satisfied with the opinion I am about to give ; but I am overborne by the cases, and authorities ; and I am conscious that greater mischiefs would arise by my differing from the authorities than in giving that opinion.

I shall lay the second question, whether the words in the sixth section of the statute relate to wills of revocation, out of the case ; for it would be absurd to say, that wills amounting to a revocation shall be executed in one manner, and wills disposing of lands shall be executed in another.

And on the first question, had it been a new case, I should have doubted : but the cases and authorities are too strong to be got over. If mischief appear, the legislature may interpose ; but it is too much for the Court.

[230] In *Lee against Libb*, there were not three witnesses to either will, or codicil. In *Lodge against Jennings* there were two signings, and each signing was a distinct execution, and but one witness could attest.

The cases, where it is held that three witnesses may attest at different times, are stronger than the present, and may be attended with mischiefs. If the three witnesses attest at different times, they cannot all see the testator execute.

Moreover, the three witnesses are intended to be a check on each other : how can they be so if they attest at different times ?

However, there are strong authorities, and I am glad this case doth not go so far.

And as I find, upon the whole, that in favour of wills, the cases have gone farther than the present, where wills have been fairly obtained, I am of opinion this will is well executed.

But I put in my claim to be of opinion, that sealing is not signing, nor do I know that it has been so determined ; and I look upon myself at liberty to consider it, in case the point should arise.

Lemayne v. Stanley is no authority for the purpose. That merely determined that writing the name at the beginning of a will was signing.

Warneford against Warneford was at *nisi prius*, and is not considerable as an authority, though it ought to have some weight.

The *Master of the Rolls* concurred in opinion, and observed that sealing identified nothing at law, and that the seal is often put by a stationer.

The *Lord Chancellor* observed, that the second will was executed at New York, and proved there, and was [231] not suffered to be sent from thence, as it related to lands there, as well as to lands here ; and, therefore, the question could not be determined at law, and concurred with the Judges.

If this had been *res integra*, his Lordship said he should have had doubts, but as it was *res judicata*, he must be governed by authorities ; and he thought this case not so strong as the cases that had been cited.

And he was of opinion on the second question, that the words in the sixth section of the statute, "signed by the testator in the presence of three witnesses," refer to the words "other writing," and not to the words "will, or codicil;" and held the will to be well executed.

[Mews' Dig. Will, IV, A, 1.]

FRANKLAND v. FRANKLAND.

25 May 1753.

Question concerning examiner's right to take depositions in the country.

The cause being at issue, the defendant prevails with the examiner's clerk to go into Norfolk, and to examine Sir Andrew Fountain as a witness.

The plaintiff moved this day to suppress the depositions for irregularity.

Lord Hardwicke, C.—Two questions have arisen:

One as to the irregularity of the proceedings:

The other, as to the interest of the officers of this Court.

The clerks in Court copy the depositions taken on commission; and the examiners copy depositions taken by them *virtute officii*.

This is an ancient question. The examiners did heretofore claim to be the sole examiners of the Court.

[232] It would be inconvenient to the parties if the defendant could take a single examining clerk into the country; for the clerk on one side might agree to go, and the clerk on the other might refuse, and so lose the opportunity of cross-examining.

Where a witness is examined, the adverse party hath a right to call on him to be cross-examined, and to attend for that purpose four days.

Can this be done out of Norfolk?

In Lord Nottingham's manuscripts, he mentions two cases in which the examining clerks have gone out of the office to examine; *Darrel v. Shirley*, 20 Eliz. [1576-77]; *Roper v. Wiseman*, 21 Car. I. [1643-44]; and also mentions *Castlemain v. Doe*, 18 Car. II. [1666-67], and *Mosely v. Maynard*, 20 Car. II. [1668-69]; but holds this course of all others most dangerous, and thinks fit to restrain all itinerary examiners, and from the two last cases had seen mischiefs.

There can be no right to examine, where there is no process to compel a witness to appear.

Parties have a right to have witnesses examined in their presence.

But that being impossible here, the method to supply it hath been, to examine them, either by the examiner, or by commissioners, and to make this examination amount to an examination in the presence of the parties, the witness is first to be produced at the seat of the Clerk in Court, for the adverse party; and a note of his name and place of abode is delivered.

If the party could carry an examining Clerk into the country, there would be no commissioners to examine witnesses *de bene esse*; yet this was never attempted.

[233] However, by consent these depositions were read, but without prejudice to the general question concerning the regularity of taking them, and the right of any officers of the Court.

WESTCOMB v. WESTCOMB.

26 May 1753. So in *Torin v. Jervois*, 19th Oct. 1750.

The committee of the estate of a lunatic, appointed his guardian to answer, and defend the suit.

WOODROFFE v. KINASTON.

21 June 1753.

A writ of *certiorari* returnable in the Court from whence it issues, and it must be to return the record, not the tenor of the bill, in the Mayor's Court.

On a motion to supersede, or quash a writ of *certiorari* issued out of this Court, to remove proceedings in *replevin*, in the Mayor's Court of the city of London, three objections were taken to the writ.

First it was made returnable in the same Court, whereas it ought to have been in a court of law: Secondly, as to the length of time of the return, it being tested the 9th

of February, and returnable fifteen days after Easter : Thirdly, that it was not to remove the record itself, but only the tenor thereof.

Lord Hardwicke, C., was of opinion, the writ was good as to its being returnable in this Court, and as to the return thereof. But that with respect to the return, it ought to be shortened, and directed the Cursitor to prepare a writ for that purpose ; and as to its being made to return the tenor, and not the record itself, his Lordship was of opinion it was erroneous, and ordered it to be suppressed, and a *procedendo* to issue.

[234] SMITH v. EDWARDSON.

23 June 1753.

The defendants, the infants, being in contempt to an attachment for want of answers, were brought into Court, to have a guardian assigned : the senior Six Clerk not towards the cause, is usually appointed ; but in this case, the infants praying their father might be assigned their guardian, the Court assigned him to be their guardian.

PARRY v. MORGAN.

29 June 1753.

The plaintiff after filing his bill, to which defendant Morgan put in an answer, being advised to amend it in divers particulars, which required a new engrossment, did, without an order for that purpose, file an amended bill, to which the defendant Tonge was named a party ; and the defendants appeared to both bills ; on motion for the purpose, liberty was given to the plaintiff to amend his bill, on payment of 20s. costs ; and for that purpose to take the last engrossment off the file, and to amend the same, amending the defendant Tonge's copy.

NEWTON v. DENT.

5 July 1753.

Defendant in contempt, and being arrested, gives his bail bond, and puts in a plea ; the plea discharged for irregularity.

The defendant being in contempt to an attachment, for want of his answer, obtained several orders for time to answer, but neglecting to put in his an [235]-swer the plaintiff on the 8th of June, 1783, sued out an attachment with proclamation against the defendant, returnable the 24th of June, and on the 16th of June, the defendant was arrested thereon, and he gave his bail bond, and the sheriff returned a *cepi corpus*, and thereupon on the 25th of the same June, the plaintiff obtained an order for the messenger to bring the defendant into Court to answer his contempt. On the afternoon of the same 25th of June the defendant put in a plea, pleading a former suit instituted by the present plaintiff for the same purpose still depending. The plaintiff applied this day by Mr. Solicitor General, Mr. Clark, and Mr. Robins, to discharge the plea for being irregularly put in ; the defendant having obtained an order only for time to answer, and being in contempt for want of an answer.

It was opposed by Mr. Henley and Mr. Green, of counsel with the defendant ; and Lord Hardwicke, C., ordered the plea to be discharged ; but it was ordered, that on the defendant's entering his appearance with the register in a week, consenting that a commission of sequestration should issue against him, in case he did not put in his answer by the time after mentioned, he should have six weeks further time to put in his answer.

TORIN v. FOWKE.

30 July 1753.

The plaintiff came in under a decree in a cause wherein he was no party, to prove a debt, and to receive satisfaction, for which he had filed his bill. [236] If the plaintiffs in the former cause delay prosecuting, the plaintiff in the other was to be at liberty to prosecute the decree in the name of the plaintiffs to that suit, indemnifying them.

LAKE v. LAKE.

3 Nov. 1753. 1 Wils. 213, S. C.

An objection was taken to reading parol evidence in support of the legal operation of a will.

Lord Hardwicke, C., cited *Littlebury v. Buchley*, where parol evidence was read in support of the legal operation of a will, to rebut an equity for the resulting trust, and declared the present case was to the same effect, and over-ruled the objection.

HANDESIDE v. BROWN.

14 Nov. 1753.

Bill in another cause admitted to be read at the hearing of this, as a corroborating circumstance to prove a stale demand.

The bill was to set aside several conveyances obtained from Sir John Thornecroft, for fraud and imposition, charging that the consideration money (if any) was paid to one Wills, who was in collusion with the defendants, and repaid the same to them. The defendants insisted on the fairness of the transaction; and in order to prove the payment of the consideration money to Wills, who acted as attorney for Sir John Thornecroft, the defendants, at the hearing of the cause, offered to read a bill filed by Sir John Thornecroft against Wills, for a general account of dealings, and transactions, whereby he charged Wills [237] particularly, with having received the consideration money for the aforesaid conveyances, and which he had embezzled.

The plaintiffs objected to reading the said bill, for that a bill was made up of the allegations of counsel; that at law it never was admitted; and they had never heard it had been admitted in this Court. And the reason why an answer was admitted to be read was, for that it was upon oath.

It was said on the part of the defendant, that it was read as a corroborating circumstance of a stale fact.

Lord Hardwicke, C.—The question is, first, whether a bill in another cause can be read as legal evidence against a person no party to that suit.

Secondly, Whether it can be read as a corroborating circumstance to prove a stale fact, the witness being dead. His Lordship cited *Snow v. Phillips*, 1 Sid. 220 (1 Keb. 780, S. C.); *Woollet v. Robert*, 1 Ch. Cas. 64; *Mountford v. Ranie*, 2 Keb. 499, and stated they were all the cases he could find on what had been said concerning the present question. The intent of this evidence is to prove a matter of fact; and as an answer was put in to the bill, it proves privity, and brings it within the two first cases. But as I am not willing to break through the modern rule (which doth not permit bills in another cause to be read as legal evidence), I shall therefore consider, whether it may not be read to verify a stale fact, and I am of opinion it may as a corroborating circumstance.

His Lordship therefore over-ruled the objection, and allowed the bill to be read.

[*Mews' Dig. Evidence*, III, b, 2, b.]

[238] LORD LEMPTER v. EARL POMFRET.

24 Nov. 1753.

Tenant in tail refused a discovery of a settlement.

This came before the Court on exceptions to the Master's report, he having reported the defendant's answer insufficient.

The bill was for discovery of title deeds, and for an injunction to stay waste: the plaintiff charging that the defendant his father was tenant for life only, subject to waste, with remainder to him in tail.

Lord Hardwicke, C.—A plaintiff is entitled to come for a discovery of deeds, or facts, where he wants them as auxiliary to relief, or for remedy at law, but not without any occasion for such relief or remedy.

If there be deeds relative to an estate touching which no relief, or remedy is wanted, yet, if the party have occasion to mortgage, he may be entitled to a discovery.

So as between father and son.

If a reasonable proposal of marriage were made to the son, and the father refused to discover deeds, a court of equity might grant a discovery: but that is not the case here: and it is incumbent on a court of equity not to give way to new inventions, that may create mischiefs.

The question now before me is, Whether the answer can be said to be sufficient without breach of the course of the Court: for the bill doth not charge the settlement to be in the custody of the plaintiff, and that he hath threatened, or intends to destroy it.

And though in case of a jointress, the Court will direct a delivery of title deeds on confirming her join-[239]-ture: yet, as between father and son, the Court has always suffered the settlement to remain with the father for the benefit of the family, unless he hath threatened, or intended to destroy it.

That is not the case here: nor is it credible. The defendant the father is tenant for life, not subject to waste. It is his own settlement, and he swears he is punishable for waste.

Therefore allow the exception.

[Mews' Dig. Discovery, A, III; Husband and Wife, I, 1, c.]

EMMET v. AYLIFFE.

(Reg. Lib. A. 21.) 8 Dec. 1753.

The question arose upon a policy of insurance of a ship bound from Naples, which was seized there. An action having been brought on the policy, the plaintiff filed his bill for an injunction, and for a commission to examine witnesses to enable him to proceed at law, but prayed no relief.

An injunction was granted, and continued upon terms, and the plaintiff, and defendant to be at liberty to examine persons named in the order, and each side to have liberty to cross-examine.

On the 12th February 1755, the defendant, after stating the above order, and that he had examined his witnesses, and that the plaintiff had cross-examined them, but had not sued out a commission, moved that the injunction might be dissolved, and that the depositions taken on the part of the defendant be published, and that he might read such depositions as evidence at the trial at law.

[240] After hearing counsel on both sides, the Lord Chancellor dissolved the injunction and ordered the depositions to be published. His Lordship cited *Royal Exchange Assurance Company v. Barker*, 10th December 1742.*

JAMES TUCKFIELD AND FRANCIS HIS WIFE, Plaintiffs: JAMES BULLER THE ELDER, AND JAMES BULLER HIS INFANT SON, Defendants.

(Reg. Lib. B. fol. 39.) 13 Dec. 1753.

Partition of an estate, the legal estate being in trustees. One of the *cestui que* trusts being an infant, the conveyance respited, until he attained twenty-one, and the parties to hold, and enjoy in the mean time.

William Gould, seised in fee of estates in the county of Devon, and of other estates, for long terms of years, died intestate, leaving Elizabeth his widow, and two children, the plaintiff Frances, and Elizabeth, afterwards the wife of the defendant James Buller, and the infant, his heirs at law, who became seised of the estates, subject to an annuity of £200 to Elizabeth their mother, by way of jointure.

Elizabeth the daughter having attained the age of twenty-one, in consideration of, and previous to her marriage with the defendant James Buller the elder, by proper deeds, conveyed all and singular her undivided share of the said estates to Sir John Clark baronet and another, and their heirs, &c., to the use of the said intended husband

* The like order in *Elcock v. Spencer*, 25 May 1756; *Parker v. Gardiner*, 18 March 1738.

for life, remainder to trustees to preserve, &c. ; remainder to the wife for life ; remainder to trustees to preserve, &c. ; remainder to the first, and other sons of the marriage in tail made, [241] with other remainder over ; with remainder in fee to the said defendant James Buller.

And in the release there is a proviso, that in case a partition of the estate should take place, the said trustees should do every act to perfect such partition, and that after such partition, the trustees should stand seised of the moiety of the divided lands to the same uses as the Buller's undivided moiety stood limited.

On the marriage of the plaintiffs, the plaintiff Frances not being of age, by articles dated 17th March 1740, the plaintiff Frances covenanted, when of age, to convey her undivided moiety of the freehold estate to John Yard, and others therein named, and their heirs, to the use of the plaintiff John for life ; remainder to the wife for life, with remainder in strict settlement ; with the ultimate remainder to the plaintiff John in fee.

The plaintiff Frances having attained the age of twenty-one, the plaintiff levied a fine, and fresh articles were entered into, which bore date the 12th of June 1745, but no alteration was made in the limitations, except in the ultimate remainder, which, instead of being to the plaintiff John in fee, was to be as the plaintiffs should appoint, and in default of appointment, to the use of the survivor in fee.

The defendant James Buller the elder having, as it was alleged, got into possession of the estate, and cut down timber, the bill, besides praying partition, prays an account, &c.

The cause was heard this day (5 Feb. 1749. Reg. Lib. B. fol. 295), when a partition was directed of the estate in moieties between the plaintiff and defendant, to be held and enjoyed in severalty, and the parties were to execute mutual conveyances of their respective allotments, which the Master was to settle ; and the defendant, James Buller the infant, was to execute the conveyance when he attained twenty-one, unless he shewed cause to the contrary ; and the party to hold, and enjoy in the mean time.

A commission of partition issued. The commissioners executed it, and the Master settled conveyances of the respective allotments.

At the first seal after Mich. Term 1753, the plaintiffs, by Mr. Solicitor General, Mr. Noel, and Mr. Capper, their Counsel, moved that the execution of the conveyances might be suspended until the infant attained the age of twenty-one, and was capable of executing the deeds ; and argued the impropriety of executing them sooner.

Mr. Henley, and Mr. Wilbraham were Counsel for the defendants, and urged, that the decree was such as was usually made in such cases, and cited *Davenport v. Oldis*, decided by the Lord Chancellor, 8th July 1738. *1 Atk. 579*, by which the parties of age were to execute, and the infant when he attained twenty-one, unless he shewed cause to the contrary.

Lord Hardwicke, C., said he would consider of the case, and it stood over until this day (13 Dec. 1753. Reg. Lib. B. fol. 39), when he delivered his opinion.

In the case before me there hath been a decree directing a partition : one of the parceners is an infant ; and by the decree mutual conveyances are to be executed, and the infant to join when twenty-one, unless he shew cause to the contrary ; and the parties to hold, and enjoy in severalty in the mean time.

[243] The objection is ; that, as the conveyances are to be mutual, it is, I said, that one shall execute, and convey away his freehold, and the other to have it in his power to object when he attains twenty-one. A case of *Davenport v. Oldis*, said to have been determined by me, hath been cited in support of the decree : I might make such a decree ; and I am apt to think others similar to it may be found, but I think them wrong ; and thinking them so, it is proper they should be set right.

Look into precedents, and see what is the course of the Court in decrees, where there is an infant. In decrees of foreclosure, where the infant is mortgagor, the legal estate is not in him ; it is only the equity of redemption ; and the only cause he can shew is upon the face of injustice, but if right, no cause will lie. But where there is an infant, and the legal estate is in him, the parcel may demur, and the Court will not decree it. See the case of *Lord Brook v. Lord Hertford*, Hil. 1728, 2 P. Wms. 348, which is a strong case in point. There the legal estate was devised to, and was in trustees, and the *cestui que trust* was an infant. It is so in the present case : I think the

application reasonable, and, therefore, let the execution of the conveyances be respited until the infant comes of age, or further order.*

[Mews' Dig. Infant, G, 4, b. Followed, Att.-Gen. v. Hamilton, 1816, 1 Madd. 214.]

[244] WALTON v. TRYON.

16 Dec. 1753. Ambl. 130, S. C.

Question as to tithes of lopping of ancient pollard oaks and of beech wood, as well as the bodies as lopping.

The above cause stood this day for judgment.

Lord Hardwicke, C. The plaintiff's bill is for an account of, and satisfaction for, tithes of three species.

1st. Tithes of lopping of ancient pollard oak, and ash cut in a wood called Ashurst Wood, in the parish of Mitcham in the county of Surry.

2d. Tithes of beech wood, as well the bodies, as tops.

3d. Tithes of rabbits, bred and sold from the warren called Ashurst Warren.

The principal question arises on the two first species of tithes; as to which it is proved, that there is no coppice or underwood; that the oaks and ashes are ancient pollard trees; that the beeches are of twenty years' growth or upwards; and that the far greatest part was cut and made into faggots for fire; some small part only having been made into posts and rails, and used for wheelwright's work.

It is also proved that tithe hath been paid for the wood so fallen at former falls.

The general point made by the bill is, that for all firewood of such kind as in the bill, cut or made into faggots, tithe is due to the rector: and this hath been argued on reason, and on precedents; and the great precedent of *Greenaway v. the Earl of Kent* is relied on.

I therefore will consider it first on reason, and then on authorities.

[245] It is argued on reason, that tithe ought to be paid of wood, as of any other growth of the earth, which *annuatim renovat*. But this proves too much: That all wood pays tithes. All wood increases yearly as coppice wood; but though all wood *annuatim crescit*, yet *non annuatim renovat*; and coppice wood is subject to tithe though *non annuatim renovat*. Yet the law takes notice of it to be cut, or taken in a certain space of time; like the case of saffron, which, though gathered but once in three years, pays tithes; but of timber trees the rule is otherwise, and the law doth not expect a stated time of felling them; but they are considered as part of the inheritance.

Loppings of pollards are tenancy profits, and should answer tithes; and in many places, loppings of spiral trees are allowed to the tenant; yet those are timber.

It is argued, that the use for which wood is cut, determines whether it be titheable; and that if it is cut for fire, it should answer tithe.

If this should be admitted, it would be a dangerous innovation: Certainty is the mother of repose, and therefore the law aims at certainty: the subsequent use of a thing, as it alters not its nature, cannot add a titheable quality; but a case is put where the use determines whether it is titheable, viz. where wood is cut to be burnt in the house of a parishioner within the parish, in which case it is not liable to tithe; but this is not by common right, but by special custom.

In many cases the use of the wood at cutting is not known. If so, how is it possible to set out tithes at the felling? And if it were laid down as a rule, that wood was titheable at felling, it would vary the law in several instances, viz. in woods near iron forges, [246] and where there is plenty of timber, they cut down timber trees, and apply them for fuel. Therefore if this doctrine, that the subsequent use of the wood makes it titheable or not, prevails, it would constitute two different laws of tithe of wood in different parts of the kingdom, and produce confusion.

It is said farther, that by the general rule of the law of tithes, cattle bred for the plough, or pail, do not answer tithes, till the general use determines, whether they will be titheable or not; but as to colts, tithe is not predial, but mixed, which the

* Ambl. 197, S. C., and *Hubble v. Read*, 23 April 1784. Similar case determined by Lord Thurlow, C., upon the same ground, after doubting, and seeing the above case.—J.D.

owner is not obliged to set out at any certain time ; the parson receiving tithes in the same manner as of other titheable things, by taking one-tenth of the profits the owner makes. They are, therefore, not titheable at dropping, or weaning, on a presumption they shall answer tithes afterwards.

Thus much on the reason of the thing.

But the law of tithes is positive, and is this :

Of all timber trees of the age of twenty years or upwards, whether they be timber trees by common law or by custom, no tithe is payable either of bodies, tops, or lops for whatever use employed, with this exception, that in certain particulars, where fraud is attempted, in such case timber trees become subject to tithe as after mentioned.

This law is declared in the statute of *Sybil Carlew* : But coppice and underwood are liable to tithe.

In the year book of Edw. the 3d, it is said, it was never known tithe was paid of great trees, or timber ; Stat. of Sarum, 2d Leonard, 80 ; Fitzherbert's Nat. Brev. 51 ; Reg. 49, Lord Coke, 2d Inst. 645 ; Selden's History of Tithes.

[247] Judgments at law have been that timber trees of twenty years' growth or upwards, are free from tithes as well as to lops and tops, as to the body.

In Molin's case in Plowden, 470, the Court was of opinion, horn beam was not timber, and was therefore titheable ; and it is now settled, unless by custom horn beam be timber : And it is so laid down in Litord's case (11 Co. 46 b), on a question of waste, 2d Instit. 642, where the body is free of tithe, every other part is likewise exempted, except as to germains growing from roots of trees fallen.

It is observable, there is a great difference between germains, and tops of pollards.

As to germains, nothing is remaining of trees ; but in case of pollards, the body remains, which will exempt the branches. See (*Ram v. Patenson*) Croke, Eliz. 477 ; Moore, 908 ; Littleton, 108.

I will next consider the cases cited against these authorities.

First Brownlow, 94. *Man v. Somerton*, is not in point.

In 1st Levins, 189, *Hawes v. Cornwall*, it is said pollards of fifty years' growth shall pay tithes when felled ; but this case, so short, and imperfectly reported, is not to be relied on : it is better reported in 1st Sidertin, 300, by which it appears the wood felled was coppice wood.

Pollards of twenty years' growth before topped, are privileged as timber trees ; and the bodies of such may be used as timber, and are so.

The modern precedents in the Court of Exchequer, *Briggs v. Martin*, Trin. 6 of Wm. & Mary ; *Northley v. Collard*, Mich. 6 of Wm. & Mary, are quite contrary.

[248] And there is no reconciling these authorities, but on the supposition that the one was lopped before twenty years' growth, and the other after.

Layfield v. Cooper, 12 July 1698, is not relied on.

The great case is *Greenaway v. Earl of Kent*, in Hil. Term, 1705 (Bunb. 98), where the Court declared the plaintiff entitled to tithe of all wood above twenty years' growth, as well as underwood that was cut and corded, and for bark stripped ; but not to tithe of wood above twenty years' growth, which was not cut, and corded.

But there Lord Chief Baron Ward was of another opinion, and the decree was made against that opinion, which was founded on the old rules, and was the better opinion.

Biby v. Huxley, 22d February 1724 (Bunb. 192), is against that determination.

And the case of the Earl of Kent is contrary to former resolutions, nor is it followed by the subsequent resolutions.

Where I say timber wood may be made titheable, it is to prevent fraud.

A parson may shew timber woods, so interspersed, that it is impossible to distinguish them.

As to tithe of beech wood, it is not disputed ; but this is above twenty years' growth, and so depends on the point, whether beech be timber by custom.

As to tithe of rabbits, if titheable, it is by custom.

An issue was offered by the Court, to try whether beech in the said parish is timber by custom, and whether the pollards in question were lopped before the age of twenty years ; but the plaintiff declining to try it, the bill was dismissed.

[249] TURNER *v.* MITCHEL.

9 Feb. 1754.

Plea, so far as it went to the account, prayed of the personal estate, allowed ; as to the real estate, over-ruled.

AYNSLY *v.* REED.

(Reg. Lib. A. fol. 565.) 11 Feb. 1754.

Will established on a bill by the heir at law ; the equity of redemption being in the plaintiff, and some of the defendants. In default of redeeming, the bill was to be dismissed as to the defendant, the mortgagee, and the other defendants were to stand foreclosed.

John Aynsly the plaintiff's father being seised of estates at South Middleton, called Highlands, which he had purchased of William Aynsly, subject to a mortgage in fee to the defendant Francis Blake Delaval, for securing £200, and being so seised of other estates in the same country, by his will (after some specific devises) devised the said estate called Highlands, and other estates therein described, to the defendant Reed, his heirs and assigns, subject to the payment of his debts and legacies, to the uses following ; to the plaintiff for life, remainder to trustees to preserve, &c., but nevertheless to permit the plaintiff to receive the rents and profits, after his, the testator's debts and legacies were paid, and not sooner ; remainder to the plaintiff's sons and daughters, by any other wife than the present, in strict settlement, and in default of such issue, then to his two daughters, the defendants, Mary Davidson and Ann Tweddel, during their lives as tenants in common ; remainder to the defendant Francis Tweddel for life ; remainder to trustees to preserve, &c., during the life of the said Francis Tweddel, yet nevertheless after payment of the testator's debts and [250] legacies, and not sooner, to permit the defendant Francis Tweddel, to receive the rents, &c., during his life ; with remainder to his first and other sons, in tail male ; remainder to his grandson, the defendant, George Tweddel, in like manner, but not to receive the rents, &c., till the debts and legacies were paid ; with remainder to his first and other sons, in tail male ; with the ultimate remainder to the testator's own right heirs : and the testator directed his trustee, immediately after his death, to enter upon his said trust estates, and receive the rents, &c., and charged and made chargeable the same, with the payment of his debts, &c., and directed him therout to pay the mortgage to the defendant Delaval, and his other debts, and appointed the plaintiff the sole executor.

The plaintiff proved the will, and the defendant Reed entered on the estates.

The bill was for an account of the testator's personal estate ; for an account of what was due on the defendant Delaval's mortgage, and of the testator's other debts, &c. ; that defendant Reed might act in the trust ; and that if the personal estate were not sufficient to pay, the deficiency might be raised by sale, or mortgage of the trust estates.

Reed by his answer admitted the will, and admitted his having entered on the estate, and submitted to act.

By the decree dated this day, the plaintiff, the heir at law, admitting the will, it was established, and the trusts ordered to be performed ; and an account was directed of what was due on Delaval's mortgage ; and upon the plaintiff's, or upon the defendant's, Mary Davidson, Ann Tweddel, Francis Tweddel, and George Tweddel, paying what should be found due, the mort [251]-gagee was to convey, &c., and in default of the plaintiff's or the said defendants', redeeming, the bill as to the defendant, the mortgagee, was to be dismissed, and the said defendants were to stand foreclosed ; but in case the plaintiff, or the said defendants, or any of them, should redeem, the equity of redemption was to be in the person so redeeming, subject, and liable to such trusts, and limitations, as were declared by the will, concerning the same.

The decree then goes on to direct an account of the personal estate, and the other accounts necessary towards executing the trusts.

[See Wicks *v.* Scrivens, 1860, 1 John. & H. 215.]

GRIMMET *v.* GRIMMET.

(Reg. Lib. A. fol. 199.) 21 Feb. 1754. Ambl. 210, S. C.

5.24 parts of the residue of the testator's personal estate after the death of his widow, and £20 a year after the death of his brother, or which shall be deemed equivalent, £750 in some of the public funds to stand in the names of trustees, until the whole could be laid out in lands to the satisfaction of the governors of the charity, and his executors, who were always to be considered as trustees of the charity, to which it was given, held not to come within the Statute of Mortmain.

William Grimmet made his will, dated 13th March 1749, as follows: "I give £20 per ann. to my brother Francis Grimmet during his life, to be paid half yearly, from the day of my death, out of the interests of money in the public funds or mortgage, or any my real estates or personal estates, of which I shall stand invested; and I give all the rest and residue of my real and personal estate, in twenty four equal parts, in manner therein mentioned, and the testator also gave $\frac{3}{4}$ parts to his wife for her life.

By a codicil dated 24th March 1749, taking notice, that $\frac{3}{4}$ parts of his estates, after payment of his legacies, and for expences remaining undisposed by his will, and also taking notice of the annuity of £20 a year given to his brother Francis, for his life, he expresses himself thus: "My further will and pleasure [252] is, that the $\frac{3}{4}$ parts of the remains of my estate, after the death of my wife, my just debts, funeral expences, pecuniary legacies, first paid, together with the £20 a year which my said brother Francis is to enjoy during his life, after his death, are to be applied in clothing and educating twenty poor boys of the parish of Brighthelmston, in Sussex, in the principles of the protestant religion; and I appoint the minister, churchwardens, and overseers of the said parish for the time being, with twelve others of the principal inhabitants, which are to be made choice of at a public vestry, as governors, or trustees of the said charity; and my further will and pleasure is, that the said $\frac{3}{4}$ parts of my estate, after debts and legacies are paid, together with the said £20 a year after the death of my said brother, or what shall be deemed equivalent to the said £20 per ann., £750 be in some of the parliamentary funds, to stand in the names of some of the trustees (who are to execute a declaration of trust), until the whole can be laid out in the purchase of lands to the satisfaction of the governors, and my executors before named (who are always to be considered as governors, or trustees whilst living for the uses aforesaid), that is, to apply the interest, profits, and rents of the said $\frac{3}{4}$ parts of the residue of my estates, and of the said £750, or the lands to be purchased therewith."

The executors after the death of the testator proved his will, and possessed abundantly more than would pay and satisfy the debts, funeral expences, legacies, and the said annuity.

The plaintiff insisted, that the devise of the said $\frac{3}{4}$ parts, and of the fund out of which the annuity of [253] £20 to the testator's brother Francis was payable, was void, being within the Statute of Mortmain of the 9th Geo. 2.

The minister and churchwardens and other trustees of the charity, insisted the bequest of the said $\frac{3}{4}$ parts of the residue and of the said £20 a year, or the £750 in lieu thereof, was not void; for that the same was not to be laid out in lands, until it could be laid out to the satisfaction of the governors of the said charity; and that therefore the same ought to be construed a direction to lay it out in some of the public funds only; for that the same could never be laid out in the purchase of lands, to the satisfaction, and approbation of the governors, and trustees, if such application thereof could any ways be construed to defeat the charity itself, and insisted it was the intent of the testator, that the trustees should have power to execute the trusts as they thought fit.

On hearing the cause this day, Lord Hardwicke, C., ordered £20 a year to be paid to defendant Francis Grimmet during his life, and after his death, the sum of £750 in lieu of the £20 a year as directed by the testator's will, to be taken out of the whole residue, and to be applied for the benefit of the charity.

[Mews' Dig. Charity, V. 6, b. See Lewis v. Allenby, 1870, L. R. 10 Eq. 670.]

FENHOULHET v. PASSAVANT.

11 March 1754.

If specialty creditors exhaust the personal estate, the simple contract creditors are to receive a satisfaction *pro tanto*, out of the real assets descended; and if the debts of the simple contract creditors shall not amount to the whole of the personal estate, which the [254] specialty creditors shall so exhaust, the legatees are to stand in the place of such specialty creditors for the residue of what they shall exhaust out of the personal estate, and are to be paid *pari passu*.

BLOWER v. MORRET.

3 April 1754. 3 Atk. 772, S. C.

Costs to be paid out of an estate being a lien thereon, and do not drop with the party, though not taxed.

By the decree, all parties were to be paid their costs out of the estate. The defendants, Morret and wife, die, before the costs are taxed, intestate, and insolvent. Mr. Boldero, their solicitor, applied this day for the Master to proceed to tax their costs, and to be paid the same.

It was objected by the residuary devisee, and legatee, that the costs not being taxed, could not be considered as a debt, or judgment; and not being so, and the suit being abated, and nothing remaining to be done under the decree, the suit could not be revived, and consequently the costs dropt with the party.

Lord Hardwicke, C.—There is a distinction between personal costs, and costs to be paid out of an estate.

Costs, when decreed out of an estate, are a lien thereon, which makes it a security; and there being nothing executory, there is no occasion to revive; therefore let the Master proceed to tax the said late defendant's costs, and let the same, when taxed, be paid to Mr. Boldero, their solicitor.

(3 & 25 July 1755, *Buckby v. Bird*, by Sir Thomas Clarke, M. R., similar determination.)

[See *Barry v. Stawell*, 1840, 1 Flan. & K. 11. For previous Proceedings see S. C. 2 Ves. 420.]

[255] LORD HERBERT v. PUSEY.

27 April 1754.

Exceptions to the joint answer of defendant Pusey and Goostrey. Pusey died: the exceptions, after some doubt, referred as to Goostrey's answer only.

MAYNE v. HOCHIN.

27 April 1754.

If a defendant's answer is reported insufficient, and he is served with an order to amend the bill, and for him to answer the amendments and exceptions at the same time, he must answer both before he can apply to dissolve the injunction that had been obtained on the original bill.

The plaintiff had obtained an injunction of course, till answer and further order. The defendant put in his answer: upon exceptions, the answer was reported insufficient. The plaintiff obtained an order to amend, and that the defendant should answer the amendments, and exceptions at the same time. The defendant put in an answer, and obtained the common order to dissolve the injunction, unless cause. The plaintiff took exceptions to the answer to the amended part of the bill; and by way of cause, on the 23d of April, shewed the exceptions, and prayed to refer them; and that the further answer to the former exceptions might also be referred. A doubt arose, whether, as the injunction was founded on the original bill, the defendant was obliged to answer both the original and amended bill, before he could apply to dissolve the injunction.

Lord Hardwicke, C., said he would consider it; and on the above 27th of April 1754, his Lordship declared, that had the defendant put in a further answer, upon his first answer being reported insufficient, before the plaintiff had obtained the order

to amend, [256] and for the defendant to answer the amendments and exceptions at the same time, the injunction must have stood or fallen upon the original bill, and the answer thereto: but the defendant not having answered the exceptions before the plaintiff obtained the said order to amend, the original and amended bill became one record, and the defendant must answer both at the same time.

[See *Ferrand v. Hamer*, 1838, 4 My. & Cr. 143.]

SPARROW v. HARDCASTLE.

6 & 10 May 1754. 3 Atk. 798, S. C.; Ambl. 224, S. C.

A grant of an advowson, and a deed declaring the trust, though for a particular purpose, held to be a revocation of the will as to the advowson.

Cyril Arthington, by his will, dated 28th July 1716, devised all his estate, both real, which included the advowson in question, and personal, to trustees and their heirs, with limitations, by which he makes his nephew Cyril Hardcastle, on condition of changing his name to Arthington, tenant for life of his estate, with remainder in strict settlement.

On the 13th of October 1720 he made a codicil.

On the 21st of November 1723 he made another codicil.

On the 20th of November 1723 he grants the advowson in question to trustees.

And on the 21st of November 1723, by deed, declares the trusts.

The question was, whether the grant of the advowson, and the declaration of trust, were a revocation of that part of the devise of the real estate.

Lord Hardwicke, C.—The general principles are, that a man who devises must have at the time of mak-[257]-ing his will, a disposing capacity of mind. He must also have an estate in the land he devises, and the estate he so hath devised must remain in the same plight and condition to the time of his death as it was at the execution of his will: for any alteration of the estate in the land, by any act of his will, makes it a different estate, and will import a different intention, and will be a revocation of his will, unless in certain special cases.

In *Arthur v. Bockenham* (Fitzg. 223; Holt, 750, S. C.), Lord C. J. Trevor says, if A be seised, and devises, and afterwards executes a feoffment, it is a revocation of his will. It there be a feoffment, and no livery, that hath been held a revocation. So, if a man executes a bargain, and sale, and acknowledges it, and it be not inrolled, yet it is a revocation.

And in the *Earl of Lincoln v. Rolls* (1 Eq. Ca. Abr. 411; Show. P. C. 154, S. C.), it was held, that where the Earl of Lincoln had devised his estate to his heirs male, and afterwards taking it into his head a lady might be disposed to marry him (though he had never asked her the question), makes a settlement of that estate to the uses of the marriage: though he never did marry, and the conveyance was for such a whimsical purpose, yet it was held to be a revocation of his will.

So a man apprehending himself to be seised, and afterwards suspecting he has only an estate tail, his suffering a common recovery is held to be a revocation.

The distinction made in the present case is, that Mr. Arthington being seised in fee of the legal estate of the advowson, and after devising it, did on the same day execute a grant of the advowson, which, [258] though a general grant, appears to be for a particular purpose, viz. to create a trust for the benefit of such son of I. S. as on avoidance might be presented, and then to himself, and his heirs: which is the same as if he had left the trust to result, which would have passed by virtue of the devise.

But there is no authority for this, and I am of a different opinion.

I think that this is a new estate, and will not pass by his will, he having parted with the whole legal estate, but that it must descend to his heir.

The excepted cases have been confined to mortgages, and securities.

In case of a mortgage in fee, though a total revocation at law, yet in equity the estate shall pass, subject to the mortgage.

And the devisee declining to try at law the time of the execution of the two deeds of the 20th and 21st of November 1723.

Declare the will and codicil, as far as they relate to the advowson revoked, and the

trust for the benefit of a son of I. S. being performed, let the trustees convey the advowson to the heir.

DA COSTA v. DA PAZ.

18 May 1754. Ambl. 228, S. C.

Where a gift to a charity was not void, but such as the Court could not tolerate, application was directed to be made to the King for his sign manual, to direct to what charitable uses he would have it applied.

The testator, being a Jew, by his will gave £1200 to be placed out at interest, and the interest to be applied in support of a Jesuba (a kind of semi-[259]-nary), wherein to read, and instruct youth in the Jewish religion. It being a charity which, though not void by law, the Court could not tolerate, Lord Hardwicke, C., upon the special reservation by the decree concerning the said legacy, declared the same ought not to fall and accrue to the residue of the testator's personal estate, but ought to be applied to some other charitable use; and that the appointing and directing of that charitable use was in the Crown; and his Lordship recommended it to the Attorney General to apply to the King for a sign manual to appoint and direct to what charitable use or uses the said £1200 and interest should be applied.*

NEWMAN v. NORRIS.

27 May 1754.

The plaintiff admitted to prove his debt before the Master.

The decree directed an account of the estate of the plaintiff's testator come to his hands, or use, and of his debts, and the creditors to come before the Master and prove their debts. The plaintiff being a creditor, the Master doubted the admitting of him to prove his debt.

Lord Hardwicke, C., directed the plaintiff to be at liberty to go in before the Master and prove his debt, and the Master to examine him relating thereto, notwithstanding he was a party.

[260] SMART v. FLOYER *et c contra*.

27 May 1754.

Original bill being abated by inter-marriage of the plaintiff, and not being revived until after a cross-bill is filed, loses its priority.

Dorothy (the wife of the defendant Peter Floyer), *dum sola*, exhibited her bill against the defendant Smart, the plaintiff in the cross cause. She afterwards married the said Peter Floyer, whereby her suit abated; but she neglected to revive the suit until after Smart, the defendant to her suit, had filed a cross-bill against her, and her husband. On the 15th of May 1754, Floyer and his wife obtained an order for time to answer the bill filed by Smart, until he should have answered the original bill filed by the said Dorothy.

Upon application by Smart, to discharge the order, Lord Hardwicke, C., held, that the said Floyer and his wife, by their marriage (being their own act), which occasioned the abatement; and having neglected to revive until Smart had filed his cross-bill against them, had lost their priority of suit, and therefore discharged the order.

THE EARL OF BATH AND OTHERS, Plaintiffs; ELIZABETH ABNEY, Spinster,
Defendant.

(Reg. Lib. A. fol. 567.) 19 June 1754.

The executor of a surviving trustee of a term of years in a copyhold, is to come in and be admitted, and to pay a fine.

The bill is to stay the defendant's proceeding at law for recovering possession of the premises in question, which are copyhold, and held of the manor whereof the defendant is lady.

* His Majesty appointed £1000, part of it, to the Foundling Hospital.—J. D.

Henry Gray Esquire being seised to him and his heirs, at the will of the lord, according to the custom [261] of the manor of Stoke Newington, of sixty acres of meadow land in Stoke Newington, made his will, dated the 6th July 1709, and thereby, amongst other things, devised the said sixty acres of meadow land to John Taylor Esquire, and Arthur Lake Gentleman, their executors and administrators, for the term of ninety nine years from the 25th of December next before the date of the said will, if Harry Pulteney Esquire, therein described, Edward Sergeant, and Joan Muncaster, therein named, should so long live, but upon certain trusts therein mentioned; and devised the inheritance, after the determination of that term, to the use of William Pulteney, now Earl of Bath, for life, with remainder to trustees to preserve contingent remainders; with remainder to his first, and other sons in tail male, with other remainders over; with the ultimate remainder, in case of the limitations not taking effect, to the plaintiff, now Earl of Bath, in fee.

At a Court Baron held for the said manor, the 11th of February 1711, the said John Taylor, and Arthur Lake were admitted to the said sixty acres of meadow land, according to the custom of the said manor, and paid a fine of £280.

The case hereinafter mentioned stated, that Edward Sergeant, one of the three lives upon which the lease for ninety nine years was to determine, was dead, but that the other two lives were in being.

That the said Arthur Lake was dead; that John Taylor survived him, and died 4th September 1735, and made his will, and John Taylor and others, since dead, his executors; that Peter Taylor was still living.

[262] That the defendant Elizabeth Abney was lady of the said manor, and had been so for upwards of four years.

In 1752, till which time it did not appear the said Elizabeth Abney had any notice of the deaths of the said John Taylor and Arthur Lake, application was made to the Earl of Bath that some person should come and be admitted to the said copyhold premises: and the said Earl insisted there was no occasion for any person to be admitted thereto.

At a general Court Baron held for the said manor the 7th of May 1752, the death of the said John Taylor and Arthur Lake were presented, and proclamation made for the heirs of the said John Taylor, or any other person who had any title to the said copyhold premises, to come in, and be admitted.

That customary estates, parcel of the said manor, are usually granted in fee; but some times, at the desire of purchasers, or under limitations in a will, have been granted for a life or lives, with remainders over; but there was no instance of any grants in the said manor for terms of years absolute.

That among other customs of the said manor, a fine is due to the lord or lady thereof, upon the death or alienation, as well of the tenants who are admitted in fee, as of those who are admitted for their life, or lives only, with remainders over: and the fines on admission to copyhold estates in the said manor are uncertain, and at the will of the lord; but that there was an unusual or customary way of assessing fines, which is stated in the case.

The case then states the yearly value of the copyhold in question.

[263] It was argued, that a copyholder, by the general law of the land, unless there be any particular custom in it, may, if seised in fee, surrender a copyhold for a term of years; and if he surrender it to trustees, who are admitted, those for whose benefit it is made shall be entitled to the benefit of the remainder of the term, without a new admittance (1 Inst. B. 1, 1 Leon. 4, 4 Leon. 118, 2 Dan. 190, 3 Leon. 9, Dy. 251, 1 Leon. 173, Hob. 181).

If a man, tenant for life, with remainders over, is admitted, that admission holds to all the remainders, without a new admission in fee, except under a special custom. It is so laid down in *Barnes v. Corke*, 3 Lev. 308; *Rennington v. Cole*, Noy, 29; *Blackburn v. Graves*, 1 Mod. 120.

It was also said, that if a wife, tenant for a term of years, marries, and dies before the time is expired, her husband shall continue without a new admission, or fine.

Lord Hardwicke, C.—There are two questions in this cause; one, whether this is a proper bill for this Court: the other, if proper, whether the plaintiff is entitled to be admitted without paying a fine.

I do not find any judicial opinion cited to me, that an executor need not come to be admitted to a copyhold.

As to the fine, it is matter of another consideration.

Therefore let a case be made for the opinion of the Judges of the Court of King's Bench, upon the facts stated in the agreement between the parties of facts and things to be admitted at the hearing, which hath been now read, together with the material facts which [264] have been proved by Joseph Barker; and thereupon let the following questions be stated.

First, whether the surviving executor of John Taylor, the surviving trustee of the term of ninety-nine years, ought to come in, and be admitted tenant to the copyhold premises in question.

And secondly, in case he ought, whether the defendant, the lady of the manor, will be entitled to any fine, on such admission.

24 Feb. 1757. Reg. Lib. A. fol. 477. 1 Burr. 206. The Judges certified, that having heard counsel on both sides, and considered the case, they were of opinion, the surviving executor of John Taylor, the surviving trustee of the term of ninety-nine years, ought to come in, and be admitted tenant to the copyhold premises in question, and that the lady of the manor would be entitled to a fine on such admission.

MANSFIELD.

T. DENISON.

M. FOSTER.

J. E. WILMOT.

The plaintiff being advised to proceed no further in the cause, applied for and obtained an order (dated July 1757. Reg. Lib. A. fol. 477) to dismiss the bill with costs.

[Mews' Dig. Copyhold, G. 1. *e*; Husband and Wife, B. 6. S. C. 1 Burr. 206;

1 Ken. 471. See *Everingham v. Ivatt*, 1872, L. R. 7 Q. B. 688.]

Ex parte DUPLESSIS.

27 July 1754. 2 Ves. 538, S. C.

A commission of *melius inquirendum* directed to issue in this case for the King.

[265] GAGE *v.* COUNTESS OF STAFFORD.

27 July 1754. 2 Ves. 556, S. C.

The plaintiff being abroad, security given to answer the full costs.

The matters in question in the cause arose in France; and proceedings had been had in the Court of Actions in that kingdom. The plaintiff, who resided abroad, commenced a suit in this Court, and proceeded in the cause, until issue was joined. Being advised it would be necessary to give in evidence the adjudication in the Court of Actions, he applied this day for a commission to examine witnesses in France.

The defendant objected that the plaintiff lived abroad, that the suit had been very expensive, and would be more so, and engrafted upon the plaintiff's motion, that it be upon the terms of giving security for the full costs.

Lord Hardwicke, C.—I think the objection well founded; and as the plaintiff comes here to ask a favour, the Court may put terms upon him; and therefore, upon the plaintiff's consenting to give security in £300 to answer costs, be it as prayed.

KINSEY *v.* YARDLEY.

24 May 1753.

A party to a suit in contempt, and in custody, must be turned over to the prison of the Fleet, before a sequestration can issue against him.

The defendant being charged in the custody of the sheriff of _____ with an attachment for not performing a decree, on the plaintiff's application for a sequestration, a question arose, whether the defendant should not be brought up by *habeas corpus cum causis*, and turned over to the Fleet.

[266] *Lord Hardwicke, C.*—It is necessary to know the practice: where a duty is decreed, an attachment issues; for the first process must be personal; where such

attachment issues, and the defendant is taken up, and in the custody of the sheriff, and a *capias corpus* returned, the question arises, whether the plaintiff may apply for a sequestration, without having the defendant brought into Court, and turned over to the Fleet; and I am of opinion, the course of the Court is, where the defendant is in contempt, and in the custody of the warden of the Fleet, the plaintiff may have a sequestration; but it is not the course of the Court to have a sequestration, where the party is in the custody of a sheriff: *Culm v. Duffin*, is a precedent against this; but no attention was had to it, and the order was made of course, and I will lay it out of the case.

The sequestration in this case, was not the ancient practice of the Court, but was found necessary, and there are greater reasons for it here, than at law: for at law, where a *capias ad satisfaciendum* first issues, the party can have no other satisfaction, and the reason is, the party might have taken out a *fieri facias*, or an *elegit*, and was not obliged at law to begin with personal process.

But here the Court *agit in personam*, and the plaintiff was obliged to take the first process against the person (unless he be a privileged person), and as the plaintiff is under such an obligation, and a defendant will obstinately be in goal, it is necessary to issue process against his effects.

I have looked into the precedents of Mr. Goldesborough, the Register, and find sequestrations were first laid on the things in question, and then further *ex* [267] tended, and laid on all the real and personal estate of the contemner: In *Thomas v. North*, 17th Car. 1. fol. 558, the plaintiff insisted on being put into possession of the land-pledged to him; the defendant (who was a prisoner for a contempt at the plaintiff's suit) opposed it as a double execution; but the Court, assisted by the Judges, were of opinion that the plaintiff's holding the lands was just, and upon the defendant's assuring the lands to the plaintiff, he was discharged from his imprisonment; so in *Perriman v. Dinham* (1 Ch. Rep. 152), in the same year, the defendant was committed for not performing a decree, and a sequestration was granted, and in *Elvard v. Warren*, 31 Car. 2 (1 Eq. Ca. Abr. 352, 2 C. R. 151, 192, S. C.; 3 C. R. 87, S. C.), although it were insisted on as double execution; the defendant being in contempt for not performing a decree, an *habeas corpus* issued against him, and he was brought up, and persisting in his contempt, a sequestration was ordered to issue; and this is in point.

Consider the contempt; it is for not performing a decree: a process of contempt is in nature of an execution, and not bailable: if so, the justice of the Court requires the defendant to be brought into Court, to answer his contempt; and when so brought, and he doth not shew he is not in contempt, the Court commits him; and therefore let an *habeas corpus* issue.

KEMP v. MACKAREL.

7 Aug. 1754. 2 Ves. 579, S. C.

Upon arguing exceptions to the Master's report, an issue was directed, to try if certain papers were forged; being upon trial of the issue found to be forged, [268] they were cancelled in Court, and kept with the Master

DICKENSON v. BLISSET.

20 Dec. 1754.

A party born deaf and dumb, attaining twenty-one, applies for possession of her real estate, and to have an assignment of her chattel estate. Lord Hardwicke, C. having put questions to the party in writing, and she having given sensible answers thereto in writing, the same was ordered.

FRENCH v. FRENCH.

29 Jan. 1755.

The probate of the testator's will, admitted as proof of his death.

The bill was brought by the heir at law, of his brother, who in 1740, went to the East Indies, and was drowned there, to be let into possession of his estate sold after his death; the defendants who were in possession disputing the death, and the plaintiff having no positive proof of his brother's death, a doubt arose at the hearing, upon the probate

of his will being offered to be read, whether it could be admitted as evidence of the fact.

Lord Hardwicke, C. An act of the Prerogative Court cannot certainly be admitted as original evidence of a fact in this Court; but in this case, as at the time of proving the will, it must be proved the party was dead, and the probate was granted so long since as 1742, and it would be difficult at this distance of time, and considering the place of his death, to get more positive proof, and the executor who would be entitled to the rent accrued before the death, as his [269] personal representative admitting his death: his Lordship under all circumstances admitted the probate to be read, as proof of his death

[Mews' Dig. Evidence, III, a, 17.]

CRUGER v. WILCOX, Assignee of CHARLES WATKINS, a Bankrupt.

1 Feb. 1755. Ambl. 252, S. C. by the name of Kruger v. Wilcox. [1 Ken. 32 S. C.].

A consignee parting with the goods consigned, parts with his lien on them.

On the 7th of December 1750, Mark Hudson, a broker, applied to the plaintiff, to purchase 100 tons of logwood, which he was empowered by Charles Watkins, and the defendant Mico, or one of them, to sell.

The plaintiff on such application, agreed to purchase 104 tons, with customary allowances, and the money to be paid on or before the 24th of December.

Before the 21st of December the plaintiff received 65 tons, and on the 18th of December the plaintiff, by the order of Watkins, paid Hudson £810 in part.

During the transaction, and till after the 18th of December, Watkins was in good credit, and his circumstances not dubious.

But on the 23d of December, Mico gave notice, that the logwood had been assigned to him by Watkins, who was greatly indebted to him on account, and he claimed a property in the logwood as a security for his debt, and required the plaintiff to pay no more money without his order.

About the 5th of January 1751, Watkins became a bankrupt, and the defendants Wilcox, &c., were chosen his assignees, and his estate, &c., were assigned to them.

[270] And upon the plaintiff's applying to the assignees, and to Mico, for delivery of the remainder of the logwood, it was agreed the same should be delivered, without prejudice to their respective claims.

On both claiming, this bill was brought, that the defendants might interplead.

The defendants, the assignees, by their answer, admit the above facts, and state, that the said logwood with great quantities of the same kind, were consigned by Watkins the bankrupt, on his own account, to the defendant, Mico, by a ship called the *Britannia*, which arrived in 1750; that Watkins not being in London, Capt. Jefferys acquainted Mico with the arrival of the ship, and thereupon Mico ordered the logwood to be unloaded, and hired a warehouse belonging to Wilkinson, to lodge it in, and Mico ordered Hudson to sell the same, under a letter of attorney he said he had from Watkins; before the logwood was sold, Watkins arrived, and acted in all respects as owner, and proprietor; and from the 15th of November, Mico in no manner acted otherwise, than under the direction of Watkins, and Watkins underwrote an order, for the payment by the plaintiff, to Hudson, and therefore the assignees insist, that Mico had no lien on the money, and that it ought to be paid to them.

The defendant, Mico, by his answer says, that in 1746 he became acquainted with Watkins, who from that time employed him as his agent, and in consequence divers consignments were from time to time made between them.

That about 27th April 1747, Watkins executed a general letter of attorney to receive all monies that [271] might be due to him, for goods sold, and delivered, or otherwise.

That till the bankruptcy of Watkins, he transacted his affairs, and received several cargoes of logwood, &c., which he sold, and received the money, and placed the same to his account, with commission and charges, &c.

That in the course of these transactions, viz. about April 1747, Watkins became indebted to him in £840, and that in the same month, Watkins being in England,

and wanting £100 applied to him, Mico, to advance the same, promising to make some considerable remittances; that relying on those promises, he, Mico, advanced the £100 and afterwards paid several considerable sums for Watkins.

That at the time of the consignment to him, Mico, by the *direction* of Watkins, was indebted to him in £2,000, and in consequence of a letter from Watkins, he made an insurance on the said ship, before her arrival, and admits the arrival of the ship, and his order to Hudson, to sell the logwood, the sale and the delivery of part.

The question in the cause was, whether the parting with the property by a consignee, was parting with his lien on the things consigned.

Being a matter of great consequence in trade, the cause stood over for this day, when by desire of the Lord Chancellor, Sir William Baker, Kingsly Bethel, Aldermen of London, and merchants; and Mr. Tonnereau, and Mr. Wilby, merchants, all of eminence in the mercantile line, attended in Court to answer questions, put to them by his Lordship.

[272] *Lord Hardwicke, C.*—The question in this cause, arises on a commission of bankruptcy.

In a bankruptcy, this Court as well as Courts of law, endeavour to level creditors.

But if a person hath a specific lien, it is still preserved to him, notwithstanding any wrong act of the debtor; and Courts have made large strides to preserve that lien.

But whether the Court ought to do so in the present case, is to be considered.

The question is, whether the defendant Mico, is entitled to a specific lien, and consequently to satisfaction, out of the money in the hands of the broker; or out of the goods in the hands of the purchaser.

Being a matter of consequence, I thought it necessary to have the opinion of merchants: What lien a consignee gains, on goods consigned to him. And if there were in this case originally a specific lien, whether the defendant lost it by any act. Four merchants of eminence have been examined, both as witnesses in the cause, and in Court. And they all agree, that if, between a factor here, and a merchant abroad, there hath been a general course of dealings, the consignee gains a right to retain the ship, not only for custom, freight, &c. but also for the balance of a general account. That a ship and money are the same thing in account.

Upon the case of an action of trover, if a consignor goes to his consignee, and says, here is your duty, commission and freight, deliver me the ship, &c., I do not know, that he would recover.

[273] But then a bill will lie.

Hath Mico done any thing to part with his lien? I think he hath.

The aldermen and the other merchants also agree, that parting with the goods, is parting with the lien.

And the law says, that parting with possession is departing from the lien.

I am therefore of opinion it is much safer for trade, to hold it so in this case; and let the plaintiff pay the money to the assignees, and Mico come in as a creditor under the commission.

[Mews' Dig. Principal and Agent, I, D, 12.]

PENN. C. LORD BALTIMORE.

12 Feb. 1755.

Defendant cannot demur, having obtained an order for time to answer only.

The defendant had obtained an order, for a month's time, to answer only; not having answered on the 8th February 1755, he applied for, and obtained, an order for time to plead, answer, and demur, not demurring alone.

On this day (12th February 1755), Mr. Yorke, Mr. Walsingham, and Mr. Lister, moved to discharge the order.

Mr. Hoskins appeared for the defendant.

Lord Hardwicke, C., directed the order to be varied, so far as it gives leave to the defendant to demur.

[274] IN THE MATTER OF COUNT HASLANG.

Lord Chancellor.

Lord C. J. of the Court of King's Bench.

Lord C. J. of the Common Pleas.

15 Feb. 1755.

Arresting the servant of a foreign minister, though not lodging in his house, held to be a breach of privilege, within the Stat. of 7 Anne.

This was brought before the Court, upon a complaint of Count Haslang, for arresting his servant.

Curia.—We sit here in an execution of a summary jurisdiction, vested in us by the statute of the 7th of Queen Anne, and whatever doubts were made before this act of parliament, as to the privileges of ambassadors, they are cleared by this act; and the first clause is declaratory, that the insulting of ambassadors, &c., was contrary to the laws of nations, and that such offender was a violator of the laws of nations, and a disturber of the public repose.

The present complaint is for an offence against this act of parliament, by the arrest of Thomas Threlkeld, a domestic servant of Count Haslang, Minister Plenipotentiary of the Elector of Bavaria, and for using very opprobrious, and reproachful words of the minister.

As to the words, we have no jurisdiction concerning them, but they aggravate the breach of privilege.

It is necessary to prove in this case, that the person arrested was a domestic servant of the minister, and properly entered, and registered, according to the act, and that the arrest was committed in breach of the act.

[275] And we are of opinion, there is sufficient proof of the registering of Threlkeld, in the sheriff's offices, before the arrest.

The next consideration therefore is, whether he was a domestic of the minister or not, and it is not sufficient merely to retain a person, or call him so, unless he is proved *reverd*, to be a domestic servant.

Here it is proved, by Threlkeld and Morice (who is secretary to the minister), that Threlkeld, was retained as messenger to Count Haslang, to carry letters and messages; that the contract was for £25 a-year wages, besides £25 a year for board wages; and Threlkeld swears, and Morice concurs with him, that he (Threlkeld) hath been always duly paid the wages, and given receipts for the same; and that he took such wages, and retained the same to his own use; and there being no evidence on the other side to impeach this, there is no doubt of his being servant to this minister.

It is objected, this is improbable, but no witness is examined to discredit the above witnesses, or to prove the fact is not so; or that it is collusive, fraudulent, or illusory, and we must judge *secundum allegata, et probata*.

It is further insisted, that the proof in this case is not sufficient, because there must be domestic service, and the person must be resident at the house of the minister; but that hath often been over-ruled, and it is not necessary, he should lodge, or reside in the house of the minister; nor doth his lodging out of the house make him cease to be a domestic servant.

The consequence, therefore is, that this person, Thomas Randal, hath been guilty of a breach of this act of parliament.

[276] As to the nature of his punishment, that is discretionary; and if in this case, the man had been guilty of the arrest barely, his submission might perhaps have been accepted; but here the scurrilous and abusive terms were probably the reason his submission was not accepted; and they greatly aggravate the offence, and call for animadversion; and we are of opinion, we are bound in justice to commit this man, and declare him to be a violator of the laws of nations, and a disturber of the public repose; and therefore he is to be fined in ten marks, and imprisoned for three months in Newgate, and until payment of his fine, and he within that time, to be carried by the sheriff to the house of Count Haslang, with a paper on his breast, declaring his offence.

[*Note.*—On the first coming on of this matter to be heard, the Attorney General submitted it to the Court, whether they would admit affidavits as evidence, or examine

the witnesses personally ; and the Court determined the witnesses to be examined in person.

The Lord Chancellor first gave his opinion, and the two Chiefs did afterwards declare their concurrence with his Lordship.—[J. D.]

Ex Parte WINDE.

4 March 1755.

An infant being found a mortgagee, within the statute of the 7th of Queen Anne, and one third of the mortgage money belonging to the infant ; it was ordered by Sir John Strange, M. R., to be paid into the Bank, on his account.

[277] SINCLAIR *v.* JAMES.

31 May 1755.

Depositions published notwithstanding they were taken during an abatement.

The plaintiff Elizabeth lived at Charles Town, South Carolina, having brought her bill by her next friend ; and having afterwards intermarried without his knowledge, he upon the cause being at issue, by virtue of an order for that purpose, sued out commissions for an examination of witnesses in South Carolina, and New York, which were executed, and the commissions returned.

A question was made, whether the depositions could be published, as they were taken pending the abatement.

Lord Hardwicke, C.—Let the Depositions be published, and read, notwithstanding the intermarriage of the plaintiffs, the fact not being known here, at the time the commissions issued.

ATTORNEY GENERAL *v.* BENTHAM.

3 July 1755.

A trial at law directed by consent, to try the right of stopping up, or obstructing lights, and a view to be had, to see if the new buildings are on old foundations.

On motion for an injunction to restrain the defendant Bentham, from erecting his edifice so as to obstruct the lights of the relator's houses :

It was by consent ordered, that the parties should proceed to a trial at law, in the Court of King's Bench, in an action upon the case, to be brought against the defendant, for stopping up or obstructing the lights of the two messuages, or houses in question ; and on the trial, the defendant is to admit the relator to have been at the time of the committing of the nuisance alledged, seised, and possessed of the house in question ; and the relator is to admit the [278] defendant was seised and possessed of the buildings in the pleadings mentioned to have been pulled down by him, before they were so pulled down ; and injunction to stay the erecting of any buildings, whereby the lights may be stopped, until after the trial ; and after trial, liberty to apply touching costs, and further directions ; and by consent, Mr. Blagden, and Mr. Dance, to be permitted to have a view of the premises in question, and particularly to inspect, whether there were any, and what, old foundations at or near the spot, where the new wall is erected.

BIGNAL *v.* BRERETON, *et e contra.*

(Reg. Lib. A. fol. 554.) 21 July 1755. Anon. 2 Ves. 661, S. C.

Interest refused on arrears of annuities ; though interest were reserved by the decree.

By the decree dated 20th March 1750, it was referred to Master Eld, to make an account of what was due to the plaintiffs in the second cause, for principal, and interest on her two legacies of £500 and £20, and also an account of what was due to the defendant Sharpless, for principal, and interest on his mortgage, and to tax him his costs.

And the Master was also to take an account of what was due to the plaintiffs, for the arrears of their respective annuities, accrued since Michaelmas 1741, and by consent of the mortgagee, the estate was to be sold, and directions were given for payment of what should be found due on the mortgage, on the legacies, and for the arrears of the said annuities ; and the consideration of interest, on the arrears of the plaintiffs annuities was reserved.

[279] On 16th of May 1755 the Master certified amongst other things, that he had taken an account of what was due for the arrears of the plaintiff's respective annuities, from Michaelmas 1741, being thirteen years and an half; and that such arrears amounted to £337, 10s.; the Master then stated, that the estate had been sold pursuant to the decree; and that the purchase money had been laid out in Bank annuities, in the name of the Accountant General.

On the 21st July 1755, the causes came on for further directions, and as to the matter of interest, reserved by the decree.

But *Lord Hardwicke, C.* would not give interest on the arrears of the annuities; but only directed the Master to compute subsequent interest, on such of the parties debts, and legacies, whereon interest had already been computed.

MILDRED v. NEATE.

3 July 1755.

Injunction to stay proceedings on a foreign attachment.

The plaintiff had a consignment of goods from Philadelphia, with a letter directing him to sell the same, and after deducting the charges, &c., to apply the money to arise thereby, in payment of what was due to several persons therein named (defendants in this cause), as far as the same would extend rateably: the defendants Neate and another, two of the creditors, upon the arrival of the goods in the Thames, and whilst on board the ship, served the plaintiff with a foreign attachment, and insisted they had thereby got a prior lien.

[280] The plaintiff filed a bill (not as an interpleading bill), for an injunction; and upon his application, an injunction was ordered.

AUSTEN v. HINTON.

(Reg. Lib. A. fol. 533.) 12 July 1755.

Bill by creditors of the testator: after they had examined their witnesses, they discovered the heir at law, supposed to be dead, was living: he was made a defendant: publication not having passed, was enlarged, and liberty given to the heir at law, an infant, to cross-examine the plaintiff's witnesses, and for the plaintiffs to read the depositions already taken against him; and they were also at liberty to re-examine their witnesses against the said infant.

CARRINGTON v. HOLLY.

12 July 1755.

Although a cause be brought to a hearing, and an issue directed, till the issue is tried, and there hath been a determination, let the cause be in what stage it may, the plaintiff may upon motion, dismiss his bill, upon payment of costs.

The plaintiff filed his bill, to establish his right to estates: Upon hearing the cause, an issue was directed. The plaintiff being advised, he had not made a case by the bill, and the matter put in issue, to support his claim, applied by motion, and obtained an order of course, to dismiss his bill, upon payment of costs.

The defendant applied the above day, to discharge the said order for irregularity, upon the ground, that the cause having been regularly brought on to a hear[281]-ing, the bill could not be dismissed, but on a solemn judgment.

Lord Hardwicke, C.—There hath not been any determination; the directing of an issue, is merely to satisfy the conscience of the Court, prefatory to their giving judgment: That issue hath not been tried, and till there hath been a determination, I hold a plaintiff may in any stage of the cause, apply to dismiss his bill, upon payment of costs; and therefore take nothing by the motion.

But his Lordship said, had there been a decree, it would have been otherwise; for all parties were interested in a decree, and any party might take such steps as he might be advised to have the effect of it.

So likewise, said his Lordship, it would have been, had the issue been tried, and a verdict in favour of the defendant; the defendant might have set the cause down on the equity reserved, in order to have the bill dismissed, upon the solemn judgment

of the Court, so as to make the order of dismissal pleadable. The language of the order, directing the issue, shews it; for the Court, after it directs the issue, reserves the consideration of costs, and of all further directions, until after the trial of the issue, when any of the parties are to be at liberty to apply to this Court, as they shall be advised.

[See *Booth v. Leicester*, 1836, 1 Keen, 247; *Curtis v. Lloyd*, 1838, 4 My. & Cr. 194.]

CHANDLER *v.* GASCOYNE.

31 Oct. 1755.

An injunction granted in the first instance, to stay proceedings in the Spiritual Court.

[282] STEVENS *v.* LONG.

1 Nov. 1756.

Reference to a Master, to look into and certify, whether proceedings were regular, or not; the Master reported them irregular; upon exceptions to the report, they were held to be regular.

The plaintiff thereupon obtained an order to tax his costs occasioned by the reference.

The defendant applied this day, to discharge the order, he having had the Master's judgment in his favour; so that there was judgment against judgment.

Lord Hardwicke, C., thought the application founded, and discharged the order.

WINTHROP *v.* ROYAL EXCHANGE ASSURANCE COMPANY.

18 Nov. 1755.

The defendants had obtained the common order for the plaintiffs to give security to answer costs; application this day to discharge it, for that one of the plaintiffs lived in England, whom the defendants might always follow for the costs.

Lord Hardwicke, C., said, as one of the plaintiffs lived in England, who would be always liable to the costs, and as there was no evidence before him of the inability of such plaintiff to answer them, the order was improper; and therefore his Lordship discharged the order.

[283] WHITEHEAR *v.* HUGHES.

28 Nov. 1755.

If a plaintiff files a bill, to revive after a decree, and neglects to revive, on the time for the defendant's answering being out, the defendant allowed to revive, and carry on the decree under the plaintiff's bill.

After a decree, whereby the plaintiff was to redeem in six months, or the bill to be dismissed, and a report of what was due to the defendant, for principal, interest, and costs, the suit abated, and the plaintiff filed a bill of revivor, but neglecting to apply for an order, that the suit should be revived, although the defendant's time for answering was out; the defendant on the above day moved, (under the bill of revivor filed by the plaintiff), that the suit and proceedings might be revived, and that the Master might compute subsequent interest, and tax the defendant his subsequent costs, and appoint a new time, and place for payment.

A doubt arose, whether the defendant could properly revive under a bill filed by the plaintiff, without exhibiting a bill for the purpose.

Lord Hardwicke, C.—As the cause is in that state, that either party might have filed a bill to revive the suit, and as the plaintiff hath neglected to revive, I do not see any inconvenience in permitting the defendant to revive, when by filing a bill of revivor, there is no doubt, but that he may carry on the decree under the plaintiff's bill; and I will put this case: Suppose an abatement happens by the death of a party, and the party dying devises his real estate, and appoints his devisee, executor of his will; the plaintiff cannot revive in the common way, but he must bring a supplemental bill, in nature of a bill of revivor, and set the cause down, to have a decree, for carrying on the former decree, and accounts.

[284] And as the defendant may in that case, on neglect of the plaintiff, set down the cause to be heard, at his own instance, I do not see any reason why the defendant may not upon the plaintiff's neglect, revive in this case ; and therefore take it according to the notice.

FREKE *v.* CULPEPPER.

(Reg. Lib. B. fol. 30.) 9 Dec. 1755.

The plaintiff ordered to pay the defendant £7 extra the 20s. for the length of the amendments.

The plaintiff after amending his bill four several times, applied again, and obtained the common order to amend, on payment of 20s. costs, and amended accordingly ; the amendments being long, and occasioning a new ingrossment, of which the defendant was under the necessity of taking a copy, whereby he was put to considerable expence, he applied the above day, by Mr. Sewel and Mr. Martin, his Counsel, that the order for the amendment might be discharged ; which was opposed by Mr. Yorke, and Mr. Capper, on behalf of the defendant.

Lord Hardwicke, *C.*, would not discharge the order, but directed the plaintiff to pay the defendant, £7 for the costs, occasioned by the fifth amendment, beyond the 20s.

[285] PATTERSON *v.* SLAUGHTER.

(Reg. Lib. A. fol. 230.) 19 Dec. 1755. Ambl. 292, S. C.

Liberty given to the defendant, to amend his answer, by insisting on his title as purchaser, instead of heir at law, having discovered his title after putting in his answer.

PAGET *v.* NICHOLSON.

22 Dec. 1755.

A bill of fees and disbursments for agency business ordered to be taxed.

COUNTESS OF LONDONDERRY *v.* CORNTHWAITE.

26 Jan. 1756.

Serjeant at Arms directed to go against the defendant for want of his answer, on petition ; he having consented the Serjeant at Arms should go, in case he did not answer.

Upon application of the defendant for further time, time was given, upon his entering his appearance with the Register, consenting that the Serjeant at Arms should go against him, in case he did not put in his answer by the time given. He answered : The answer was reported insufficient ; and he was served with a subpoena, to make a better answer ; but neglecting to answer, the plaintiff applied by petition, that the Serjeant at Arms might go.

Lord Hardwicke, *C.*, doubted, whether the same could be granted on a petition ; but after search, many precedents being produced, his Lordship ordered the Serjeant at Arms to go.

[286] GASON *v.* GARNIER.

27 July 1756.

The defendant becoming impaired in his mind, after the decree, had a guardian appointed him, by whom he might produce books, &c.

LUTWYCH *v.* SOUTHN.

23 Feb. 1756.

Fine levied *pendente lite*, not to be set up at the trial of an ejectment.

During the pendency of the suit a fine was levied, and deeds executed, declaring the uses of it :—On hearing the cause, the bill was retained for twelve months, with liberty for the plaintiff, to bring an action of ejectment, in order to try the right to the lands.

The plaintiff afterwards coming to the knowledge of the fine, re-heard the cause, in order to prevent the fine, and non claim, being set up at the trial.

The cases cited were *Burgoyne v. Hutton*, 5th Dec. 1738; *Selie v. Medox*, 1 Vern. 459; *Sorell v. Carpenter*, 2 P. Wins. 482.

Sir Thomas Clarke, M. R. : Let the fine and deeds be not set up, nor any new claim arising from thence, be insisted on.

[287] SNELL v. HYAT.

Hil. 1756.

On application of a defendant, a lunatic, stating that his committee was one of the plaintiffs, it was referred to a Master, to appoint a guardian of the lunatic, to answer and defend the suit.

DEAN v. ABEL.

7 March 1728.

The defendant by consent, was to appear gratis at the hearing, and pay no day over; at the hearing he made default, and a decree was pronounced; from the decree he appealed to the House of Lords; but their Lordships without going into the merits dismissed the appeal, for that it was in the nature of an original hearing.

PERKINS v. HAMOND.

5 June 1746.

The defendant, the infant, being brought up by the Messenger to have a guardian assigned him, to answer and defend the suit, it was prayed, that he might not be discharged, and that he might pay the costs.

Lord Hardwicke, C., said, an infant could not be kept in custody, after a guardian was assigned him; and that an infant, defendant, pays no costs of a contempt; the plaintiff always pays the Messenger.

[288] BRAY v. BULKBY.

30 June 1756.

Depositions of witnesses, examined to the credit of other witnesses, referred for scandal, and impertinence.

SMITH v. FRY.

6 July 1756.

Before the cause was heard, the plaintiff became insolvent; at the hearing, costs were decreed; the plaintiff applied to be relieved against such costs, as incurred before his insolvency; which the Court refused, saying, that though he could not pay, they would be a debt on his estate.

FLOWERDAY v. COLLET.

1 July 1756.

One John Delaport had been examined as a witness on the part of the plaintiff, before he was cross-examined, he secreted himself.

On motion, *Sir Thomas Clarke, M. R.*, ordered the plaintiff, in a fortnight after notice, to procure the said John Delaport to attend, and be cross-examined, or in default, that his depositions taken on the part of the plaintiff, should be suppressed.*

[289] HALL v. DARNEY.

5 Aug. 1756.

If a plaintiff obtains an injunction upon the defendant's being in contempt for want of his answer, the defendant is not entitled to an order to dissolve the injunction, unless cause, barely upon putting in his answer, but he must also have paid the costs of the contempt.

The defendant being in contempt for want of his answer, the plaintiff obtained the common order for an injunction till answer, and further order.

* Similar order made by Lord Hardwicke, C., in *Gason v. Granger*, 1753.

On the 27th of July 1756 the defendant, upon the usual suggestion, that he had put in his answer, obtained the common order to dissolve the injunction, unless cause.

On the 5th of August 1756 the plaintiff came to shew cause against the order, and for cause, alledged, that though the defendant had put in an answer, yet that the defendant had not paid the costs of his contempt, and therefore the order was irregularly obtained.

Lord Hardwicke, C.—By shewing cause, you admit the answer: the proper way is for the plaintiff to move to discharge the order for irregularity; therefore take nothing by your present motion.

MOLESWORTH v. OPIE.

6 Aug. 1756.

The estate in question having, pursuant to the decree in the cause, been sold before the Master, Mr. Lienbrey, a solicitor of this Court, on behalf of one George Beauchamp, obtained an order to open the bidding, and the best bidder was to deposit £200.

The Master proceeded to resell the estate, when Mr. Lienbrey set up the Opies, as sham bidders, and the Master made a report, of their being the best bidders.

They not proceeding, upon application of the plaintiff, Lord Hardwicke, C., discharged the report of their [290] being the best bidders; and it being admitted by Lienbrey, there was no such person as George Beauchamp, his Lordship declared, Mr. Lienbrey was to stand as the best bidder, at the price at which he opened the bidding; and the Master was to make a report of it accordingly, and any of the parties were at liberty to take out such report; and Mr. Lienbrey was to pay unto the plaintiff, 40s. for the costs of the motion.

VALLENCE v. WELDON.

10 Aug. 1756.

Reference to the Master to review his report in order to give liberty to take objections for the purpose of grounding exceptions.

Application to take exceptions to a report, although no objections were left with the Master.

Sir Thomas Clarke, M. R.—It is a practice long established, not to admit of exceptions after report, and no objection taken to the report: *Jacobson v. Hawkins*, before Lord Hardwicke, C., and *Gregor v. Molesworth*, before Lord Hardwicke, C.; but if the Court sees reason to be dissatisfied, it may refer it to the Master to review his report: therefore refer it to the Master to review his report, and let the parties be at liberty to take objections to the report; the application was by petition, but it was thought more regular to move it, and therefore liberty was given to move the matter of the petition.

[291] HENDRY v. KEY.

(Reg. Lib. B. fol. 82.) 22 Nov. 1756.

Plaintiff in an interpleading bill, if he conduct himself properly, shall have his costs from the defendant, who succeeds, and such defendant shall have them over again from the defendant who fails in his claim, with his own costs.

On the 31st of March 1754, Elisha Brown died: the next day Francis Brown, his brother, his heir at law, and sole next of kin, deposited in the hands of the plaintiff for safe custody £111 and some silver teaspoons, &c. A very short time afterwards, the said Francis Brown died intestate; upon his death, the defendants severally demanded the above particulars, and commenced an action against the plaintiff; the plaintiff thereupon filed his bill of interpleader, and on obtaining an injunction, paid the £111 into the Bank, with the privity of the Accountant General, subject to the order of the Court.*

On the 22d of November 1756, this cause was heard at the request of the defendant Key: the plaintiff was ordered his costs of the suit, and at law, out of the cash in the

* The plaintiff in an interpleading bill must compel the defendants to answer: he must reply, and have a subpoena to rejoin, in order that the defendants may examine witnesses.—J. D.

Bank : the residue with the spoons was ordered to the defendant Key, and the other defendants, who could not support their claim, were ordered to pay the defendant Key his costs, and the costs the plaintiff should be paid under the above direction.

(The giving of the plaintiff his costs was strongly argued against : it was said the bill was for his accommodation, and that there was not an instance in which a plaintiff in an interpleading bill had his costs : but it being said, there was a similar decree by Lord Talbot, C., his Honour directed the decree to be suspended, until it was searched for : the name of the cause is, *Bladwell v. Reeves*, 6 Aug. entered Reg. Lib. B. 1753, fol. 461.

It should seem, that until the time of Lord Chief Baron Skinner, the Court of Exchequer had not given costs to a plaintiff in an interpleading bill : for such [292] costs being pressed before that Court, his Lordship sent to me to know if it had ever been done in this Court, and upon sending him the above two cases, and another in *Lord Anson v. Connor*, 5th June 1753, the Court of Exchequer, as I was informed, gave the plaintiff his costs ; and Lord Thurlow, C., in June 1791, in a cause *Dowson v. Hardeastle*, the bill being brought by a wharfinger with whom some Russian tallow was deposited, and which was claimed by the different defendants, gave costs in the same manner, as Sir Thomas Clarke did in the above case of *Hendry and Key*. In *Brymer v. Buchanan*, the plaintiff not having conducted himself properly, had not his costs, and it was strongly urged that he should pay costs.—J. D.)

PHILIPS v. JOHNSON.

18 Dec. 1756.

Exceptions being shewn for cause to continue an injunction, the common order was made, to refer the exceptions, and to procure the report in four days, or the injunction to be dissolved without further motion : which not being obtained, the injunction was of course dissolved ; after which the plaintiff obtained an order to refer the exceptions to the defendant's answer ; and upon such exceptions, the answer was reported insufficient : the plaintiff gave notice to revive the injunction, and moved accordingly, which was granted ; Lord Hardwicke, C., at the same time saying, it was of course.

BLUNT v. CLITHEROW.

Between the years 1750 and 1756.

Lord Hardwicke, C.—No precedent hath been found where a testator having directed the residue of his personal estate to be laid out in a purchase of lands, and settled to the use of daughters and their heirs, as tenants in common, with cross remainders, that the [293] residue hath been divided, and laid out in separate purchases, for the conveniency of each daughter, and yet be settled to the uses of the settlement : and therefore his Lordship, after decreeing the necessary accounts, directed the residue of the personal estate to be laid out in land, and settled agreeably to the limitation in the will.

PALMER v. PALMER.

21 Jan. 1757.

Money, under the particular circumstances of the case, ordered to be paid under a letter of the wife, who was in the East Indies ; although upon enquiry, and search, not found to have been ever ordered before.

REES v. MANSEL.

26 Jan. 1757.

After the defendant had answered, the suit abated, and the plaintiff filed a supplemental bill, and bill of revivor against the defendant, and served him with a subpoena to appear, and answer : having stood out all process of contempt to a sequestration for want of his answer, the plaintiff obtained an order, for the Clerk in Court to attend at the hearing with the record of the bill, in order that it might be taken *pro confesso*. It being afterwards discovered the defendant was a prisoner in the Fleet, he was served with a subpoena to hear judgment in the original cause, as he had answered [294] the bill in that cause : upon the cause coming on to be heard, the defendant made default.

The supplemental bill was decreed by Sir Thomas Clarke, M. R., to be taken *pro confesso*; and the decree made was to be binding on the defendant, unless he shewed cause to the contrary.

Ex parte JORDAN.

21 Jan. 1757.

Dispute concerning the guardianship of the person and estate of an infant, appointed by will, there being no cause in Court.

The testamentary writings, appointing the guardian, not having been executed according to the statute of 12th of Charles 2d, Sir Thomas Clarke, M. R., declared the appointment to be ineffectual.

ROGERS *v.* EARL.

22 Feb. 1757.

Parol evidence read to prove a mistake of a solicitor in taking instructions for a settlement.

Bill to rectify a mistake in settlement; parol evidence offered to prove it, which was objected to.

Sir Thomas Clarke, M. R.—One branch of the jurisdiction of this Court is to relieve against fraud, trusts, and mistake; and parol evidence is admitted to rebut an equity, as it was in *Lamplugh v. Lamplugh*, 1 P. Wms. 111, 2 Eq. Ca. Abr. 415, S. C. *Joynes v. Statham*; I do not mention *Brown v. Selwyn*, Ca. Temp. Talb. 240, 4 Bro. P. C. 179, S. C., because there was a difference in opinion, between two judges of great character; this is one head where [295] parol evidence is admitted: The other is, where parol evidence is admitted, to make out equity: As to the head of mistake, I do not give a positive opinion, but I do not think this Court hath relied upon parol evidence singly; it must be corroborated by other evidence, as in *Pritchard v. Quincent* (Ambl. 147), and *Hill v. Wiggan*: It is, however, less necessary to enumerate the various cases under this head, because there is one in point, *Young v. Young*, February 14, 1750, the plaintiff married Lucy a defendant, and an infant; the husband stated, or drew by way of instructions, to his attorney, what the wife's fortune then was, and agreed to add as much to be settled in strict settlement, and likewise stated that the intended wife had a prospect of an additional fortune, to which he agreed, provided it did not exceed £1000, to add a like sum, to be likewise settled in strict settlement, and he to have the excess: the settlement was prepared according to the instructions: but the solicitor having in the margin of the draft, added double the sum, a settlement was prepared and executed, according to that mistake: In that case, parol evidence was admitted to prove the mistake, and so it ought to be read in the case before me.

Coriton v. Helliar, *Harvey v. Harvey*, 24th of November 1739, and *Uvedale v. Halfpenny* (2 P. Wms. 151, 2 Eq. Ca. Abr. 718, S. C.) were cited in the course of the cause.

[Mews' Dig. Settlement, III, A, i, b; 4.]

[296] BETHUEN *v.* BATEMAN.

4 March 1757.

If an answer be reported insufficient, and the plaintiff obtain an order to amend, and that the defendant may answer the amendments and exceptions at the same time, unless he serve the order before the defendant answers, the defendant may answer the exceptions only.

Order for an injunction, until answer and further order: the defendant answered; the plaintiff took exceptions: On the 11th of November 1756, the answer was reported insufficient; on the 12th of November, the defendant put in a further answer; on the same day the plaintiff obtained an order to amend, and for the defendant to answer the exceptions and amendments at the same time, and served the order.

The defendant applied to discharge the order, for irregularity, and for that it was obtained upon a false suggestion.

It stood over several times, until this day, the 4th March 1757, for the consideration of the Court.

Sir Thomas Clarke, M. R.—This matter arises from a trial of skill between the parties in point of jockeyship: The plaintiff sensible his bill is without equity, to support his injunction, wants to bolster it up by an amendment; the defendant aware of his intention, wishes to prevent it, by putting in a further answer immediately, upon his answers being reported insufficient; the propriety of which is the question now before me.

Had the plaintiff obtained the order to amend his bill, and for the defendant to answer the amendments and exceptions at the same time, and had served the order before the defendant had answered, the defendant must have answered both: for the original bill so amended, is but one record; and so it was held by Lord Hardwicke, C., in *Mayne v. Hochin*, 27 April 1754 (Supr. [Dick.] 255), and I am of opinion the defendant may put in [297] his answer, when he thinks fit; he hath done it; and therefore that part of the order, which directs the defendant to answer the exceptions, is wrong, and let it be discharged.

ROBINSON v. KING.

4 March 1757.

Bill by a single bond creditor for payment of what was due to him out of the real assets descended. *Vid. Walter v. Goring, infra* [Dick. 299].

Bill by a single bond creditor, to be paid out of the personal and real estate of Thomas Fawcet, the intestate, against his personal representative, and his heir at law.

The personal estate being inconsiderable, and the administrator being a bankrupt, the plaintiff at the hearing, waived an account of it; and therefore Sir Thomas Clarke, M. R., directed the real estate descended to be sold; and the infant heir, to join in the sale at twenty-one, and the purchaser to hold and enjoy in the meantime, and the money to arise by the sale, to be applied in payment of what should be found due to the plaintiff for principal and interest on his bond, and for costs; and if not sufficient, an account of the rents and profits was directed, and those to be applied; but this was to be without prejudice to any remedy the persons entitled to the real estate of the intestate, might be entitled to, in exoneration, and aid of the real estate.*

[298] FRY v. PROSSER.

24 May 1757.

Decree *nisi* made absolute, and proceedings before the Master, defendant to be at liberty to rehear upon terms.

The defendants made default at the hearing, and suffered the decree to be made absolute, and proceedings to be had before the Master.

They apply this day by petition to rehear the cause; the cases cited were *Cunningham v. Cunningham*, 17 May 1750 (Ambl. 89); *Cay v. Cay*, Hilary, 1722.

Sir Thomas Clarke, M. R. Upon paying the costs of the default, and making the usual deposit, and submitting in case the decree on the rehearing should be varied, so as to render the proceedings before the Master useless, to pay the costs, the plaintiffs have incurred; the cause to be reheard.

WEBB v. WEBB.

(Reg. Lib. B. fol. 502.) 16 June 1757. *See also Hicks v. Hicks, infra* [Dick. 650]

By the decree, the estates, or a sufficient part, were directed to be sold, and all deeds and writings relating to the estates, to be produced before the Master; the deeds were accordingly left with the Master; part of the estates were afterwards sold, and the incumbrances being discharged, the tenant for life of the estates, applied the above day to have the deeds and writings delivered to him, which, upon hearing an affidavit of notice read, the Lords Commissioners ordered.

* The minutes of this decree were left with his Honour for his consideration, and were returned, altered as they now stand.—J. D.

[299] WALTER v. GORING.

16 & 21 June 1757. *Vid.* Robinson v. King, *supr.* [Dick.] 297.

Bill by a single bond creditor against the executors and heirs of obligor, to be paid what was due to him, out of the personal assets of the obligor; and if not sufficient out of the real assets descended, and decreed by Sir Thomas Clarke, M. R.

SCOTT v. FAWCET.

14 July 1757.

Tenants in common of a copyhold. This Court has no jurisdiction to grant them a commission of partition.

Bill to have partition of copyhold estate, between the plaintiff and defendant, tenants in common of the estate.

It stood till this day for judgment.

Sir Thomas Clarke, M. R. The plaintiff and defendant are tenants in common, of a copyhold; the plaintiff in one third, and the defendant in two other thirds.

The question is, whether the Court can grant a partition of copyhold; the parties indisputably are not entitled to a partition here, if not entitled at common law or by act of parliament.

What is there for this Court to ground its jurisdiction upon?

Upon the statute I am clear this jurisdiction is confined to cases within the statute.

If a legal one, then it is discretionary in the Court, whether the Court will exercise its jurisdiction.

But this case is not; therefore, let the bill be dismissed, but without prejudice to any other remedy, the plaintiff may have.

[Mews' Dig. Copyhold, G, 3; Partition, A; B. 1. See now Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 87.]

[300] BOSON v. BOSON.

22 July 1757.

Bill by the devisee against the heir at law, to establish the will of the testator and to execute the trusts, but prays nothing more.

The cause was brought to hearing, when Sir Thomas Clarke, M. R., established the will, and directed in general, the trusts to be executed, but did not direct any account, and ordered the plaintiff to pay the defendant his costs.

SEAGOOD v. FERRARD.

Trin. 1757. *Vid.* James v. Dore, *supr.* [Dick. 63].

After a decree, in which the defendant was an accounting party, and by the proceedings under it before the Master, it was evident (though no report had been made), a balance would be due from the defendant to the plaintiff; the plaintiff died; his representative filed a bill, merely to revive; the defendant absconded to avoid being served with a subpoena; the plaintiff pursued the directions of the act of 5th of Geo. 2, c. 25, and on hearing the cause on the bill of revivor, Sir Thomas Clarke, M. R., directed the bill to be taken *pro confesso*.

[301] WILLIAM THOMAS AND ALICE HIS WIFE, devisees under the will of DOROTHY DAVIS, the widow of MORRIS DAVIS, Plaintiffs; and BENJAMIN DAVIS, and STEPHEN DAVIS, devisees of MORRIS DAVIS, of whom STEPHEN DAVIS, was his heir at law and JOHN HOWEL, heir at law of THOMAS DAVIS, mortgagee in fee of the estate of the said MORRIS DAVIS, Defendants.

14 & 15 Nov. 1757.

On a question whether a particular estate *nominatim*, not mentioned in a recovery, or the deed leading the uses of it, passed by the recovery; held it did not.

The bill was to rectify a mistake in a conveyance, by Morris Davis and Dorothy his wife, and in a recovery, suffered in pursuance of covenants, in the said conveyance;

to have a reconveyance of an estate, called Redmond Hill, which under general words in the deeds legally passed, and to have the benefit thereof, as standing in the place of the said Dorothy Morris's widow, and to stay proceedings on the ejectment brought by the defendant Stephen, and to be quieted in possession.

The question in the cause was, whether a particular estate, by name called Redmond Hill in Conwere, not mentioned in a deed, leading the uses of a recovery, nor in the recovery, passed under general words "of all other lands," and how far the evidence of one Philips, the attorney who received the instructions to prepare, and did prepare the deed, was admissible to prove what was intended.

It was read *de bene esse*.

[302] *Sir Thomas Clarke, M. R.* The bill is to be relieved against a verdict in ejectment, for recovery of a certain estate, called Redmond Hill in Conwere.

The case is this, Morris Davis under a settlement in 1710, made on his marriage with Dorothy his wife, was seised of lands in three parishes, in the county of Pembroke, one called Conwere in Conwere, Powton in Rudbaston, and another in Saint Mary, Tenby.

All these are admitted to have been settled on the marriage of Morris Davis and Dorothy his wife, so as to have interested the wife in the land.

These lands being thus in settlement, Morris Davis and his wife, in 1710, purchased the estate in question, called Redmond Hill in Conwere, and the conveyance is to the husband and wife, and to the survivor in fee : In 1736, Morris Davis being thus seised, and disposed to mortgage, sent to Philips, to prepare a deed, leading the uses of a recovery. Philips accordingly prepares a deed, inserts a description of particular lands, but Redmond Hill is not mentioned, and then follow general words, of all other lands : a recovery is suffered following the deed ; Dorothy the wife joins.

In 1737 a mortgage was executed to Thomas Davis, in fee.

The wife survived the husband.

The questions are, whether under the general words all other lands, Redmond Hill was meant to be, or is included ? And whether parol evidence is admissible, to prove the intent ?

These being the circumstances of the case, I will consider the force of the evidence, because if it be not sufficient there is no occasion to enter on the question of its admissibility.

[303] The question arises on the words of a feoffment : after a description of three particular estates, general words of all other his estates, in the parishes of Conwere, Powton, and Saint Mary Tenby, in the county of Pembroke.

Do these words comprize Redmond Hill ? I do not think they do include Redmond Hill : But other words do ; if Redmond Hill was not intended, why was the wife to join ; and why did she join ? That method being devised, Mr. Philips was sent for, and instructions given to him : it is to be remembered, that the recovery, and deed leading the uses, in which the wife joined, were for the purpose of effectuating a mortgage.

What does Philips say ? That he did not know that Morris had any other estate in Conwere, except the estate called Conwere : that Morris did not tell him he had ; and that he never heard it till 1737, when Morris brought him the purchase deed.

Evidence circumstantial is entitled to read, provided any parol evidence be admissible.

The objection is, that it is a direct contradiction to the Statute of Frauds ; but I am clear it may be read.

Parol evidence is admitted for several purposes : It is allowed to *relax* an equity : It is often admitted to prove an original fraud, or mistake, in the latter instance where it is joined with other circumstances ; but see the cases on this head, *Pritchard v. Quincent* (Ambl. 147, and *supr.* [Dick.] 295) ; the bill was originally to rectify a mistake : evidence was offered not only to shew the mistake, but to shew on the true construction, what was the correlative : In *Hill v. Watkins*, the parties sought to rectify a mistake in a Court Roll ; minutes of the Court Roll were produced : In *Young v. Young*, the bill was to rectify a mistake. [304] and to ascertain, what the husband was to settle, whether double, or single : the only evidence was parol evidence of the counsel and attorney, accompanied with circumstances : the Court was of opinion, by that evidence it was authorised to rectify : *Rogers v. Earl* is no authority, being now *sub judice*.

This case doth not depend on the evidence of Philips, but variety of circumstances. I do not admit this evidence to make an addition to, or in diminution of the estate, only to put a construction on general words; only such construction as shall restrain, or controul general words.

The case of *Brereton v. Gamul* (2 Atk. 240), in 1741-2, occurs to me: A tenant of Mr. Brereton, by lease for twenty-one years, afterwards hold over having lands of his own: In his will, he devises all his lands, and levied a fine of all his lands: on this will, evidence was admitted, to prove his intent, as to the lands he held over.

And therefore declare, as between the plaintiffs and the defendant, Stephen Davis, the heir at law of Morris Davis, the estate Redmond Hill, upon all the circumstances of the case, is to be considered as intended to be comprised in the deed, leading the uses of the recovery, dated the 2d of April 1736; let the heir at law be restrained from proceeding at law to recover it; but I am of opinion the plaintiffs are not entitled to the like, as to the defendant the mortgagee.

[305] *GROSVENOR v. COOK, et e contra.*

(Reg. Lib. A. fol. 32.) 22 & 24 Nov. 1757.

Creditors by bond entitled to interest only, to the extent of the penalty: Creditors by note, though not on demand, or on a day certain, or on contract to pay interest, to have interest, and to be considered as creditors by specialty: Creditors by book debts not allowed interest.

The bill by the plaintiffs in the first cause, was on behalf of themselves, and other creditors of Randolph Greenway the elder, for an account, and satisfaction of their debts out of his assets.

On hearing the cause the 6th of July 1735, before Sir Joseph Jekyl, M. R., it was referred to Mr. Kinaston, one of the Masters, to take an account of what was due to the mortgagees, and to the other parties, and to all other the creditors of the said Randolph Greenway, the intestate; and the Master was to advertise for the creditors to come before him, and prove their debts; an account of the testator's personal estate was to be taken, which was to be applied in a course of administration, and by consent of the mortgagees the real estates were to be sold; and out of the purchase money, they were to be first paid; and as to what was claimed by the defendant Charles Scott on a note of hand, (which he wanted to tack to his mortgage); His Honour declared he should come in as a creditor for the same on the personal estate; and if the specialty creditors should exhaust any part of the personal estate, the simple contract creditors were to stand in their place, and receive a satisfaction *pro tanto*, out of the real estates; costs, and further directions were reserved until after the Master's report.

On 16th July 1757, the Master made his report, and stated what was due to the mortgagees, and then goes on to state, that he had taken an account of what was due to the plaintiffs, and the other creditors of the said intestate, and found that there was [306] due to several persons by bond, and otherwise, £7381, and that the several debts set forth in the second schedule to his report, consisted of debts, due upon bond; debts due by promissory notes, some whereof were payable at times certain; and others on demand for value received, but without any contract for interest, by way of damage; and others upon book debts, and other simple contract debts.

And the Master further found, that by the length of time since the decree, all or the greatest part of the principal sums secured by the bonds exceeded the penalty of the said bonds; and that he had in such cases, allowed only the penalty: And it having been insisted on behalf of the creditors by note, that they were entitled to interest upon their notes respectively; (that is to say) upon such as were payable at times certain, from such time as they became respectively due, and upon such as were payable on demand from the time of filing the plaintiff's bill, notwithstanding there was no express contract for interest on the said notes; the Master therefore, upon consideration of the premises, and for that the effects to pay the creditors by bond, would not be nearly sufficient to pay the principal monies due to the said creditors; and that if interest was to be allowed on the said notes, from the several times before mentioned, the creditors by note would be in a much better situation than the creditors by bond, as they would in such case receive above six years interest more than the creditors by bond, as they

would have no more than the penalty of their bonds; and that if such interest was allowed, the other creditors by simple contract, would have but very little towards payment of [307] their respective debts, although the same had been as long due as the said debts on notes; for which reason, and at the request of the clerk in court, and solicitor for the plaintiffs, the creditors, the Master submitted to the Court, whether any interest ought to be allowed on all or any of the promissory notes mentioned in the second schedule; and if any, from what time, and at what rate: the Master then reports, that he had taken the accounts directed of the assets of the intestate, and the respective balances.

On the 22d of November 1757, the causes came on to be heard, for further directions, before Sir Thomas Clarke, M. R., and the great question was, whether notes not payable on any day certain, and no contract to pay interest, should carry interest; and also, whether the debts liquidated should carry interest. His Honour said, he would consider the questions.

On the 24th of November 1757, his Honour delivered his opinion as follows:

These causes come before me on a special case, on the Master's report, which bears date the 16th of June 1757; Randolph Greenway, died indebted to divers persons by bond; by note payable on demand for value received; by note payable on a day certain, for value received; and by note payable, without either demand, or day certain, for value received.

The Master hath reported due to the creditors by bond, to the extent of the penalty of their bonds, and no further, being as he apprehends, confined by the bonds. He also reports, what is due for principal, and interest, to the creditors by note on demand, or day certain, but does not compute interest [308] on the others, and he certifies, that the fund to pay debts, is deficient.

In order to determine, how far these simple contract creditors are entitled to interest, it is necessary to see how the case stands at law, and whether there be any equitable circumstances to alter it.

At law, creditors by bond, are entitled only to the penalty of the bond. The reason is obvious; they have chosen their own security, and it is their fault in suffering the debt to increase beyond their security.

As to creditors by note at a certain day, and where by contract, no interest is payable; yet courts of law, and a jury will give interest.

As this is a legal right, is there any material circumstance in this case, to vary such right? No. I take it to be clear, that the justice of this Court is such, that where a creditor comes before it for a legal demand, this Court will give the same relief as he would have been entitled to at law.

In case of bankruptcy it is different, because the Court levels all creditors. This is the reason given by Lord Hardwicke, C. in *Mackintosh v. Ogilvie* (*supra*. [Dick.] 119), 10th March 1747, for granting a writ of *in reat regno* to Scotland, upon attachment of property there.

It hath been argued for the bond creditors, that if creditors by note are allowed interest, they will be in a better condition, than the creditors by bond; they may be so; but as I said before, the bond creditors chose their securities.

As to the creditors by book debts, though their case is hard, and though it may be said, that I could relieve them, yet I must not break through rules. Lord Hardwicke, C., wished to do it in *Bedford v. Coke*, 7th [309] December 1752 (*supra*. [Dick.] 178), where there was an ample fund, and there were due £22,000 for arrears of the Duchess of Wharton's annuity, by way of jointure, and she had been obliged to take up money at interest for her support, and there were no other simple contract debts of longer standing: His Lordship directed precedents to be searched for, but none could be found; and therefore he did not grant her application, and that of the other simple contract creditors for interest.

His Honour, after giving his reasons as above, made the following order:

"It appearing that the personal and real estate of the intestate are not sufficient to satisfy the whole of the debts, declare the creditors are to rebate in proportion, and the Master to settle the proportions; and the creditors by notes, consenting to interest upon their notes shall be computed only for twenty years after such time as the money due thereon, became payable, declare that such creditors, in settling the said proportions, are entitled to have interest computed on their respective notes, only for that period of time accordingly, after the rate of 4 per cent. per annum, and

are to be considered as creditors by specialty, for such principal and interest ; in like manner, as the creditors by bond are to be considered as specialty creditors, for the penalties of their respective bonds."

[310] OWEN v. OWEN (Two Causes).

24 Nov. 1757.

Two bills, brought by different *prochein amys* in the name of the infant ; upon a reference * to the Master, to see which suit was most proper to be proceeded in, the Master reported the first suit : the *prochein amy* in the second suit took exceptions, which were over-ruled ; upon the petition of the *prochein amy* in the first suit, the report was confirmed, and the petitioner was to be at liberty to prosecute the first suit ; the Court was pressed to restrain the plaintiff in the second suit, from prosecuting that suit, but Sir Thomas Clarke, M. R., refused to do so, as such proceeding would be at his peril : on searching by order of his Honour precedents could not be found, the parties generally resting on the report.

MOLE v. MOLE.

6 Feb. 1758.

Maintenance allowed an infant out of the produce of the residue of personal estate, bequeathed to him by his father, where the will directed the interest to accumulate, till he attained twenty-one ; and if he died before, the whole given over, and the will was silent as to maintenance.

Christopher Mole, the father of the plaintiff the infant, by his will, gave to the defendant Mary Mole, his sister, £500, and gave the residue of his estate to the plaintiff upon his attaining the age of twenty-one years, and the interest to accumulate, saying nothing as to maintenance ; and if he died before, gave it over to the defendant.

The bill was brought by the infant against the defendants Ann Mole his mother, and Mary Mole his aunt, the executrix, for an account of the testator's personal estate, to have the residue secured, and to have an allowance for maintenance.

[311] The cause came on to be heard, the 25th of February 1750 ; an account of the personal estate, and of the debts, and payment were decreed ; the defendant Mary was to retain her legacy of £500, and the residue of the personal estate was to be paid into the Bank, and laid out, subject to the contingencies in the will ; and the consideration of maintenance was reserved until after the Master's report.

The Master made his report, and ascertained the residue of the personal estate, which was considerable.

The cause came on the 31st of January 1758, for further directions, as to maintenance, and stood till this day (6 Feb. 1758), for judgment.

Sir Thomas Clarke, M. R.—This cause comes before the Court, as to maintenance, and costs reserved by the decree.

The question is, whether the plaintiff the infant, is entitled to maintenance out of the produce of the residue of the personal estate : I am sorry it is made a question.

It is to be considered, whether maintenance can be allowed out of the produce of a residue that depends upon contingency, and while it is in suspense.

There is a difference between a legacy given by a parent, and a distant relation. *Shudal v. Jekyll*, 2 Atk. 516.

First. Suppose a legacy is given by a parent, payment at twenty-one ; the Court will give interest from the death of the parent, in case the child should want maintenance.

Secondly.—Suppose a legacy given to a child, vested immediately, but defeasible on the contingency of dying before twenty-one ; there is no doubt but the [312] Court would give interest, from the death of the testator ; but in this case it is said, there is more reason for doing so, because it is vested *in presenti*.

There are instances where maintenance is allowed out of a real estate ; that is, where a portion is charged on a real estate, but not to be raised until the child attains twenty-one.

* Similar reference in the case of *Conquest v. Markham*, 5 Jan. 1760. *Sir Thomas Clarke, M. R.*

With respect to authorities : *Houghton v. Harrison*, 30th June 1742 (2 Atk. 329), on a legacy to an infant, by his grandfather, to go over if he died before twenty-one : it was contended interest should be allowed.

Chassey v. Weaver, 21st May 1750.

Heath v. Perry, 9th June 1744 (3 Atk. 191). Legacy by a stranger to an infant, and over, if he die before twenty-one : interest contended for, but denied, because too remote : yet it was laid down to be otherwise, in the case of a legacy left by a parent. *Inledon v. Northcote*, 2d March 1764-7 (3 Atk. 430), on a legacy by a parent to such child, as should attain twenty-one ; interest was allowed.

Greenhill v. Waldoe, Precedents in Chancery 367, portion by settlement for a daughter, payable at eighteen, or day of marriage, after the death of the father, and mother : the father, and mother both died, before either of those contingencies, yet maintenance was allowed.

And I think the plaintiff in the present case, is entitled to maintenance ; and therefore let the Master consider of a proper allowance, for the maintenance, and education of the plaintiff the infant, from the death of her father the testator, to be paid out of the produce of the testator's estate.

[313] And it appearing from the report, that the residue of the testator's estate, consisted of £6,800 bank annuities, the executrix was directed to transfer the annuities to the Accountant General, subject to the trusts, and contingencies in the will.

TURNER v. TURNER.

20 April 1758.

The cause came on to be heard, for further directions on the report, which was confirmed.

Sir Thomas Clarke, M. R., not being satisfied, referred it back to the Master, to review his report, and to be more particular.

ROBERT JOHNSON, the heir at law, Plaintiff : EDWARD GARDINER and his wife the devisee, Defendants.

The said EDWARD GARDINER and his wife, Plaintiffs : and the said ROBERT JOHNSON, Defendant.

(Reg. Lib. A. fol. 261.) 29 April 1758.

Heir at law files a bill to set aside a will which upon an issue is established : ordered to pay costs in this Court, and at law : but on a bill by the devisee, to establish the will, no costs given on either side.

The bill in the first cause, was to have a receiver appointed, of part of the testator's estate, of which the plaintiff had got possession : to have the will set aside, as being obtained by fraud : to have possession of the rest of the real estates, and the title deeds, and to have a distributive share of the testator's personal estate.

The bill in the second cause by the devisees, was to have an issue directed, to try the validity of the will.

[314] On hearing these causes, the bill in the first cause was dismissed with costs, so far as it prayed a distributive share of the personal estate, and an issue *decerni et non* was directed, and the rest of the costs, and further directions reserved.

There was a verdict in favour of the will.

These causes came on again this day (29 April 1758), on the equity reserved, and for costs : the question was as to the heir at law paying, or having costs : Lord Keeper Henley reasoned in the same manner, as Lord Hardwicke, C. did in *Blinkorne v. Post* (2 Ves. 27 ; 1 P. Wms. 285, S. C.), that costs were discretionary ; that there was a distinction between an heir at law coming to the Court for relief, and being brought into Court ; and therefore dismissed the bill in the first cause, in which the heir at law was plaintiff, with costs ; and in the second cause by the devisee, established the will, but gave no costs, either in this Court, or at law, on either side.

KETTLE *v.* CORBIN.

1 May 1758.

Bill that the defendant might redeem, or stand foreclosed : the defendant not appearing, the plaintiff was to take such decree as he could hold, unless cause : the plaintiff at the same time, prayed an injunction to stay waste, but Sir Thomas Clarke, M. R., refused it, saying, an injunction is granted only on an interlocutory application.

[315] LANGLEY *v.* FURLONG.

3 July 1758.

A settlement under articles, deviating from them, set right, and made to agree with the articles, and what the estate was damnified, by the tenant for life not upholding it as he ought, declared to be a specialty debt, and to be answered out of his assets.

Bill by a tenant in tail, under marriage articles, dated the 15th January 1689, to have the settlement dated the 9th of April 1691 ; so far as it deviates from those articles rectified ; and to have what the estate was damnified, by the tenant for life not upholding it as he ought, answered by his representative out of his assets.

" *Sir Thomas Clarke, M. R.*, declared the settlement of the 9th day of April 1691, so far as it varied from the said articles, ought to be rectified, and made agreeable thereto ; and that the plaintiff Jane Langley, the daughter of Elizabeth Langley, who was the sister of Charles the son of Charles Burwell, the only son of the marriage between Henry Burwell and Elizabeth Mathew, was tenant in tail of the Maxway estate, purchased with the sum of £2000, stipulated to be laid out by the said articles, with remainder to the daughters of that marriage as tenants in common in tail general ; with remainder to the plaintiff Jane, as right heir of the said Henry Burwell. And let the said estate be settled accordingly, with the approbation of the Master ; and let the Master enquire in what condition the said estate was left by the said Henry Burwell at the time of his death ; and whether he did sufficiently uphold, and maintain the said estate as a tenant for life ought : and in case he did not, let the Master see how much the plaintiff is damnified for want of the said estates being so upheld, and maintained ; and let the plaintiff be considered as a creditor by specialty for what the Master shall find she was so dam-[316]-nified. And then follows a direction for the executors to pay the plaintiff out of the personal estate in a course of administration ; and if assets not admitted, to account : and the defendants to account for the rents, and profits of the said estate accrued since the death of the said Henry Burwell, and to pay the same to the plaintiff ; and also to deliver possession of the said estate to the plaintiff.

TURNER *v.* TURNER.

12 Nov. 1758.

Bill decreed to be taken *pro confesso* upon a sequestration, for want of a better answer, the first having on exceptions to part of it been reported insufficient.

The defendant had answered ; which, as to so much as exceptions taken to it went, was reported insufficient ; and the defendant having stood out all process of contempt to a sequestration for want of a better answer, the plaintiff's clerk in Court was ordered to attend with the record of the plaintiff's bill, in order to take it *pro confesso*. The cause came on to be heard on the above day, when the Counsel objected to the propriety of it ; for that it could not be said to confess the bill, when there was an answer upon record (part of which was not excepted to) that denied it ; and cited *Hawkins v. Crook*, 2 P. W. 556 (Mosel. 294, 383.—3 Atk. 594, S. C.) ; and said farther, that there was a case under the consideration of the Barons of the Exchequer upon a like question.

Lord Hardwicke, C., said he well knew the case of *Hawkins v. Crook*, and had always thought it wrong, for that in his idea an insufficient answer was no answer : that the defendant, after such contumacy, and affected delays, had not any reason to expect favour from the Court, much less, that they would strain a [317] point for him ; and therefore he should decree the bill to be taken *pro confesso*, (which he did), and would leave it to the defendant to apply to set it aside for irregularity, if he thought fit.

EASTLAND *v.* REYNOLDS.

13 & 14 Nov. 1758.

On questions, whether a child by marriage broke the condition annexed to her legacy, and whether there were cross-remainders as to real estate, determined in the negative on both.

The bill is brought by Richard Eastland, the surviving executor of Sir Robert Wilmot, that the claims of the defendants may be ascertained, and to have the directions of the Court for the execution of the trusts of the testator's will.

Sir Robert Wilmot's will is dated the 25th of October 1746 : and by his will he appointed John Wilson deceased, and the plaintiff, executors.

The testator by his will gives £3000 a piece to his three daughters, Elizabeth, Ann, and Unice, payable at marriage ; provided they married with the consent of his wife, and his executors, to be had in writing.

The interest of such £3000 to be paid as long as each of the daughters lived with their mother ; and if they refused to live with their mother, only £50 a year, and the interest to accumulate, and to go and be paid as their original portions : but if any of the daughters died before marriage, £1500, part of the £3000, to be divided amongst the surviving daughters : if two died, then the survivor to have £5000, and the interest of the £1500, part of one £3000, or £4000 the remainder of the £9000 as it should happen, according to the contingencies expressed in the will, to be paid to their mother for life, and then to the surviving daughters, or daughter, upon the same [318] terms as the original portions of £3000 are given : and in case all the daughters died in the life-time of their mother, then the interest of the whole £9000 to the wife for life : and after her death, the capital to Elizabeth Spurrier (the wife of the defendant Joseph Spurrier) her executors, or administrators.

And if his personal estate amounted to more than £9000, the interest of the overplus to be paid to his wife for life ; and after her death, the capital of such surplus to be paid to such of his children as should be living at her death, and to be paid when their original £3000 bequests became payable in manner aforesaid.

And in case all his said three daughters died without issue, he devised his real estates to the said Elizabeth Spurrier in fee.

The testator died the 9th October 1746, and left Lady Wilmot his widow, and three daughters, Elizabeth, Ann, and Unice.

Part of the testator's real estates were copyhold, which, not having been surrendered to the use of his will, his said daughters, being heirs, were admitted.

Elizabeth died in the life-time of her mother, without issue, and unmarried.

Ann married with the defendant Thomas Reynolds, with the consent of her mother, but not of the executors, who refused it.

In 1750 Lady Wilmot died : Reynolds and his wife, and Unice, entered on the real estates, and received the rents.

After the death of Lady Wilmot, and John Wilson, one of the executors, Unice married Thomas Anderson, [319] without the consent of the plaintiff, and died in 1754 without issue.

Thomas Anderson took out administration to his wife, which afterwards was revoked, and administration was granted to Reynolds, and his wife.

Reynolds and his wife insist, that having the consent of the mother, and the executors having unduly refused to give their consent, they have not forfeited their right to the portions ; and Lady Wilmot the mother being dead, and the other two sisters being also dead without issue, they are entitled to the whole of the personal estate, and likewise to the real estate of the testator : for that the words of the will implied, and must be construed to create, cross remainders.

Mr. Perrot and Mr. De Grey, on the part of the defendants Spurrier and his wife, insisted, that as to the real estate there were no cross remainders, and cited the following cases ; *Garbel v. Vandal*, 26th November 1739, determined by Mr. Verney, M. R. : *Reynish v. Martin*, by Lord Hardwicke, C., 5th May 1746 (3 Atk. 330, — 1 P. Wms. 130, S. C.) ; *Wheeler v. Bingham*, by Lord Hardwicke, C., 13th June 1746 (3 Atk. 364, — 1 P. Wms. 135, S. C.).

Sir Thomas Clarke, M. R.—There are two questions in this cause : one relative to the personal estate ; the other to the real estate.

The first question is, whether the defendant Mrs. Reynolds is entitled to the legacy, or portion given by the will of her father, as having been guilty of a breach of the condition annexed to the legacy. Sir Robert Wilmot had three daughters, Elizabeth, Ann, and Unice ; and by will gives his personal estate to trustees to be placed out at interest and to pay to each of his daughters £3000 on marriage, and not [320] before ; and then only in case they married by the consent of his wife, and his executors in writing.

His Honour then stated the clauses in the will before set forth in case of their marrying without consent, and of their, or any of their, dying without issue.

Elizabeth died after the testator, unmarried : Ann married the defendant Reynolds with the consent of the mother, but not of the executors : Unice married after the death of her mother, and of Wilson, one of the executors, so that the consent required by the will could not be had.

Reynolds and his wife have taken out administration to her.

Let us suppose a pecuniary legacy given by a parent to a child, with a condition annexed : and this is certainly a pecuniary legacy out of a personal estate.

The rules of the Ecclesiastical Courts are clear, that conditions in restriction of marriage are void, as only *in terrorem*, and are all void, where there be a limitation over, or not, except *in pios usus*.

We differ from them in respect to limitations over, because it is plain the testator meant a benefit for a third person.

Here there is a personal legacy which hath a condition annexed to it, and we must admit by the words a condition precedent ; but if there be a limitation over, it makes no difference, whether the condition be precedent, or subsequent. I am in the present case, and under the particular circumstances, of opinion Mrs. Reynolds hath not forfeited her legacy : The mother did consent ; the executors improperly withheld theirs.

[321] As to the real estate, I am clear there are no cross-remainders. His Honour then cited the following cases : *Daily v. Lord Clanrickard*, by Lord Hardwicke, 11th December 1738 ; *Davenport v. Oldis*, 12th July 1738 (1 Atk. 579). His Honour therefore declared, under all the circumstances of the case, the defendant Reynolds, in right of his wife, was entitled to the whole £9000 provided for the three daughters, and directed payment, subject to an enquiry as to a settlement.

And also declared, that according to the true sense, and construction of the will, and circumstances of the case, there were to be no cross-remainders, and consequently that on the death of Elizabeth without issue, one third of the estate belonged to the defendant Spurrier.

LEE v. LEE.

20 Dec. 1758.

If the wife elope, this Court will not assist her in recovering property settled to her separate use.

On the marriage of the plaintiff with defendant, her estate was settled to her separate use. The husband receives the rents, and refusing to pay her what he received, she having absented herself from him, she filed a bill against him, and for an injunction to restrain him from receiving any more of the rents. She applied this day to restrain her husband from receiving the rents, and for a receiver, and that he might pay the rents to her.

But *Lord Northington, C.*, would not assist her, and made no order. The case of *Moore v. Moore* (1 Atk. 272), was cited, in which a woman left her husband without just cause, and it was held that this Court would not give her any assistance to get alimony.

[322] RAMSDEN v. HILTON.

Lord Keeper Henley. 1 Feb. 1759.

The solicitor's bill was taxed, agreeably to the statute of 2 Geo. II. chap 23. It amounted to £1038, and was taxed £1000, not a twenty-eighth part. On application by the solicitor to be paid the costs of the taxation, the Court refused it.

TULLET v. TULLET.

15 Feb. 1759. Ambl. 370, S. C.

Timber improperly cut down during infancy, and infant dying, shall go as real estate.

The bill was brought to have an account of timber cut down during the infancy of John Tullet, of whom the plaintiff was heir; and to have the same considered as real estate; insisting, that though timber was severed, yet, as it was unwarrantably severed, it did not alter the property.

The cause stood for judgment to this day.

Sir Thomas Clarke, M. R.—The plaintiff in this case is heir of John Tullet, who was seised in fee of a freehold estate, on which there was growing a considerable quantity of timber. John dying in his infancy, the estate descended to the plaintiff.

The mother of the said infant cut down timber during the infancy.

The infant died before he was of age to make a will.

The plaintiff, as heir of the infant, hath brought his bill to have the timber so cut down considered as the real estate of the infant.

This is clear, notwithstanding what is mentioned in Lord Coke, that a guardian of an infant, duly appointed, is entitled to do everything as an adult would have done, that if a guardian do any act to alter the course of succession, without leave of the Court, this Court will set it right.

The only thing that induced me to consider of the case, was the case of *Saville v. Saville* (2 Atk. 458) that was cited. If it were in the power of the guardian to cut down timber unnecessarily, that is, not for repairs, &c., and such cutting would alter the property, the consequences are apparent.

A mother, for instance, guardian of an infant a year old, and his death almost certain, with £10,000 worth of timber on an estate, cuts it down. If by severing it, it becomes personal estate, she, under the statute, will come in for a distributive share.

See how it is almost daily in this Court as to personalty. If an estate descends to an infant in mortgage, and out of savings application is made to pay off the mortgage; the Court adds, but so as not to alter the nature of the property, whereby his personal representative might be affected.

The Court will certainly, and ought to use the same caution with respect to realty, and not suffer any person's interest to be impaired by the unwarrantable act of another.

Therefore declare the timber cut down is to be considered as real estate, and belongs to the heir at law; and let an account be taken, and the money be paid into the Bank, and laid out in bank annuities; and if the plaintiff dies before twenty-one, it will go in succession as real estate to the plaintiff's heir at law.

[324] GIBBONS v. HILLS.

1 March 1759.

Bank annuities directed by will to be purchased out of personal estate, to be considered as pecuniary legacies.

The testator, by his will, directed £3920 bank annuities to be purchased out of his personal estate, for persons named in his will, and gave several legacies to other persons. The personal estate not being sufficient to purchase so much bank annuities, and to pay the other legacies, a question arose, whether the bank annuities so directed to be purchased were to be considered as pecuniary, or specific legacies. *Sir Thomas Clarke, M. R.*, after hearing Counsel on both sides, held the bank annuities so to be purchased were to be considered as pecuniary, and not as specific legacies.

WILLIAMS v. FLOYER.

13 March 1759.

Application being made for the records of the bill and answer, and the same not being produced, being either stolen, or lost, Mr. Currier, the late clerk in Court, and Mr. Trollop his successor, were ordered to attend *Sir Thomas Clarke, M. R.*, on the above

day. The petition was brought on this day; when it appearing the records were not to be found, they having been stolen by agents in the office, new engrossments from the office copies were ordered, and to be deposited in the office.

A similar case was cited.

[325] TRIGG v. TRIGG.

3 April 1759.

On hearing the cause, a commission of partition was directed to divide the estate in moieties between the plaintiff, and defendant, with directions for the parties to produce deeds, &c., before the commissioners.

The defendant being in contempt for not producing the deeds, &c., he was taken on an attachment, being served with a writ of execution of the decree, and turned over to the Fleet.

A sequestration was ordered to issue against him.

ELLIOT v. WILLIAMS.

2 May 1759.

A commission having issued for the examination of witnesses at Haverfordwest, divers exhibits, which had been examined to thereon were, by the country solicitor, put into a box and directed for the town solicitor, and delivered to the Monmouth carrier, with strict charge of care; the person who conveyed them to the carrier alledging they might be worth £20,000.


The carrier, or his book-keeper, thereupon marked the box £20,000 value, and on its arrival in town £100 was demanded for carriage of the town solicitor, who offered one guinea, though the carriage by weight did not amount to more than five or six shillings.

[326] Lord Keeper Henley directed the box to be opened in the presence of the town solicitor, the book-keeper here, and another person on behalf of the country carrier, and if it contained nothing but writings, or common-goods, it was to be delivered on payment of one guinea; but if any jewels, plate, or money, the same were to be retained till further consideration, but the writings in the mean time were to be delivered.

This decision was on the ground that the keeping of the exhibits tended to a delay of justice in the cause.

NEGUS v. COULTER.

8 May 1759. Ambl. 367, S. C.

Leasehold estate given by will to a charity, and the residue of the personal estate also to the charity, the bequest of the leasehold void, but the produce of the leasehold to be applied, first in payment of debts, &c.; and if deficient, then to have recourse to the other part of the personal estate. 

This cause arose in relation to a question on bequest of a leasehold estate given to a charity, and the residue of personal estate also given to charity.

The cause stood for judgment this day.

Sir Thomas Clarke, M. R.—If the bequest is void by the Statute of Mortmain, the question is, whether that bequest will go as an undisposed part of the personal estate, or accrue to the residuary part, which is also given to the charity.

If a bequest becomes accidentally ineffectual, it will most clearly fall into the residue. In the case of *Mogg v. Hodges* it is clearly laid down to that effect. When a residue is given, it takes in not only what is given after payment of debts, &c., but what may accrue by accident, or contingency. There is difference between real and personal estate, because the residue of real [327] estate is certain and precise, but personal estate is fluctuating.

In *Tomkin v. Tomkin*, 4 March 1754, the testator gave all his estate to a particular charity: he had no freehold, but leasehold, and other personal estate. The gift of the leasehold as to the charity was declared void, but then the Court threw all the debts and legacies on the leasehold, and left the other part of the personal estate to answer the intent of the charity.

So in the present case, his Honour declared such part of the testator's leasehold estate as was given to the charity void, but directed the debts, legacies, &c., to be paid out of such leasehold estate in the first place; and in case it were deficient, then to have recourse to the other part of the personal estate; and in case there should be any surplus arising from the leasehold estate, that to go to the next of kin; and the residue of the other part of the personal estate to go to the charity, for which it was given.

KNIGHT *v.* PECHEY.

17 May 1759.

Question as to the admissibility of evidence to support the plaintiff's equity.

Bill to be let into possession of some burgage tenements at Midhurst, and to have a conveyance of them, insisting that the title under which the defendant held was borrowed; and in order to prove his case, the plaintiff offered to read some books.

To this evidence objection was taken on the ground of its being contrary to the Statute of Frauds.

Sir Thomas Clarke, M. R.—The question now is, on the admissibility of evidence offered by the plaintiff to a material part of the case.

[328] It is necessary to see what his case is, and how far the evidence is contradictory to the Statute of Frauds.

The bill is, to have a conveyance of some burgage tenements, as representative of Mrs. Knight, who was representative of Mr. Lewkner.

The defendant Sir William Peehey claims the tenements under the will of Sir Bulstrode Peehey Knight, the second husband of the said Mrs. Knight.

The plaintiff insists the burgage tenements were the property of Mrs. Knight, as representative of Mr. Lewkner.

The defendant insists they were the property of Sir Bulstrode Peehey Knight, and by him devised to Sir John Peehey, who devised them to him the defendant.

The plaintiff, in order to make out his title, produces these books, and says, Bulstrode Peehey had no title until he married Mrs. Knight: that in 1722, standing candidate to represent Midhurst in parliament, in order to effectuate his interest, he wanted the deeds, and gave security to return them: that a schedule was taken of them; and that they were lent, and returned accordingly.

In order to shew the tenements belonged to Mr. Lewkner, books are produced to shew payment by his steward.

The intent of the Statute of Frauds is to take in trusts in part declared, and not fully.

In the case of a purchase by A. and a receipt in his name, yet evidence hath been admitted to prove the purchase to be in trust for B.

[329] The Court hath made a distinction between the case, where on evidence admitted the plaintiff files a bill to support his equity, and the case where the evidence offered by a defendant is to rebut an equity.

The books produced are to shew the receipt of £500 as a security to return the deeds lent to Bulstrode Peehey, and the repayment of that money.

And the next intent of producing the books is, to prove the payment of the consideration money for some part of the tenements.

The production is to support the plaintiff's equity, for which his bill is filed. I think, therefore, the evidence admissible, and let it be read.

WESTLY *v.* CLARKE.

27 June 1759

Three executors join in a receipt for conformity, thinking it necessary, for money, part of the assets, paid to one of them, which he dissipated: held that the others were not liable.

Matthew Smith, by his will, dated 1755, amongst others gave the plaintiff a legacy, and appointed the defendants Betts, and Clarke, with one Caesar Thompson, who was an attorney, and concerned for him in his affairs, executors of his will, with trust clause, that each should be answerable for his own acts, and not the one for the other. Part of the personal estate was a mortgage for a term of years, which Thompson called in.

and received the money secured thereby to the amount of £600, and having executed a reconveyance, with a receipt indorsed, which he also signed, he sent the same to his co-executors to execute, and sign, which they did for the sake of conformity, and thinking it necessary.

[330] Thompson having applied the money to his own use, and afterwards becoming a bankrupt, the testator's assets by means thereof became deficient to satisfy the plaintiff's legacy, and therefore the plaintiff filed his bill against the defendants for an account of the testator's personal estate, and to be paid his legacy; with a view, as the defendants Betts and Clarke had executed the re-conveyance, and signed the receipt for the mortgage money, to have it considered as a receipt *in solido*, and to make them answerable at least for their proportions of it.

The following cases were cited: *Townley v. Challoner*, *Bridgman* 38; the same case, *Cro. Car.* 312; *Fellows v. Mitchell and Owen*, 2 *Vern.* 504, 515, the same case, 1 *P. Wms.* 81; *Murrel v. Pitt*, 2 *Vern.* 570; *Churchill v. Hobson*, 1 *P. Wms.* 241; *Brown v. Litton*, *Wms.* 140; *Pooley v. Wray*, 1 *P. Wms.* 355.

Lord Northington, C., said, that had the defendants been trustees, the case might have been different: that the receipt of one executor was a good discharge; that what Clarke and Betts had done was an act of supererogation: it was unnecessary, and had been done merely for the sake of conformity; that it was not even stated by the bill that they had received any part of the money; on the contrary, that Thompson had received the whole: and the will providing that each of the executors should be answerable for his receipt only, he was clear that Clarke and Betts were not answerable; and accordingly his Lordship declared, that the defendants Clarke and Betts were not liable to make good the £600 received by Thompson.

[*Mews' Dig. Executor and Administrator*, III, d; *Trust and Trustee*, C, 7, a; 11, c, iii; *S. C.* 1 *Eden*, 357.]

[331] GAYNON AND ANN HIS WIFE, late ANN FOLEY v. WOOD.

19 July 1759.

A debt held to be satisfied by a legacy.

Bill filed for an account of the estate of the testator, and to be paid two legacies of £500 each, given by the will, and codicil.

Sir Thomas Clarke, M. R.—The testator, by his will, gives to the plaintiff Ann Foley, now the wife of the plaintiff Gaynon, £500, then £500 to charity, and appoints Griffiths and Wood his executors.

After making his will, the testator contracted debts with the plaintiff Ann, and gave her his bond for securing £200.

By a codicil he revokes the charity legacy of £500, and gives the said legacy to the said plaintiff Ann, over and above the £500 given to her by the will; and also gives to her all his ready money, and bank bills, and doth not dispose of the residue. The defendant Griffiths renounced: Wood alone proved the will, and possessed the personal estate, and paid the bond debt to the plaintiff Ann.

The bill is, to be paid the two legacies. The defendants insist that the legacy given by the codicil is a satisfaction of the debt of £200 due by bond to the plaintiff Ann.

The question is, whether the rule of satisfaction takes place, or whether there is any consideration to take it out of the general rule.

The general rule, though admitted to have long prevailed, yet has not escaped censure.

When all creditors, and legatees were by the will directed to be paid, if the personal estate were not sufficient, they were to be paid *pari passu* till the time [332] of *Lord Nottingham, C.*, when he declared, that a testator must be supposed to be just before he is bountiful, and therefore directed the creditors to be paid; and if the personal estate were not sufficient, the legatees to abate.

The bequest of the £500 by the codicil must be taken as an original bequest; there is nothing arises upon the will, or codicil to alter the common case.

There is nothing that arises upon the cases that have been cited to alter it.

Chancey's case, 1 *P. W.* 408, was the first case. In that case the testator directs all his debts, and legacies to be paid; and the Court held, that a testator, when he says,

I give to A £500, could not be said to give £500 if £100 were to go in satisfaction of debts of which the law would enforce payment: besides, he directs his debts to be paid.

In *Lothian v. Lothian*, 17th November 1740, a bill was entertained by a sister against her brother, as executor of her father, to be paid the sum of £180, due to her out of the testator's estate. It was insisted by the defendant, that the debt was satisfied by a legacy of £500 given by the testator.

The Court would not enter into the question, because it was not precisely put in issue.

Cuthbert v. Peacock, 1 Salk. 155, and 2 Vern. 593. Cramner's case was reversed by Lord Harcourt, C. (Salk. 508,—2 Eq. Ca. Abr. 350, S. C.)

I therefore see nothing in this case that takes it out of the general rule: and as to the defendant's having paid the debt, it makes no difference. When a person comes into this Court for equity, he must do equity: and the defendant must have an allowance out of the plaintiff's legacy of what he paid for the debt.

[333] Therefore declare the legacy of £500 given to the plaintiff Ann, by the codicil is to be considered, and deemed a satisfaction of the bond for £200 given by the testator to the plaintiff.

And let an account be taken of the debts and legacies, particularly of the said two legacies of £500 and £500.

And let the defendant Wood the executor, have an allowance out of the legacy given by the codicil, of what he paid for principal and interest, in respect of the said bond for £200.

BALLARD v. HOBBS.

Lord Keeper Northington. 7 Nov. 1759.

Demurrer in the petty bag, made a concilium, and ordered to be argued, and afterwards over-ruled.

The order of this day states, that the plaintiff had brought an action in the petty bag against the defendant, and declared for the sum of £50 due to him: to which declaration the defendant had demurred, and the plaintiff had joined therein: and upon reading the record, it was ordered, that the same be made a concilium: and that the demurrer should stand in the paper of causes, to be argued on the 14th of the same month, of which notice was to be forthwith given.

The demurrer was brought on (13 Nov. 1759), but the defendant not appearing, and service of the above order being proved, it was ordered, that the demurrer should be over-ruled, and that the plaintiff should have judgment against the defendant.

[334] WARDEL v. DENT.

Mich. 1759.

Commissioners' summons for witnesses to attend and be examined not sufficient: they must be served with a subpoena. Demurrer of witness over-ruled, and he ordered to pay £5 costs.

Constantine Phipps and others, being served with the Commissioners' summons, to attend and be examined, neglected to attend, whereupon the defendant obtained an order nisi, that they should at their own expence, attend, and put in their examination, in the Examiner's office: on their shewing for cause, that they had not been served with a subpoena *ad testificandum*, and only with the Commissioners' summons, Lord Hardwicke, C., allowed the cause, and discharged the order.

Phipps having afterwards demurred to five of the interrogatories, the demurrer was argued, 17th December 1759, and over-ruled: and Phipps ordered to pay £5 costs of over-ruling demurrer.

Ex parte CARPENTER.

(Reg. Lib. A. fol. 21.) 20 Nov. 1759.

Commitment for breach of franchise.

This was an application by petition, to commit James Graham, for breach of franchise; he was a sheriff's officer, and had arrested Carpenter in the liberty of the Rolls, the writ not being backed by the Master of the Rolls.

C. I.—10*

Sir Thomas Clarke, M. R. This application complains of breach of franchise.

Two questions arise upon this petition; First, what the franchise is; Secondly, whether the party has been guilty of a breach of it.

[335] This district is an ancient part of the jurisdiction of the Rolls, and is extra-parochial, and no writ can be executed, without the permission of the Master of the Rolls: Graham has presumed to execute a writ without such permission; he is therefore guilty of a gross contempt; and therefore let James Graham stand committed close prisoner to the Fleet.

Afterwards, upon pleading ignorance, begging pardon, and promising never to be guilty of the like again, he was discharged, paying all costs.

WELSH COPPER COMPANY *v.* MOORE.

28 Nov. 1759.

An application for a copy of interrogatories relating to a contempt denied.

HEATHER *v.* WATERMAN.

14 Feb. 1762.

The executing of a sequestration on mesne process held to be improper, and though the bill were decreed to be taken, *pro confesso*, and the sequestrators decreed to account, costs were reserved generally.

Bill for an account, and to be paid the sum of £360 charged to be due for tithes; sequestration having issued against the defendant, for want of his answer; the bill at the hearing was decreed to be taken *pro confesso*, and the defendant directed to account, and pay the balance; the sequestration having been executed, though on mesne process, the plaintiff preferred a petition, which came on at the same time with the cause, and thereby prayed that the sequestrators might account, and pay the balance to him in part of his demand. *Sir Thomas Sewell, M. R.*, reprehended in very severe terms, the executing of the [336] sequestration, saying, it was very improper; that it must be either ignorance of the plaintiff's solicitor in his profession, which was shameful, or by design, for the purpose of taking the account, for which the solicitor would be paid: and his Honour, though he ordered the bill to be taken *pro confesso*, and directed an account of the tithes, and the sequestrators to account, nevertheless reserved costs.

[*Note.*—The decree doth not appear to have been prosecuted.—J. D.]

WALKER *v.* FANDERHEIDE.

(Reg. Lib. B. fol. 119.) 18 March 1760.

A prohibition issues of course upon a proper affidavit, but the defendant must plead, before he applies for a prohibition.

The defendant being arrested at the suit of the plaintiff, on a writ issuing out of the Marshalsea, he upon affidavit, that the cause of action, was not within the jurisdiction of that Court, sued out a writ of prohibition, upon two points: First, whether such writ issued of course, which Lord Keeper Henley declared it did, upon a proper affidavit: Secondly, that the defendant ought to have pleaded, before he applied for a prohibition, which his Lordship held, he ought to have done; and therefore superseded the prohibition.

BLOIS *v.* BETTS.

26 March 1760. See *Vaughan v. Vaughan, sup.* [Dick] 90.

A surety for a receiver, having procured himself to be discharged, the receiver entered into a fresh recognizance, but the time for enrolling being elapsed, [337] it was ordered to be entered *nunc pro tunc*; it was however added, that the same was not to take effect, if any intermediate purchaser, or incumbrances for a valuable consideration, of the lands of the cognisors, but from the time of the enrolment.

BINFIELD v. LAMBERT.

22 May 1760.

A will executed and attested according to the statute, though two only of the witnesses could be found to be examined: the trusts were nevertheless ordered to be carried into execution.

In this case, the will was executed by the testator, and attested by three witnesses, agreeably to the statute; and the bill prayed, that the will might be declared well proved, and be established, and the trusts decreed to be performed, and carried into execution, &c.

Two of the witnesses were examined, who proved the due execution, and attestation of the will, but the third witness could not be found, though advertised, at which there was proof.

At the hearing of the cause before Sir Thomas Clarke, M. R., a difficulty arose, what the Court could do.

The plaintiff's counsel pressed his Honour to declare the will well proved.

His Honour answered, that the will could not be said to be strictly proved, agreeably to the statute; but his conscience being satisfied, as to the proof of it, he would, and he accordingly did, direct the trusts to be performed, and carried into execution.

(The case of *Bird v. Butler*, before Mr. Baron Eyre, sitting for the Lord Chancellor, 5th July 1780, was circumstanced exactly as the preceding, with this difference, that the third witness who could not be found, had not been advertised for. The judge did not declare the will well proved, but only directed the trusts to be performed and carried into execution. See also *Stokes v. Taylor*, *inf.* [Dick] 349.)

[338] ELLIS v. UNET.

13 June 1760. Sir Thomas Clarke, M. R.

If a plea is allowed, and the cause goes on to hearing, the defendant is to open the case, as he hath nothing to do, but to verify the plea.

JAMES v. NEWMAN.

6 July 1760.

A witness was examined at the trial of an ejectment, a new ejectment being brought, she was examined to perpetuate the testimony upon the same interrogatories as those on which the former witnesses had been examined; and her testimony was ordered to be perpetuated.

The defendant having brought an ejectment to recover lands descended to the plaintiff, the plaintiff filed his bill in this Court, to perpetuate the testimony of his witnesses; the defendant answered, and several ancient witnesses were examined, and publication passed by rule; the plaintiff at law neglected to proceed to try the ejectment, but afterwards brought another, and proceeded to a trial, and a verdict was found for the defendant at law: the plaintiff in the said ejectment having brought another, the plaintiff in this Court, the defendant at law, applied to examine one Elizabeth Favier, aged eighty-eight, who had been examined on the said trial, notwithstanding publication had passed, in order to perpetuate her testimony. Sir Thomas Clarke, M. R., doubting, it stood over till this day for consideration; his Honour said, he had considered Lord Bacon's rules for examining witnesses *in perpetuum memoriam*, and that he was of opinion, as a new ejectment had been brought, and others might be brought, and as the plaintiff might bring a new bill to perpetuate the testimony of any other witnesses, to which [339] the former suit would not be pleadable, he therefore gave the plaintiff liberty to examine the said Elizabeth Favier, on the interrogatories exhibited by the plaintiff, for the examination of her former witnesses, and directed, that the testimony of the said Elizabeth Favier should be perpetuated, the same as if she had been examined, before publication passed.

DENT v. WARDEL.

(Reg. Lib. B. fol. 467.) 19 July 1760.

£5 costs ordered to be paid for the length of an answer.

In October 1758, the plaintiff exhibited his bill in this Court, consisting of one hundred and two sheets, for divers matters therein mentioned, and amongst others, for a partition of a close, called the Intack; the defendants answered separately; one put in an answer, consisting of ninety-six sheets, the other of ninety-two sheets. On the 5th of February 1760, the plaintiff obtained an order to amend, on payment of 20s. costs; and amended his bill, and put in a new ingrossment, consisting of no more than thirteen sheets, praying a partition of the intack, and waiving all other matters in the original bill: the defendants by Mr. Perrot and Sir Anthony Abdy on the above 19th July moved, that the said order of the 5th of February 1760, might be discharged, and the bill dismissed with costs, or that the plaintiff might pay unto the defendants, the costs of their putting in an answer, to so much of the original bill, as did not relate to the partition thereby prayed: After hearing Mr. Hoskins for the plaintiff, Lord Keeper Henley or [340]dered, that the said order of the 5th of February, should stand, on the plaintiff's payment to the defendants of the further sum of £5 and that the defendants should pay the same accordingly.

Ex parte DUCHESS OF MARLBOROUGH.

(Reg. Lib. B. 1759, fol. 475.) 4 Nov. 1760.

An order to acknowledge satisfaction on a statute.

BECKET v. BECKET.

9 Dec. 1760.

A wife's chose in action assigned by the husband to an unprovided child by a former wife, natural love and affection recited to be the consideration, not good.

John Becket the plaintiff's father, many years since intermarried with the defendant Ann; differences arising between them, she withdrew herself, and he was obliged to retire into Denmark: during the time he was abroad, Jane Jefferys by will, gave to the defendant Ann, £700 South Sea annuities; but if she married again, the testatrix gave the annuities to the defendant Randal, and appointed the defendants Slesch and King, executors; they proved the will, and admitted assets.

The plaintiff's father having left England, without making any provision for the plaintiff (his child by a former wife), and such bequest having been made in favour of the defendant Ann, he by indenture dated the 20th April 1750, after reciting the above bequest, in consideration of natural love and affection, and of 5s., transferred, and assigned all his interest in [341] the said legacy, to the plaintiff his son, and soon afterwards died.

The plaintiff claiming the legacy under the said assignment, and the defendant Ann also claiming the same as a chose in action; the executors filed their bill, for the indemnity of the Court.

Upon hearing that cause, the 29th of July 1754, amongst other directions, the executors were ordered to transfer the said £700 South Sea annuities, to the Accountant General, subject to the contingencies in the testator's will; and the Master was to enquire whether the defendant Ann had been deserted by her husband, and was left without maintenance; and whether he had made any settlement.

The Master by his report, dated the 19th of January 1756, certified that John Becket did go abroad and leave his wife, without maintenance by him, but that it did not appear, she was deserted, she having declined living with him, and found that the husband had not made any settlement on the defendant Ann, but that she enjoyed a yearly income of £44. 15s. under the will of her mother, for her separate use.

On the 8th of February 1756, the said cause came on to be heard for further direc-

tions, when liberty was given to the said John Becket the son, and to the said Ann Becket, to file a supplemental bill, to bring the right to the said £700 South Sea annuities properly in question.

John Becket accordingly filed his bill stating the aforesaid assignment, and praying to have the aforesaid £700 South Sea annuities transferred to him, subject to the contingency of the defendant Ann's marrying [342] again, notwithstanding his father was dead, leaving the defendant Ann, his widow.

The defendant Ann by her answer insisted, that her said late husband, had no power over the said £700 South Sea annuities, specifically bequeathed to her; that her husband being dead, and the said annuities being a chose in action not reduced into possession, they survived to her.

This cause came on the 4th day of December 1760 and stood for judgment till this day (9 Dec. 1760).

Sir Thomas Clarke, M. R.—The husband and wife intermarried in 1729; it doth not appear any portion came with the wife, on any provision moved from the husband.

In 1732, he received a benefit from his wife's mother, who likewise by her will, gave a fortune for the separate use of the wife.

His Honour then stated the case at large, and the questions, and proceeded as follows: To determine this case, it will be necessary to consider if there are any general rules, in regard to a husband's right in the property of his wife; and if any, whether they are applicable to the present case, or whether it depends upon its own circumstances.

If a man marries a woman with mere personal property in possession, he without doubt gains a property uncontrollable.

But observe, what vests in a husband in right of the wife is, where it is mere personal property in possession.

How doth it so vest, where a husband hath a legal right?

This Court will not interpose to prevent his receiving it.

[343] But if the right be merely equitable as a legacy, and he comes into this Court to receive it, the Court will impose terms upon him; as appears by the case of *Watkins v. Watkins* (2 Atk. 96); and in *Wiseman v. Wiseman* (10 Nov. 1740), decided by Lord Hardwicke, C., his Lordship directed the husband to make a settlement; the wife died before a settlement, the Court interposed for the children.

Consider how it stands on the death of a husband, as in the present case.

It will be proper to make a distinction between what vests in him, in right of the wife, and what in his own right.

The distinction is, that what vests in the husband in right of the wife, if it hath no ear mark, will go as his own personal estate.

But if it be specific, and not reduced into possession, the husband and wife will be considered as joint tenants, and it will go to the survivor; his Honour then cited *Pit v. Hunt*, 1 Vern. 18; *Gray v. Kentish*, 21 July 1749 (1 Atk. 280), in the Book of Entries, fol. 522, and assimilated those cases, to the present case.

I do not know, continues his Honour, where a voluntary assignment hath prevailed, and cited *Bate v. Bate* by Lord Hardwicke, C., but not the date.

It is said, this legacy is to be considered as reduced into possession, by being brought into Court; the transferring of the annuities to the Accountant General, in trust in the cause, is only, as it were, changing the trustees; and the fund still remains, subject to the same equity.

Therefore as between the plaintiff, and the defendant Ann Becket, I am of opinion, the plaintiff is not entitled, and let the bill be dismissed.

[344] *HILL v. PRICE.*

26 Jan. 1761. *Sir Thomas Clarke, M. R.*

A common decree of foreclosure, and the defendant in case of a foreclosure, was to surrender the mortgaged premises which were copyhold, at the expence of the plaintiff.

SPRACKLING v. RANIER.

4 March 1761.

Legacy given to children of A lawfully begotten or to be begotten, does not extend to children born after the death of the testator.

George Martin by his will, dated 13th March 1743, gave £600 to George Hooper in trust, to place out at interest, and to pay the interest, to his the testator's son George, during his life, and after his death, then he gave the said £600 to the sons and daughters of his son George, and their children, in case any of them should be then dead leaving issue, equally between them at their respective ages of eighteen years, with the interest then due for the same; but so as the child or children, of such of the said sons or daughters, as should happen to be then dead, should be entitled only to the share his or their father, or mother would have been entitled to, if living; and if the said testator's son George should die without lawful issue, then he gave the said £600 to the sons and daughters of his the testator's daughter, Mary Sprackling, lawfully begotten or to be begotten, and their children, in case any of them should be then dead, leaving issue equally to be divided between them, at their respective ages of eighteen, together with the interest due for the same, but so as the child or children of the son or daughter so dying, should not be entitled to more than the share of his father or mother, if living.

[345] George the son died in the lifetime of the testator, without issue.

At the time of the death of George the son, the testator's daughter, Mary Sprackling, had three children the plaintiffs George, Martin, and Stephen. Stephen died before eighteen, and the plaintiff George took out administration to him.

The said Mary Sprackling, after the death of her brother George, had another child born, the defendant Mary Sprackling.

The plaintiffs filed their bill to be paid the said £600 in exclusion of the defendant Mary.

On the part of the defendant Mary it was insisted, that under the contingent bequest to the sons and daughters of Mary Sprackling lawfully begotten, or to be begotten, every child lawfully begotten and born of the said Mary Sprackling was entitled to a share; and in support of it the following cases were cited by Mr. Conyers: *Cook v. Cook*, 2 Vern. 545; *Rolt v. Jackson*, in King's Bench, March 1742.

Sir Thomas Clarke, M. R. The Court will sometimes extend the word "then living," to those living at the time of the will, but never further than the death of the testator; and the said George the son having died in the lifetime of the testator, and the defendant Mary being born after the death both of the son George, and George the testator:

Declare the £600 vested in point of right only in such of the children of the testator's daughter, Mary Sprackling, as were living at the death of the testator's son George; that is to say, in the plaintiff George as to one third part; in Stephen Sprackling deceased, as to [346] one other third; and in the plaintiff Martin as to the remaining third. And directions were given for payment accordingly.

[Mews' Dig. Will. IX, h. 2, b. See *Dias v. De Livera*, 1879, 5 App. Cas. 133.]

LANCASTER v. THORNTON.

5 May 1761.

Bill by an infant: the cause heard, and a decree made. Afterwards the *prochein amy* died. The plaintiff's solicitor refusing to name a new *prochein amy*, the defendant petitioned, and obtained an order that the infant should, in ten days after notice to his Clerk in Court, procure a person to be appointed his *prochein amy* to prosecute the cause, or that the defendant should be at liberty to name a proper person as his next friend for that purpose.

His Honour Sir Thomas Clarke cited a like order by Lord Hardwicke, C., in *Ludolph v. Saxby*, in 1742.

LAWSON v. LAUDE.

28 May 1761.

Parol evidence offered to prove, that a particular estate was left out of a lease, under an agreement by the joint direction of both parties, refused, and the bill dismissed.

Bill was brought to carry into execution an agreement between the plaintiff and the defendant, for granting to the defendant a lease of the farm in question, and that the defendant may excuse the lease.

The defendant objected to execute the lease, for that the land called Oxlane was left out of the lease.

Evidence was offered by the plaintiff to prove that it was left out by the particular and joint direction of the plaintiff and defendant, but the evidence was objected to.

[347] *Sir Thomas Clarke, M. R.*—The plaintiff is owner of the estate in question : agreed with the defendant for letting it to him for a term of nine years, at a certain rent : particular premises, namely, Oxlane land, were afterwards detained by the plaintiff, though in the tenure of the defendant before, and being convenient for him.

The plaintiff insists, Oxlane land was to be detained by him, and he was to give up two acres in another place : the defendant insists he was to have both.

By the Statute of Frauds, parties are not to be bound but by an agreement in writing.

What are the rules of a Court of Equity ? It will permit a defendant to plead in bar of a discovery of an agreement.

If there is fraud attending an agreement, this Court will let in parol evidence.

Nothing of that kind appears in the present case. The question is, whether there hath been a partial execution of the agreement ; and if there hath, the Court will decree a performance. This bill is to carry the agreement into execution.

The agreement is for a lease of the farm : there is no exception of Oxlane in the agreement.

The evidence attempted to be read is to prove that the particular of the lands in which Oxlane was left out, was taken by the joint direction of the plaintiff and the defendant. It is directly in contradiction to the Statute of Frauds : therefore allow the objection, and let the bill be dismissed.

[348] SPARROW v. FIEND.

Trin. 1759. 4 K. & J. 601.

Commission of partition decreed to divide a manor, in Trinity 1761.

Heard on the commissioner's certificate.

So in *Lay v. Cox*, Mich. 1772.

[*Mews' Dig. Partition*, B. 1. See *Hanbury v. Hussey*, 1851, 14 Beav. 152 :

Cattle v. Arnold, 1858, 4 Kay & J. 601.]

FOSTER v. STRANGE.

24 June 1761.

The bill was that the defendant might account for one moiety of the profits arising by the sale of the testator Sir John Strange's manuscript books, and pay what should be found to the plaintiff, as administrator of Matthew Strange, one of the sons of the said Sir John Strange, to whom, and the defendant they were given by the said Sir John Strange as joint tenants.

The following cases were cited : *Tottingham v. Stevenson*, 4th July 1720 ; *Willing v. Baine*, 3 P. W. 113 ; *Wheeler v. Horne*, Trinity, 13 & 14 Geo. II. (14 Vin. Abr. 513).

Sir Thomas Clarke, M. R., declared, that under the circumstances of the case, the acts done by the defendant were tantamount to a severance of the joint tenancy.

HALL v. CHAPMAN.

26 June 1761.

Original bill dismissed for want of prosecution after the plaintiff had become a bankrupt, his assignees neglecting to revive.

The plaintiff, after the defendant had answered, became a bankrupt. His assignees not filing a supplemental bill in nature of a bill of revivor, the defendant obtained the common order to dismiss the bill [349] for want of prosecution, and proceeded to tax the costs, and the Master made his report. The plaintiff desired time, and promised to pay the costs: but this day applied to discharge the order for dismissing the bill as irregularly obtained; after the plaintiff had become a bankrupt. If it were irregular, which Sir Thomas Clarke, M. R., seemed to think it was, yet, as he had asked for time, and had promised to pay, he had waived the irregularity; and upon Mr. Sewell's mentioning the case of *ex parte* Berry (reported *supr.* [Dick.] 81), his Honour denied the motion.

STOKES v. TAYLOR.

10 Dec. 1761.

Will though proved *per testes*, not declared well proved in the absence of the heir, but decreed to be established.

The object of the bill was, to establish the will of Richard Taylor, and to carry the trusts into execution.

The will was proved *per testes*. The heir at law not being to be found, Sir Thomas Clarke, M. R., would not declare the will well proved, because the heir at law was abroad, and not to be found, but declared it ought to be established (see *supr.* [Dick.] 337, *Binfield v. Lambert*).

FLOWER v. HERBERT.

13 Dec. 1761.

If a plaintiff replies, defendant may rejoin gratis, and give rule to produce witnesses.

Injunction granted on the merits, and the plaintiff was ordered to speed his cause: he replied the term following, but proceeded no further. The defendant applied to dissolve the injunction.

Lord Hardwicke, C., said, as the plaintiff had replied the defendant might rejoin gratis: and if the plaintiff [350] neglected within the next term to give a rule to produce witnesses, the defendant might the term following; and therefore refused the motion.

(This all the bar, and the Clerks in Court, thought to be against rule; and his Lordship in *Bennet v. Leigh* [Dick. 89] was of a quite contrary opinion.—J. D.)

TOOK v. CLARK.

22 Jan. 1762.

Bill decreed to be taken *pro confesso* against husband and wife, on 22d January 1762: re-heard on the petition of the wife, the husband being dead.

Ex parte CHAMPNEY.

13 Feb. 1762.

The surviving testamentary guardian of the petitioner declining to take upon himself the guardianship, it was referred to the Master to approve of a proper person to have the care of the maintenance, and education of the petitioner. It had stood over, Sir Thomas Clarke, M. R., having a doubt whether such an application could be entertained without a will.

TITTERTON v. OSBORNE.

7 March 1762.

The bill was filed by several plaintiffs. The defendants having answered, the plaintiffs replied, and the cause was at issue. On the above day one of the plaintiffs applied

to amend the bill by striking out [351] his name, upon this ground, that till then he was ignorant of the suit, and that his name was inserted without his knowledge, privity, or consent. The defendants opposed the motion, for that he was the only plaintiff of ability to answer the costs.

Lord Northington, C., held the objection to be good, but ordered the notice to be saved until the hearing of the cause : that in case the plaintiffs should be ordered to pay costs, one William Goodin the solicitor, who inserted the said plaintiff's name, might be ordered to indemnify him ; at the same time saying, that were he to grant the motion, it would tend only to derange the cause, and impede the hearing.

YEOMANS v. KILVINGTON.

In the Exchequer. 7 April 1762.

A perpetual injunction having been decreed, it is not necessary, upon an abatement, to file a bill of revivor merely to keep on foot the injunction.

Bill for an account of land sold, and the money produced by the sale, and to set aside a note of hand ; and for an injunction. On hearing, it was referred to the remembrancer to take an account of what was due. He reported £6, 6s. to be due to the plaintiff. On hearing for further directions, the defendant was directed to pay the money reported due, and to deliver up the note, and to pay the plaintiff his costs to be taxed, and the injunction before granted to be perpetual. The note was delivered up, and the balance was paid ; but before the costs were taxed, the defendant died ; on which the plaintiff filed his bill against the executor of the defendant to revive the suit, charging that the note had not been delivered up, and that the defendant threatened to bring a fresh [352] action on it. The defendant by his answer denied he had the note, and believed it was delivered up pursuant to the decree ; and denied threatening to bring an action, and disclaimed any benefit from the note. The Court dismissed the bill without costs.

JONES v. DONITHORNE.

East. Term 1762.

A witness was examined *de bene esse* on a commission *ex parte*, and died before he was examined in chief : the commission was returned, but lost. An order was made on the commissioner in whose custody the paper draught of the deposition remained sealed, to return the same unopened, and that the same should be delivered to the Six Clerk unopened, and be engrossed, and that such engrossment should be filed, and made use of as the original deposition might have been.

COTES v. LINDSAY.

East. Term 1762.

The defendant, abroad in the King's service, brought his action against the plaintiff. The plaintiff filed his bill for an injunction, and obtained the common order for an injunction, with liberty to proceed to trial, but with a stay of execution. The defendant proceeded to trial, and obtained a verdict for £4000 and costs ; and on affidavit of the danger of his losing his debt, obtained an order for the plaintiff to pay the money recovered against him into Court by a day fixed, or the injunction to be dissolved.

[353] HOCKLY v. LUKIN.

Trin. 1762.

A bill having been filed against an infant, his father, to prevent his being served with a subpoena, secreted him. On application, Lord Northington, C., ordered the father to discover where the infant was, that he might be served.

BROWN v. YERROWAY.

6 July 1762.

The opinions of Counsel read as evidence.

The object of the bill was, that the defendant might complete his purchase, and pay the residue of his purchase money, and that the defendant Ford, a mortgagee, might execute on being paid what was due to him.

At the hearing of the cause, the opinions of Counsel were offered to be read ; and objected as improper.

Sir Thomas Clarke, M. R.—It is not usual to read the opinions of Counsel, but in a case circumstanced as this is, it is proper : therefore let them be read ; and the opinions of Mr. Rivet, and Mr. Robert Bicknel were read accordingly.

CLARKE v. BURGOINE, *et c contra*.

12 & 13 Nov. 1767.

£2000 paid by the testator on the marriage of his daughter, with a covenant to pay £4000 more on his death, an extinguishment of two legacies given by the will to his said daughter.

The testator, by his will, gave to his daughter two legacies of £3500 and £3500.

[354] After making his will, the testator, on the marriage of his daughter, paid £2000 in part of her portion, and covenanted to pay £4000 on his death.

The bill was, to be paid the said legacies.

On the other side it was insisted, that the provision made by the testator for his daughter on her marriage was a satisfaction of the said legacies. The following cases were cited : *Johnson v. Sir Edward Smith*, in 1749 (1 Ves. 314) ; *Jenkins v. Powel*, 2 Vern. 115 ; *Blandy v. Widmore*, 1 P. W. 324 ; *Wilcox v. Wilcox*, 2 Vern. 558 ; *Hartop v. Whitmore*, Prec. Ch. 541 ; *Ward v. Lant*, Prec. Ch. 182.

Lord Camden, C., declared, that the [testator] having advanced a portion of £6000 on the marriage of his daughter ; £2000 *in præsent*, and £4000 at his death, the legacies given by his will were extinguished, and revoked.

[*Mews' Dig. Portion*, 7, a. See *Pym v. Lockyer*, 1841, 5 My. & Cr. 52.]

VAUGHAN v. WILLIAMS.

1 Dec. 1762. *Vid. sup.*

Bill decreed to be taken *pro confesso* on a sequestration for want of the defendant's answer, and the defendant decreed to pay to the plaintiff £770 received for his use. The sequestration had been executed.

Sir Thomas Clarke, M. R., held it to be unnecessary, and improper.

[355] COVENY v. ATHILL.

(Reg. Lib. A. fol. 33.) 20 Dec. 1762.

The plaintiff brought his bill to perpetuate the testimony of his witnesses. The defendant stood out all process of contempt, and was brought up on an *alias pluries habens corpus*, for want of his answer, and the plaintiff's clerk in Court attended with the record of the bill, to have the same taken *pro confesso* : but the plaintiff by his bill praying no relief, and as he, by the defendant's persisting in his contempt, was prevented serving a subpoena to rejoin, and bringing the cause to issue, whereby he was in danger of losing the benefit of his witnesses.

Sir Thomas Clarke, M. R., after taking time for consideration, gave the plaintiff leave to sue out a commission to examine the witnesses, though no answer were come in.

[*Followed*, *Lancaster v. Lancaster*, 1834, 6 Sim. 439.]

ADDERLY v. SMITH.

7 Feb. 1763.

The plaintiff, under the protection of a foreign ambassador, ordered to give security to answer costs.

ATTORNEY GENERAL v. POWEL.

17 Nov. 1763.

A new relator named in the room of a deceased relator.

[356] TOWNSEND v. BARBER.

25 April 1763.

If one executor possess part of his testator's estate, and pays it over to another executor, who embezzles it, the former, or in case of his death, his assets shall make it good.

The bill was brought for an account of the testator's personal estate, and to have the residue paid, or secured for the defendants; and that the representative of Speed, one of the executors, might answer any loss the estate sustained through his neglect, or misconduct.

The testator, by his will, appointed three executors: they all proved. Speed principally acted, and possessed the estate, and, among other particulars, fourteen East India bonds, which he permitted one other of the executors to get into his possession, who disposed of them, and afterwards became a bankrupt, whereby they were lost to the testator's estate. The cause was in hearing several days: it stood this day for judgment.

Sir Thomas Clarke, M. R.—The principal question in this cause relates to fourteen East India bonds.

Whether, under the circumstances of the case, the assets of Speed, one of the executors who possessed them, are to make satisfaction for those bonds.

In order to determine this point, it is necessary to see whether there is any general rule with respect to cases of this kind.

The meaning of a person's appointing more executors than one is, that they may be a check, or a caution to each other.

And I take it to be a general rule, that where one executor receives the whole, or part of his testator's estate, and pays it over voluntarily and unnecessarily to his co-executor, and the same is embezzled; if [357] embezzled, or lost, he who so paid it over is answerable.

If this is a general rule, it is highly reasonable.

If there are twenty executors, each is independent, and not answerable to the other.

If so, let us consider the present case, and see if it falls within that rule.

The testator appointed three executors; one his cousin, another his agent in his trade, the third Speed, his riding partner: his view was, that the whole should fall into the hands of Speed his partner.

Speed possessed the testator's effects, and, according to the above rule, had a right to keep possession; and it was not necessary to pay part of it to Wilson, another of the executors.

Part of the estate of the testator consisted of fourteen East India bonds, which Speed possessed, and afterwards permitted Wilson to take, and carry away.

Wilson afterwards became bankrupt, and the bonds are lost.

The great question is, who is to make them good to the estate?

And I am of opinion, that Speed having possessed them, and having voluntarily, and unnecessarily parted with them to Wilson, whereby they are lost, the assets of Speed, according to the rule before laid down, are to make them good. Cases have been cited, but cases of this kind depend on their own foundation. His Honour mentioned a case of *Ridout v. Bickerton*, but did not say where it is reported.

And in directing the accounts, ordered the value of the bonds, as if existing, to be answered out of [358] Speed's assets, but without prejudice to any remedy the executors of Speed might have against the assignees of the bankrupt executor.

[Mews' Dig. Executor and Administrator, III, d.]

VERNON v. CUE.

22 March 1763.

Bill amended after pleas set down, on payment of 20s. costs, and £5 for the plea.

The defendant pleaded, and the plea was set down to be argued. On the 28th of October 1759, the plaintiff obtained an order to amend his bill on payment of 20s. costs.

The defendant applied this day to discharge the order for irregularity.

Lord Northampton, C.—Upon payment of 20s. costs for the amendment, and £5 for setting down the plea, let the order stand.

DARLING v. STANIFORD.

10 May 1763.

Deposition of a witness rectified, having been first examined in Court.

This came on upon a petition of John Brison, a witness, examined to the plaintiff's interrogatories, to rectify his deposition; complaining that the Examiner had mistaken what he said, and taken his examination contrary to it; of which he made affidavit, and therefore prayed to have the examination rectified.

It was strongly opposed.

Sir Thomas Clarke, M. R. As this hath been so much laboured, it is necessary to see what is the examination. The complaint is, that the Examiner hath mistaken the words and meaning of the witness.

[359] The Examiner writes in my name, and is, and acts as my deputy; he is the same as the persons in the Roman law called co-judices. If they take an examination short, it is usual for the Court to take the examination into their own hands, and examine the witness. In the present case, John Brison the witness attended in Court, and was examined; and his Honour being satisfied, ordered the deposition to be amended according to the prayer of the petition, and the witness to reswear it after the amendment.

KELLY v. POWLET.

18 May & 7 June 1763. Amb. 605, S. C.

Question whether plate, china, and linen were comprised in a bequest of household furniture.

Lavinia Diss of Bolton, by her will, dated the 6th of December 1759, gave to the defendant her household furniture and farming utensils at her house at Westcomb at the time of her death, and appointed the plaintiff sole executor and residuary legatee.

The plaintiff insisted that household furniture and farming utensils did not comprehend plate, china, linen, books, pictures, and other valuable effects of the testatrix, at Westcomb, and therefore filed his bill to have the plate, &c., delivered to him.

The testatrix was possessed of a large quantity of plate, great part whereof she kept locked up, and used only other part of it; and therefore it was contended, that if what was in use was to be considered as household furniture, yet it certainly did not include that part which was not in use.

On the part of the plaintiff, the following cases were cited: in *Harvey v. Badcock*, 25th July 1750, by the [360] Master of Rolls, it was held that books did not pass by the description of household goods and furniture; and so likewise in *Bridgman v. Dove*, in 1744 (3 Atk. 201). *Swinburn of Testaments*, part 7, page 415; *Jesson v. Essington*, Prec. in Ch. 207; In *Gulliford v. Devinesh*, 26 Nov. 1718, it was sent to the Master to see what was in general use; *Le Farrant v. Spencer*, 14th June 1748 ([1] Ves. 97); *Frankland v. Lord Burlington*, Prec. in Ch. 251.

On the part of the defendant the following cases were cited: *Masters v. Masters*, 1 P. W. 421; *Nichols v. Osborn*, 2 P. W. 419; *Budgel v. Ellison*, 1731.

The cause stood till this day for judgment.

Sir Thomas Clarke, M. R.—The question in this cause arises on the specific bequest to the defendant of the testatrix's household furniture and farming utensils, which shall be within and upon the premises at her death.

At that time, plate, china, library, a telescope, pictures, linen, &c., were in and upon the premises.

The question is, which and how many of these things passed, or may be said to pass by the will?

The chief of the dispute concerns the plate, and concerning the meaning and extent of the word furniture.

In the first place, therefore, I shall consider what is the meaning and import of that word.

It is as general a word as can be made use of, incapable of a definition, and only of a description. It comprizes every thing that tends to the use or convenience of a householder or occupier of a house.

[361] In the next place, what is the meaning of the word when accompanied with other circumstances; and in that light I shall consider the present case.

The circumstance of rank and family is very material.

Suppose a person of rank and family purchases a service of plate, and dies without using it, I should have no doubt that it passed under the word furniture.

But plate will always pass wherever it is mentioned in the will of a testator.

If a tradesman hath purchased a service of plate, such part of it as is in common use, and suitable to his rank, will pass, but not such as is above his rank.

In *Nichols v. Osborn*, 2 P. W. 400, plate did pass, but a library of books did not. *Bridgman v. Dove* warrant this opinion, and that a telescope doth not pass.

But china and linen I am of opinion do pass; they are what are in use, and for the conveniency of a householder: but the library of books, silver sun-dial, camera obscura, telescope, globes, and case of butterflies, are not such articles as are in use, or in any respect necessary or convenient for a householder, and therefore declare the plaintiff is entitled to those articles as not comprised in the specific bequest to the defendant, but as part of the general residue of the testatrix's personal estate.

And also declare, that according to the true meaning and construction of the will of the testatrix, and by virtue of the specific bequest, the defendant is entitled to the plate, household linen, china, whether [362] useful or ornamental, existing at the house at Westcombe at the death of the testatrix.

As to pictures, whether hung up or in cases, the plaintiff present in Court admitted that the defendant was entitled to them.

[*Mews' Dig. Will*, IX, K, 1, a, i. See *In re Londesborough*. 1880, 50 L. J. Ch. 10.]

PAUNCEFORT v. EARL OF LINCOLN.

21 April 1763.

The dates and general purport of wills, &c., under which the plaintiff claimed being only stated in the bill by way of reference, it was referred to the Master to state a case of the rights claimed by the plaintiff under the several instruments.

† The plaintiff's claims were founded on a variety of deeds, wills, and other instruments; to avoid expence, or for some other purpose of the solicitor, a Mr. Wharton, the dates and general purport only of the deeds, &c., were stated in the bills, with reference to them.

When the cause was brought on to hearing, his Honour said, were he to make a decree, there was not anything upon the records of the Court on which to found it, and therefore referred it to a Master to state a case of the rights claimed by the plaintiff under the several deeds, &c., mentioned in the bill, and reserved costs and further directions until after the report. The cause was afterwards heard on the report, which stated the deeds, &c., and a decree was made.

ALLEN v. ALLEN.

14 June 1763.

Report pursuant to a decree: no objection was taken to the draught, and the report was confirmed.

The cause came on this day to be heard for further directions on the report.

[363] After hearing the decree and report read, Sir Thomas Clarke, M. R., ordered the cause to stand over, with liberty for the plaintiff to take exceptions to the report, as if he had taken exceptions to the draught.

ATTORNEY GENERAL *v.* LORD FOLEY.

26 June 1753. 2 Bro. P. C. 368, S. C.

A person's building a chapel on lands of which he had a lease, and the owner standing by and seeing it built, without obstructing it, does not give the former a right to the chapel, or to nominate.

The relators had erected a chapel of ease on some land, of which they were in possession under a lease. The owner saw it in the course of the building, and made no objection.

The information was to establish the right to the chapel, and to have the right of nominating a curate to officiate in it, and to establish the nomination that had been made by one Collins.

It was argued on the part of the relators, that having built the chapel, and the owner of the lands standing by and not obstructing them, it was now too late to set up a claim to it: that it was for public service, and must be supposed to be given up to the public; as, where a man, owner of ground, erects buildings in the nature of a street, it is supposed to be for the benefit of the public, and he cannot afterwards stop the way.

And the case of the Attorney General *v.* Brereton (2 Ves. 425) was cited.

On the part of the defendant, Lord Foley, it was argued, that he had purchased of Lord Abergavenny the soil on which the chapel was erected.

The question therefore was, whether Lord Foley has a right to the chapel; and if so, whether he had [364] not a right to nominate a curate to officiate in the chapel, or to remove him from it.

Lord Foley purchased the soil of Lord Abergavenny, and has the same right as Lord Abergavenny had. If he were entitled to the soil, he was entitled to whatever was built on it; and if he had such right, he had a right to dispose of it, which he hath done.

The soil certainly belongs to Lord Foley, unless Lord Abergavenny hath done some act to divest himself of that right.

It was insisted by the plaintiff, that as Lord Abergavenny suffered the chapel to be built, and was privy to it, he designed it for public benefit, and cannot now reclaim it.

So, if a man lays out buildings in the nature of a street, it is supposed to be for the benefit of the public; it will be so for ever, and an action of trespass will not afterwards lie against passengers.

But the plaintiff must shew he had a title to the soil at the time he built the chapel. It is true, he had a temporary title by virtue of a lease, but that doth not give him a title after the lease is expired.

So Lord Coke says in 7 Rep.; and Lord Coke in 3 Inst. 203, says, "Albeit people build chapels, yet it is necessary, before they are properly called so, that they should be consecrated."

This chapel hath not been consecrated by the bishop, consequently it is no chapel, but lay property, and must belong to a layman; if so, to whom more properly than to Lord Foley, the purchaser?

A chapel of ease hath a district: that district is obliged to keep it up; this is not so: who is to repair it?

[365] And if a chapel of ease, the parson is to nominate. So held in Hobart, 66, 67.

Lord H. Mansfield, C.—The first question, and fundamental point of this suit is to establish a right to the building and soil, as a perpetual chapel, for the use of the inhabitants; and unless that point be established, all the rest falls to the ground.

If that is established, then the other question will arise, whether Lord Foley hath a right to nominate a curate; and if to nominate, whether he hath not a right to remove.

And then another question will arise, as to establishing the nomination of Mr. Collins.

I will, for the present, suspend my judgment upon the fundamental point, and give my opinion upon the latter question.

First: If it be considered in the light of a private chapel, it seems to me that Lord Foley hath a right to nominate.

The chapel hath been erected thirty four years: in all this time five curates have been appointed: no other proof of nomination but that of Mr. Collins, which is a parti-

cular case. What was done by Mr. Le Hant carries with it the appearance of a nomination.

That is the only evidence of nomination to this chapel : and after this length of time I must consider the patron to have the nomination.

It is true, if there is no contract or writing to the contrary, the rector or vicar will have it. Supposing it to be an established chapel, if Lord Foley had once nominated, I could not have removed his nominee.

The next question is, in respect to the licence by the Bishop of Hereford. That licence determined at his [366] death : the words are "at my pleasure." All leases at will determine at the death of the grantor.

Now as to the fundamental point, whether the informants have a right to have the chapel established :

And that depends upon the question, whether the owner of the inheritance of the soil, by acts done by, or acquiesced in by him, gives a right to the inhabitants of a village to erect a chapel for divine worship on his soil, and gives such a right as to establish it against him.

But that is not this case.

This case is very different from that of the Attorney General *v.* Brereton which hath been cited, there being in that case an endowment of part of the tythes.

The plaintiffs do not pretend to any right or grant, but only that Lord Abergavenny knew of the building, and did not obstruct it.

It hath been argued, that where a person in possession of land builds a house on it, and the person who hath the legal estate permits him to build, and takes no notice of his right, the Court will not permit him afterwards to make use of such right to claim the house.

Next it is insisted, that the chapel ought to be considered for the use of the public : as if an owner lets his land be used as an highway, he cannot afterwards shut it up.

As to the first ground, this is by no means a case within that rule : for in this case the inhabitants knew their title, and upon that title only they built : whereas it is requisite to have the benefit of the rule, the party should build on an apprehension the estate was his own.

[367] It is of no signification that the place on which the chapel is built was a place that was used for sport : all places near towns will be used as such at times : besides, the ground appears to have been on lease from the year 1664.

There is not a sufficient foundation to determine on Lord Abergavenny's permitting the lands to be built on, that he forfeited or lost his right. If it is not to be considered in that light, then it is said, it ought to be considered as a donation ; Lord Abergavenny's having permitted the land to be used and built upon for public use.

The case of leaving lands for streets or public highways bears some analogy to this case ; but there is a manifest difference : the shutting up of an highway is an annoyance to the public, and no contract can be made.

The inhabitants contracted with Cheltenham for a lease, and got it : what occasion for any other right ?

The question, therefore, that remains, is, whether that permission or non-obstruction of Lord Abergavenny to erect the chapel for public use is a donation.

I am of opinion it is not. There is also another objection to its being so considered : Lord Abergavenny had no estate in him to do it, he having only an estate tail.

I ground myself on the answer to the other points made by the relators, and the letter of the 2d October 1719, is a very strong piece of evidence against the relators, it being not four months after the lease : for it is plain Lord Abergavenny expected the inhabitants to treat with him, to take some grant, and to make some acknowledgment.

[368] In short, it is my opinion, that a person, the owner, standing by, and seeing a building go on, though for public service, is not a sufficient ground in equity to establish a right against him. And therefore let the information be dismissed.

SYKES v. MEYNAL

28 June 1763.

Husband, by settlement after marriage, considered a purchaser of a mortgage belonging to the wife, not reduced into possession.

The defendant Ann Holden was married to three husbands : the first entitled to the mortgage in question : he died, and appointed the defendant Ann his executrix and residuary legatee. She afterwards married Samuel Burton : he made a settlement on her and died ; but the mortgage was not reduced into possession. She afterwards married Thomas Holden : and he died. Samuel Burton died intestate : the plaintiff, his sole next of kin, brings his bill to have the benefit of the said mortgage, insisting that though it were not reduced into possession, Burton became a purchaser by the settlement.

Two points were made by the plaintiff in the cause :

First, whether, by a settlement before marriage, the husband became a purchaser of a mortgage that belonged to his wife, not reduced into possession :

Secondly, if a settlement after marriage made any difference.

Ser Thomas Clarke, M. R.—The single question in this cause is, whether a mortgage to the first of three husbands of the defendant Ann Holden, of whom she was executrix and residuary legatee, is a chose in action not reduced into possession, or by any act done on the marriage of the defendant Ann with the said [369] Samuel Burton, or since by settlement it belonged to the said Samuel Burton.

In this case it depends on a settlement after the marriage. The property Ann was entitled to is part of the consideration of the settlement, though it might not have been good against creditors, it is good against the wife.

In *Jones v. March*, decided by Lord Talbot, a very inconsiderable sum came to the wife after the marriage by a collateral relation, in consideration of which the husband made a settlement of all his estate : it was held good, though against creditors.

There was another case of this kind in 1742 or 1743 ; I mean the case of *Lanoy v. Duke of Athol* (2 Atk. 444).

I am of opinion, therefore, that Mr. Burton was a purchaser of his wife's interest in the mortgage :

And therefore declare, that Samuel Burton, by virtue of the settlement made by him on the 21st of October 1743, became entitled to the mortgage in question : and let an account be taken of what is due on it ; and declare the plaintiff is entitled to one moiety, as sole next of kin of Samuel Burton, who died intestate ; and that the defendant Ann Holden, his widow, is entitled to the other moiety.

[370] HERLE v. GREENBANK.

19 July 1763.

Unless interest be reserved by the decree, the Court cannot give it ; but the cause was reheard merely to introduce a reservation of interest.

Interest not being reserved by the decree, upon hearing the cause for further directions on the Master's report, it was urged to have the defendant ordered to answer interest. Interest not being reserved, Lord Northington, C., said, he could not order it, but recommended the plaintiff to re-hear the cause, merely to introduce a reservation of interest.

JESSON v. BREWER

10 Nov. 1763.

Pleadings and a decree are lost. A paper writing, dated the 26th Oct. 1684, ordered to be entered as the decree, and to be enrolled *nunc pro tunc*.

By the Minute Book, it appeared a decree was pronounced in this cause on the 24th of October 1684, which had been drawn up, and acted under, and proceedings had before the Master, and reports made.

But the decree had not been entered, and the pleadings in the cause were lost ; but there existed a paper writing, dated 26th October 1684, purporting to be a copy of the decree.

Application was made to enter the said decree, and to inrol it *nunc pro tunc*.

Mr. De Grey, Counsel for the petitioner, cited Snoden v. Corbet, 27 April 1742, and *Ex parte* Earl of Falmouth, May 1722.

Sir Thomas Clarke, M. R.—This application is to come at an instrument which appears to be a judicial act of the Court : that a decree was pronounced at the time, to the effect of the writing now produced, is evident from the Minute Book at that time : that it [371] hath been acted under is also evident from the report of the Master to whom the cause was referred, and several orders subsequent to it.

Precedents have been produced in support of the application, and were I to act contrary to precedents I should be guilty of injustice.

Suppose a deed is lost ; the loss being proved, a copy of it will be admitted as evidence.

There have been similar applications on account of fire. In Goddard and Others v. the Earl of Suffolk and Others, the decree was pronounced the 19th of James I. ; there was an exemplification under the great seal, but damaged so as to be scarcely legible. The inrolment was not to be found, the records being burnt : application was made to the Court that the decree might be inrolled pursuant to the exemplification. On the 27th July 1727, it was ordered that the exemplification should remain in the Rolls Chapel ; and on the petition was indorsed, " 19 James I. Ordered, that the bills, answers, decree, &c., when the originals are burnt, on the application of the parties interested, shall be re-engrossed from the copies."

And where any decree or inrolment of a decree hath been burnt, on application of a person interested, on producing any exemplification or writ of execution of a decree, the Court will order the exemplification to be left in the Rolls Chapel, and a new inrolment.

This brings me to consider the present application, and I am of opinion it is the regular way.

In the next place, is there any ground to enter the decree now produced ? That such a decree was pronounced, the Minute Book proves ; that the decree [372] hath been prosecuted and pursued is evident from the Master's report, and subsequent orders recognising it : but the decree and pleadings are lost, and there being no other traces of it, than the Minute Book, and what is now produced, which correspond, I think I am bound by precedent, were it not my own opinion, which it is, that it is right to grant the petition.

And therefore let the paper writing, marked with the letter A., purporting to be a copy of a decree that day made in the cause wherein Henry Risley gentleman, and Paul Risley an infant by the said Henry Risley his father, and next friend, are plaintiffs ; Thomas Risley, &c., defendants, be entered as a copy of that decree, and as such enrolled *nunc pro tunc* ; and let the said paper, and the several orders, reports, and proceedings subsequent thereto, mentioned in the petition, remain in the Chapel of the Rolls, with such inrolment.

ODWYER v. SALVADOR.

3 Dec. 1763.

The Master ordered to settle what security the plaintiff, a foreign merchant, was to give to answer costs.

The plaintiff a merchant, resident in Spain, had dealings with the defendant, and setting up a demand, proceeded against him in the Courts in this country : and likewise brought his bill, and proceeded in this Court.

The defendant the above day applied, stating a case to the above effect : that he had been put to great expence in the suits ; that the plaintiff resided abroad, had no effects here, and was in indifferent circumstances ; and therefore prayed, that all further pro-[373]-ceedings in this Court might be stayed, until the plaintiff gave security to be approved by the Master, to answer costs.

Lord Northington, C., on reading an affidavit of the facts, thought the application reasonable, and granted the motion.

LEITHLY v. TAYLOR.

(Reg. Lib. B. fol. 139.) 20 Feb. 1764.

Attachment against husband and wife, for want of the wife's answer, stayed as to the husband, and liberty given to attach the wife.

[See *Lloyd v. Barnet*, 12th February 1750, and *Searl v. Flint*, 13 December 1778.]

Ex parte MUNDAY.

28 Feb. 1764.

Order to acknowledge satisfaction, on a Statute Staple. *Vid. supr.* [Dick. 340] *ex parte* Duchess of Marlborough.

MEALS v. MEMES.

Hil. 1764. Lord Northington, C.

The plaintiff a feme covert, being entitled to a legacy under the will of her aunt, and the executor refusing to pay it to the husband, he instituted a suit in the Spiritual Court for the legacy; the plaintiff his wife, filed her bill in this Court, for an injunction [374] to stay her husband from proceeding in the Spiritual Court for the legacy, which was granted, the husband not having made any settlement on, or provision for the plaintiff his wife.

[See *Duncombe v. Greenacre*, 1860, 2 De G. F. & J. 519.]

OCTAVIUS REYNOLDS AND OTHERS, Plaintiffs: DECIMUS REYNOLDS AND OTHERS, Defendants.

(Reg. Lib. B. fol. 337.) 10 July 1764.

Where money is given in trust for all the children of their father living at his decease, though the father and mother are so aged that their having more children is improbable, the Court will not presume it to be impossible; but in such case upon consent of the father, and of the other children, that their shares should remain to answer what an after-born child might claim, the Court ordered the share of one of them to be paid.

Thomas Reynolds, by his will, dated 5th April 1743, gave £4000 to the defendants Decimus Reynolds and Edward Lacon, upon trust, after the death of his brother, the plaintiff Octavius Reynolds, for all the children of the said Octavius, living at his decease, in manner following: viz. for the maintenance and education of such of his nephews and nieces as should be living at his said brother's death, till twenty-one if males, and till twenty-one or marriage, if females: at which period, and not before, he willed the capital should be divided amongst his said nephews and nieces equally, with benefit of survivorship, should any die before. The testator died, and on the 28th of March 1744, the will was proved.

The bill was to have the trusts of the will executed, and it stated, that the plaintiff Octavius and his wife, had then seven children living, one named Elizabeth, married to the plaintiff Penfold: all of whom had attained twenty-one; that the said Penfold and his wife, wanting money, and the plaintiff Octavius the father, being willing to give up his life interest, as to her share; they applied this day, 10th July 1764, to have [375] their share of the said trust money, or so much thereof as the Court thought fit, paid or transferred to them, upon the ground that the father was sixty-two, and the wife of the same age, and very infirm; and therefore there was no probability of their having more children.

See Thomas Clarke, M. R., said, though it might be improbable, yet it was not impossible, and would have denied the motion; but the father consenting, and the other children consenting, that their respective shares should stand as a security, to answer what any after-born child, should there be one, might be entitled to, the Court granted the motion.

ATHERTON v. WORTH.

2 Aug. 1674.

Bill by such creditors as had signed a deed of composition, arising from a trust estate, conveyed for the purpose of paying debts in general; other creditors refusing to come in, to have the trusts of the deed carried into execution, dismissed.

Henry Worth being greatly indebted by mortgage, bond, and otherwise, to divers persons, by deed of lease and release, dated the 4th and 5th February 1755, conveyed his estates to trustees, to sell for payment of his debts, should the creditors come in, and accept the composition thereby made.

The plaintiffs and many others, signed the deed, and agree to accept the composition.

Others refused, and in consequence of such refusal, the trustees refused to execute their trust.

The bill is brought to establish the said deeds, to have the trust estates sold, and the money applied in discharge of the creditors coming in under the deed, subject to two mortgages, to the representatives of one [376] Crewys; to have an account taken of what is due to the plaintiffs, and the other creditors, who have acceded to the trust deed.

It was argued on the part of the plaintiffs, that the intention of the debtor, was just and commendable; that he was desirous of satisfying his creditors, as far as his estate and effects would extend; that he had with that view, and for that purpose, conveyed and assigned his estates to trustees; that they the plaintiffs had shewn their ready disposition to accede to the terms of the deed, and had executed it, and it was hard, that they should be deprived of this benefit, by the perverseness of creditors, who would not accede to the deed.

Sir Thomas Clarke, M. R., frequently called upon the plaintiff's counsel to produce an instance of such a suit, and proceeded thus:

The defendant Worth by the conveyance, meant to do justice to all his creditors in general, and not to be partial; and to carry the trust of the deed into execution, for the benefit of those who have signed it, by selling the estates, and applying the money arising from the sale, as prayed, would be acting contrary to what the deed speaks, and certainly was not intended.

If a debtor convey an estate to trustees for payment of his debts, and to divide the trust money amongst the creditors, in proportion to their debts, it is not obligatory on the creditors to come in, and accede to it; neither will it prevent a creditor, who doth not chuse to come in, from taking a legal course, or such as he shall be advised for payment of his debt. The Court hath no power to prevent him; were I to entertain the suit, and direct an execution of the trusts as [377] prayed, it would in effect be doing so; nay it would be better to do so, for after having proceeded at law and obtained judgment, there would be nothing to execute it upon, but the body of the debtor.

The meaning of the conveyance, as I before observed, was for the benefit of *all* the creditors, or none.

I have repeatedly desired a single instance to be produced: not one hath been produced, and I am persuaded cannot; I must say, that I have not in my researches met with one.

I mentioned the manner in which the case impressed me at the opening. After a week in hearing, I see no cause to alter my opinion.

Therefore let the bill be dismissed, and I bless God, this is not the *dernier resort*; there are two things against which a Judge ought to guard, precipitancy, and procrastination.

Sir Nicholas Bacon was made to say, which I hope never again to hear, that a speedy injustice is as good as justice, which is slow.

CHAFFEN v. WILLS.

13 Dec. 1754.

An application by motion, to discharge an order for a commission to examine witnesses on a Master's certificate : a question arose whether the mode was by taking exceptions to the certificate, or by motion. Lord Hardwicke, C., held the present to be the proper mode.

[378] ATTORNEY GENERAL v. TILER.

3 April 1765.

Information at the relation of a lunatic not proper ; he must be a party.

Bill by the Attorney General, at the relation of a lunatic.

At the hearing an objection was taken by Mr. Wedderburne, and Mr. Madocks, that the information at the relation of a lunatic was improper : First, because it was not the case of an idiot, who is so *ex nativitate*, but of a lunatic, who is under a temporary incapacity, and may recover his senses ; that though the suit was at the relation of the lunatic, yet he was not a party to the suit, and should the information be dismissed, who was to pay costs : that if he should recover his senses, and file a bill for the same purposes for which this suit is commenced, the defendant could not plead this suit.

For the defendants it was said, the Attorney General is not a common trustee, but he stands in the place of the Crown, who hath the common care, as *pater patriæ*, of all idiots and lunatics ; and the Attorney General, at the relation of a lunatic, against Sir Robert Backhurst, 1 Chancery Cases, 113 and 153, was cited ; and it was also said, the Court on application of the defendant, would add a plaintiff to the relator, to answer costs, or have security given to answer them.

Sir Thomas Sewel, M. R., was clear the objection was well founded, and that it was to be taken as a rule of this Court, from long practice : that a lunatic, or some person on his behalf, must be a party to a suit instituted for his benefit : and therefore or [379] dered the cause to stand over, with liberty to amend, by adding parties, and if so, advised to change the information into a bill.

[Mews' Dig. Crown, I, 3.]

ATTORNEY GENERAL v. LORD MOUNTMORRIS.

June 1765.

Lord Mountmorris by his will charged his real estate with the payment of his debts and legacies, except three legacies given for charitable purposes, which three legacies he directed to be paid out of his personal estate.

Lord Northington, C., decreed the charity legacies to stand in the place of the specialty creditors, for what they should exhaust of the personal estate.

BROMFIELD v. CHICHESTER.

20 June 1765. See Ambl. 464.

If a defendant is in contempt for want of his answer, and he then puts in an answer, and that answer is reported insufficient, it is not necessary to serve the defendant with a subpoena to make a better. The plaintiff may immediately go on with the process, where he left off.

So said by *Sir Thomas Sewel, M. R.*, and confirmed by Lord Northington, C.

[380] BRUNSDEN v. WOOLRIDGE.

25 June 1765. Ambl. 507, S. C.

The testator in this cause gave a sum of £500 to the poor relations of Elizabeth Burgess.

Sir Thomas Sewel, M. R.—The question in the cause is, who are poor relations : relations must be confined to next of kin, and poor relations must be such as want assistance, and are next of kin according to the statute.

The cases cited, were *Carr v. Bedford* (2 Ch. Rep. 146), *Griffiths v. Jones* (*Ibid.* 394), *Isaac v. De Friez* (23 Feb. 1754).

TAYLOR v. LEITCH.

1 Aug. 1765. Sir Thomas Sewel, M. R.

Jane Evans widow, the plaintiff's late mother, bequeathed to the defendant in trust for the plaintiff, all her goods, chattels, &c.

They proved the will and possessed her personal estate ; upon an affidavit of the above facts, and that upon an account made out between the plaintiff and the defendants, they acknowledged to have in their hands £640, and that they threatened to go abroad : a writ of *ne exeat regno* was granted, to be marked in £640.

[381] WEST v. WELSH.

29 Nov. 1765. Lord Northington, C.

Legacy payable before twenty-one, ordered to be paid out of the monies in the cause, in the name of the Accountant General, before the legatee attained that age.

[*Weston v. Earl of Aylesford*, Lord Northington, C., Hil. 1766 ; the like order.]

HAMOND v. WORDSWORTH.

13 March 1766.

A commission issued for the examination of witnesses in Sweden ; the solicitor for one of the parties attended the execution of the commission ; in taxing the costs, the party claimed the costs of his solicitor in attending the execution of the commission. Lord Northington, C., was decidedly of opinion, he was not entitled to such costs.

PRICE v. HUMPHREY.

17 March 1766. Lord Camden, C.

Demurrer to a bill after a decree, under which nothing remained to be carried into execution, but to save costs only. The demurrer was over-ruled.

[382] TROUGHTON v. GETLEY.

12 May 1766.

The defendant had liberty to examine plaintiff as a witness.—*Qu.*

The defendant gave notice, and moved for liberty to examine one of the plaintiffs on the cause, as a witness : it was objected to, as being contrary to rule (and so I have heard Lord Hardwicke often express himself.—J. D.) : for that if a plaintiff was an immaterial party, the defendant might demur : and if the defendant wanted a discovery, he might file his bill for that purpose, and in that case, the defendant would have an opportunity to tell his case and the circumstances, whereas in his examination before commissioners or the examiner, they must not permit a witness to say more, than barely to answer the interrogatories. It had been before moved before Sir Thomas Sewel, Master of the Rolls (who had a perfect knowledge of the practice of the Court.—J. D.), and he greatly doubted, and would not grant it ; but Lord Northington, C., laid it down as a rule in law and equity, that a defendant may examine a plaintiff as a witness ; and therefore as the plaintiff was sworn to be a material witness, it was right to order it ; and he accordingly gave the defendant liberty to examine the plaintiff as a witness.

[It was doubted by almost the whole Bar, and was exploded by Lord Thurlow, C., in *Hewtson v. Tooky*, July 6, 1785, *infra*] [Dick. 799].

[See *Davis v. Quarteman*, 1840, 4 Y. & C. 260.]

WRIDE v. CLARKE.

12 June 1766. Sir Thomas Sewel, M. R.

A testator wills his debts to be paid, and charges his estates with the payment of them, and subject thereto, devises his estate in fee simple to his widow ; it was held to be equitable assets.

Doctor John Clarke, was indebted to the plaintiff and others, by bond and simple contract, and being seised of a real estate, and possessed of some personal estate : he

willed all debts should be paid, and charged all his estates with the payment thereof, and [383] subject thereto, devised all his estates to defendant Rosamond his wife, in fee, and appointed her executrix : she proved the will ; possessed his personal estate, and entered on his real estates.

The bill was brought for satisfaction of the debts, out of the testator's estate.

The defendant the widow, by her answer, admitted her late husband died seised of several estates, subject to mortgages, out of which she was dowable ; that he was also seised of copyhold estates, to which upon his death she became entitled according to the custom of the manor ; and that he was also seised of freehold estates purchased after his will, which descended to the defendant Ann Iveson, his heir at law : admits her husband's will, and the charge of his debts on his real estate, and that the personal estate, and the real estates devised were not sufficient to pay his debts.

By the decree, an account of the testator's debts, and an account of his personal estate, and application of it in payment of debts, &c., were directed ; if that were deficient, the real estate descended, was to be sold, and applied in payment of specialty debts ; and if there were still a deficiency, an account of the rents and profits of that estate was directed, and the simple contract creditors, to stand in the place of the specialty creditors, and to receive a satisfaction *pro tanto*, out of the descended estate ; and if both the above funds were insufficient, the estates of which the testator was seised at the time of his will, were to be sold, subject to the widow's dower, and the money arising from the sale, after payment of the mortgages, to be applied as equitable assets, *pari passu*, among the creditors remaining unsatisfied ; and if any of the credi- [384] tors should be paid anything out of the personal estate, they were not to receive any more till the other creditors were paid up equal with them.

[See next case.]

SILK v. PRIME.

17 June 1766. 1 Bro. C. C. 138 in not. S. C.

The testator charged all his real estates, except a particular estate, with the payment of his debts, which he willed should be paid, and directed his executors *nominatim*, and the survivor and his heirs, to sell for that purpose, without devising the estate to them : these estates held to be equitable assets, and if deficient, a real estate specifically devised, and part of the personal estate, specifically bequeathed, to contribute in proportion to raise the deficiency, and the Master to settle such proportions.

Christopher Thompson was seised in fee of estates in Yorkshire, and possessed of personal estate, and by his will, gave his wife an annuity of £60 during his mother's life, in case he died in the life time of his mother, and charged all his estates therewith, and gave all his estates at Oatmaster to his mother in fee, and gave part of his personal estate specifically, and directed all his debts to be paid, and if the personal estate was not sufficient, he charged all his real estate (save the said lands at Oatmaster), with the payment of his debts, and did direct the defendants Prime and Moxon, and the survivor and his heirs, to sell all his estates, except as aforesaid, or such part as with his personal estate should be sufficient to pay his debts, and gave the surplus of the purchase money, and of his personal estate, if any, to his wife and daughters equally ; and devised all his estates, which should not be sold, to his wife and daughters in fee, and appointed the said defendants Prime and Moxon executors.

The testator was at his death indebted to the plaintiffs and others : the executors proved the will, and possessed the personal estate, and with the widow and daughters, entered on, and received the rents and profits of the real estates.

[385] The plaintiffs filed their bill to be satisfied out of the estates of the testator.

The executors insisted, that the estates directed, not being devised, to be sold, were legal assets, and that having been sureties for the testator, they had a right to retain any debt they were liable to pay as such sureties, and to give a preference to creditors.

The plaintiffs insisted these estates were equitable assets.

Upon hearing this cause the above day, Sir Thomas Sewel, M. R., declared, the testator's real estates charged by his will with the payment of his debts, were equitable assets, and decreed an account of the testator's debts, and of his personal estate, and an application of it, in a course of administration : if deficient, the deficiency to be made good out of the real estates charged by the will with payment of debts, and the estates to be sold, and the purchase money applied in making good the deficiency, if such real estates were not sufficient, the rents and profits of the same, to be accounted for in like manner : if all the above funds were deficient, his Honour directed the deficiency to be made good out of the personal estate, specifically bequeathed, and the real estate devised to the testator's mother in fee, and each to contribute in proportion, and the Master to settle the proportion : and so much of the estate devised to the mother as was necessary to be sold, and the money applied ; and if any of the creditors had received any thing out of the personal estate, they were not to receive any more till the other creditors were paid up equal with them.

[386] On the 8th March 1768, this cause was heard on an appeal before Lord Camden, G., preferred by the defendants the executors, insisting the real estates, charged as aforesaid, were legal, and not equitable assets.

Lord Chancellor.—The testator by his will, in case his personal estate should fall short to pay his debts, directs his executors, and the survivor of them, and his heirs, to sell his real estate, or such part thereof, as with his personal estate should be sufficient to pay his just debts ; and the question is, whether the real estate ought to be deemed legal, or equitable assets ?

His Honour the Master of the Rolls, hath decreed them equitable assets. I am of the same opinion, and shall affirm the decree.

Where trustees for payment of debts are made executors, in most of the cases, assets are ruled legal.

The first case in which an estate devised to trustees for payment of debts generally, was deemed equitable assets, and the debts to be paid *patri passu*, was *Wolley v. Long*, 1 Chancery Cases, and 2 Chancery Cases, 54, for as the money did not reach the hands of the executors, the creditors could not bring their action, and therefore the statute was made against fraudulent devises.

In the case of *Sir Charles Cox's* creditors, 3 P. Wms. 344, a trustee was named executor, and the land was charged with debts, and the Court held the assets equitable ; but where a trust was reposed with the executor, difficulties arose, as assets in his hands as executor, are legal, and such assets as are in his hands as trustee, are equitable (Co. Litt. 112 b, 113 a ; Roll. Abr. Tit. Power and Interest).

[387] Where lands were devised to be sold by executors, in that case, the lands descended, and the rents and profits were the property of the heir, till the sale. But where they were devised to the executors to be sold, the profits were taken for the benefit of the executor. Therefore the Courts of Equity gave the heir an entry for breach of the condition : and in all these cases the assets were legal (*Girling v. Lee*, 1 Vern. 63, 2 Vern. 133, 249, Preced. in Chan. 127, 136, Bunb. 339 ; *Lewin v. Okely*, 2 Atk. 50).

A devise to a trustee for payment of debts, and the same persons appointed executors, the assets were deemed equitable, and thereby the old rule overthrown ; and where the executor hath a naked power to sell *qua* executor only, the assets are deemed legal.

And the Court should always favour the trustee, rather than the executor, for the sake of equality. Here the power is lodged in the executors, and the survivor of them, and his heirs ; and this converts the executors into trustees, and makes the assets equitable, which are favoured by the Court.

Therefore let the decree be affirmed.*

[*Mews' Dig. Executor and Administrator*, X, a, 1. See *in re Bate*, 1890, 43 Ch. D. 600.]

* *Bulkley v. Williams*, before Lord Thurlow, C.—Upon the same words as in the two preceding cases, his Lordship, after repeated arguments, and great consideration, was of opinion, that the word heirs, added to executors, plainly meant a trust, and therefore held the assets equitable.

TONNINS v. PROUT.

18 June 1766. Lord Camden, C.

The defendant, before he had prayed time to answer, or was in contempt, was restrained from selling diamonds, to which the plaintiff by his bill, claimed a title.

[388] PRENTICE v. PRENTICE.

17 Dec. 1761. Lord Northington, C.

Similar allowance in *Hyde v. Greenhill*, by Lord Hardwicke, C.

Exceptions taken by sequestrators; for that the Master had not allowed them 6s. 8d. a-day. They were allowed one shilling a-day each.

REBECCA LOWE, AND MICHAEL, FRANCIS, AND BENJAMIN BIDDULPH, Plaintiffs;
WILLIAM JOLLIFFE AND THOMAS SAMUEL JOLLIFFE, Defendants.

5 & 6 Dec. 1776. See 1 Bl. Rep. 365.

An issue *decisavit vel non*, directed to be tried at bar. A verdict by a special jury in favour of the will. Upon hearing the cause on the equity reserved, the will was decreed to be established, and the trusts to be executed, and which were executed accordingly. Afterwards the testator's heir at law died, having by his will devised the residue of his real estate to one of the defendants his second son, he having brought an ejectment; a perpetual injunction was decreed.

Thomas Jolliffe, Esquire, being seised in fee simple of estates in the counties of Worcester and Stafford, and elsewhere, by his will duly executed and attested, devised his estates in the county of Worcester to his niece, the plaintiff Rebecca Lowe for life, with remainder to her first and other sons in tail male; with like remainders to the other plaintiffs; with remainder to the sons of his eldest brother and heir John Jolliffe; and devised his estate in the county of Stafford, to Thomas Mills, and Rupert Dovey, and their heirs in trust, to sell in aid of his personal estate, and to pay the residue of the money to arise by the sale, to the plaintiffs Michael, Francis, and Benjamin Biddulph; and gave and devised the residue of his estates, not therein before disposed of, to the said plaintiffs.

By a codicil duly executed and attested, he charged the Staffordshire estate with other legacies.

On the 1st of April 1753, the testator died, leaving John Jolliffe his brother and heir at law.

The plaintiffs filed their bill in this Court to establish the will, and to have the trusts executed.

[389] On the 6th February 1762, the cause was heard before Lord Northington, C., and an issue *decisavit vel non*, was ordered to be tried at the bar of the Court of King's Bench, by a special jury of the county of Worcester.

The trial was had accordingly; and there was a verdict in favour of the will, notwithstanding the subscribing witnesses, swore to the testator's insanity, whom the Court recommended the plaintiff to indict for perjury, which the plaintiff did in Trinity Term 1762. The then defendant John Jolliffe applied for leave to bring an ejectment to recover the Staffordshire estate, or to have an issue *decisavit vel non*, to be tried by a special jury of that county.

The witnesses to the will having been convicted of perjury, the cause came on to be heard, on the 25th of April 1763, before Lord Northington, C., on the equity reserved; and his Lordship decreed the will to be established, and the trusts to be executed, and directed the necessary accounts, and that the Staffordshire estate, or so much thereof as should be necessary, should be sold in aid of his personal estate, and the surplus of the purchase money to be paid to the plaintiffs, Michael, Francis, and Benjamin Biddulph.

The accounts were taken, part of the estate was sold, and the Master made his report of the debts and legacies, which were satisfied.

In pursuance of an order, dated the 20th of April 1765, the devisees in trust, con-

veyed such part of the Staffordshire estate, as had not been sold, to the said plaintiffs Michael, Francis, and Benjamin Biddulph, and [390] their heirs, as tenants in common; and the plaintiff Rebecca Lowe in consequence of the decree, continued in quiet possession of the Worcestershire estate.

On the 10th January 1771, John Jolliffe the testator's heir at law died, having made a will, whereby he devised the residue of his real and personal estate, to his said son the defendant, Thomas Samuel Jolliffe.

The defendants notwithstanding the decree, and the acts in consequence of it, having brought an ejectment against two of the tenants of the Worcestershire estate, the plaintiffs filed their bill in this Court for an injunction to stay the defendants from proceeding at law for recovery of any part of the estates devised by the will of the testator Thomas Jolliffe: the defendants having answered, and the cause being set down for hearing, the defendants presented a petition, praying leave to file a bill of review, which was ordered to come on at the same time with the cause.

Upon hearing the petition, the 5th of December 1776, the same was dismissed.

After which the cause was brought on; Mr. Attorney General, and Mr. Kenyon for the plaintiffs; Mr. Solicitor General, Mr. Ambler, and Mr. Hollist, for the defendants. And Lord Bathurst, C., decreed the injunction granted in this cause, for stay of the defendants proceedings at law, for and touching any of the matters therein, in question to be perpetual, but did not give costs on either side.

[391] COCKEL *v.* PHIPPS.

8 Dec. 1766.

Legacy on condition of marrying with consent, the condition held to be a condition subsequent, and the legacy, payable to the husband; but the wife being dead, the Master to see if the husband had made any provision for her.

The object of the bill, was to be paid the sum of £500 with interest from the end of two years, after the death of Thomas Phipps, the testator.

The testator by his will, dated the 27th of February 1746, gave to his daughter, the plaintiff's late wife £1500 payable within two years after his death, provided she married with the consent of his executor in writing; if without consent, then he gave her only £1000 and the other £500 to the executor.

The testator died, in February 1747.

The plaintiff intermarried with the testator's daughter; and says, though it was not with the express consent, yet it was with the implied consent of the executor, and entered into evidence, which was read, to prove the wedding was public, and the company who attended it.

But yet supposing it was not with the consent required by the will, he contends the condition is subsequent, and that there is no bequest over.

The defendant insists on the forfeiture of £500.

The cases cited were *Garret v. Pritty*, 2 Vern. 293; *Mesgrett v. Mesgrett*, 2 Vern. 580; *Farmer v. Compton*, 1 Chancery Rep. p. 1.

Sir Thomas Sewel, M. R., held it to be a condition subsequent, and directed the £500 and interest, but before payment, referred it to the Master to see if the plaintiff had made any provision for the issue of his marriage with his late wife; she being dead.

[392] WIDMORE *v.* WOODROFFE.

(Reg. Lib. B. fol. 54.) 12 Dec. 1766. Ambl. 636, S. C.; 1 Bro. C. C. 13 in not. and 33 in not. Lord Camden, C.

A legacy of £200 to the governors of Queen Ann's bounty, declared to be void, being within the Statute of Mortmain; the governors being, by their rules, bound to lay out the same in the purchase of real estates.

[*Mews' Dig. Charity*, V, 1; 6, a. See *Luckraft v. Pridham*, 1877, 6 Ch. D. 211.]

CHANDLER *v.* BEARD.

18 Dec. 1766. See *infra* [Dick.] 394 and 395.

By the decree the estates to be sold, and all proper parties, one of whom was an infant, and thought to be a trustee within the statute of the 7th of Queen Ann. to enable C. 1.—11

infants to convey ; but although Lord Camden, C., was of opinion the infant was not a trustee within that act, his Lordship nevertheless ordered the purchaser to hold and enjoy until the infant attained the age of twenty one, and then to apply that he might convey.

KEYS v. LUFFKIN.

26 Feb. 1767.

I give to my two sisters A and B the residue of my personal estate, held to be a joint tenancy.

This bill was brought for an account of the personal estate of John Waland the father, Joseph Waland the son, and John Waland the son.

And the only question in the cause arose under the will of Joseph Waland, whether the defendant Mary Luffkin was entitled to the whole of the residue of his [393] personal estate, she insisting the bequest to her and her sister Sarah, the late wife of the plaintiff, was a joint tenancy. The words of the will were, " I give to my sisters Mary and Sarah the residue of my personal estate."

They survived their brother.

Ser Thomas Smith, M. B., after directing the necessary accounts and payment of debts, &c., declared the residue of the personal estate of the said Joseph Waland belonged to his two sisters, Sarah, the late wife of the plaintiff, and Mary, the wife of the defendant Luffkin ; and that on the death of Sarah, the wife of the plaintiff, the same survived to the defendant Mary Luffkin.

DOUGLAS v. CLAY.

(Reg. Lib. A. fol. 126.) 21 Feb. 1767.

After a decree for a satisfaction of creditors, the Court will enjoin a single creditor from proceeding at law for his debt.

Joseph Hankin died in 1764, having made his will, and the plaintiff his executor, who proved the will, and possessed his testator's estate : the testator being indebted to the defendants and others, they filed an amicable bill on behalf of themselves and the rest of the creditors of the testator, against the plaintiff in this cause, his executor, for an account and satisfaction out of his assets.

That cause was heard on the third of July 1766, and an account of what was due to the plaintiffs and the other creditors of the testator was directed, with the usual advertisement, and likewise an account of the testator's estate, and an application of it.

[394] The Master proceeded under the decree, and advertised for the creditors to come before him. Some of them did, but the plaintiffs in that cause, and the defendants in this, omitted so to do : and in order to gain a preference to the other creditors, brought an action at law against the plaintiff as executor, for payment of their debts ; and threatening to proceed to judgment, the plaintiff in this case filed his bill for an injunction to stay them.

The defendants put in their answer, and thereby insisted, that their names in the bill suggested to have been filed by them, was without their consent ; and admitted that they therefore were proceeding at law to recover their debts, and to obtain judgment, and hoped they should not be prevented.

The plaintiff this day, 21st February 1767, moved for an injunction to stay the defendants from proceeding at law against him, for and touching any of the matters in question ; which, after hearing Counsel on both sides, Lord Camden, C., ordered accordingly until further order.

(The defendants having filed such bill as before stated, for an account of the testator's effects, and payment of their debts, and having a decree for that purpose, might they not be said to have made their election to proceed in this Court, as was held by Lord Hardwicke, C., in *Farnham v. Burroughs*, 13 March 1753 ?—J.¹D.)

Ex parte BENTON.

3 March 1767.

The Master, upon reference, having certified it to be his opinion, that an infant was not a trustee within the act of the 7th of Queen Ann. entitled, " An act to enable

infants trustees or mortgagees to [395] convey : " upon the report being brought before the Court, Lord Camden, C., was of opinion, that the infant was within that act, and directed him to convey pursuant to it.

BUCKLY v. BUCKERIDGE.

14 March 1767.

Motion on behalf of the plaintiff, an infant, to restrain the defendant, the executor, from receiving any more of the personal estate of the testator, and the rents and profits of the real estate, and for a receiver.

Lord Camden, C., would not make any order on the motion, but directed the *prochein amy* to pay the costs of the application.

Ex parte BURTON.31 March 1767. See *supra* [Dick.] 394, and 392.

The Master being of opinion that an infant was not a mortgagee, or trustee, within the statute of Queen Ann, the question was, in what manner the parties were to proceed ; whether by exceptions, or by applying to refer it back to the Master to review his report.

Sir Thomas Sevel, M. R., said, exceptions did not lie to such reports, the reference to the Master being to state his opinion : that the proper mode was, to bring it on by a petition stating the report, that the Court might judge of it. It was done accordingly : and the Court being of opinion he was an infant within the act, directed him to convey.

[396] GOUGH v. BOTVEL.

28 July 1767.

If an heir at law bring a bill to dispute a will, and the will is established, he shall pay costs at law and in equity ; otherwise if he be a defendant.

This cause came on the above day, on the equity reserved after a trial at law, on an issue *devisavit vel non* ; and a verdict in favour of the will.

The heir at law was plaintiff in the cause. The only question was respecting costs. Mr. Yorke was Counsel for the plaintiff, Mr. Attorney General De Grey, Counsel for the defendant. It was argued for the plaintiff, that costs were discretionary ; that heirs at law were favoured : and though the Court would not give an heir at law his costs, it would not direct him to pay costs.

Lord Camden, C.—Costs, it is true, are discretionary, and the giving or not giving of costs will depend upon the conduct of the parties. There is a difference where an heir at law files a bill to set aside a will ; and where a devisee files a bill against an heir at law in order to establish a will ; he is brought into Court, and being brought here, he may make the best defence he can.

That distinction was taken by Lord Talbot, C., in *Luxton v. Stevens*, Trin. 1735, 3 P. Wms. 373 ; and by Lord Hardwicke, C., in *Blinkhorne v. Feast*, 28th October 1751, 1 Wils. 285 ; 2 Ves. 27 ; by Lord Keeper Henley in *Johnson v. Gardner*, 29th April 1758 (*supra* [Dick. 313]) ; and by Sir Thomas Clarke, M. R., in *Beaumont v. Whiton*, October 1758 : therefore let the bill be dismissed with costs both at law and in this Court.

[397] STRODE v. WINCHESTER.

15 July 1767. Lord Camden, C.

Parol evidence of the declarations of a devisee admitted, to prove her being only a trustee.

The testator had devised absolutely to Mrs. Gough his sister, who made her will, and gave her property to the defendant Winchester, and made him her executor.

Upon hearing this cause on a bill by Strode, who had married Mrs. Gough's

daughter, for an account, parcel evidence was admitted to prove her declarations, that part of what she possessed was devised to her by Ferdinando Paris, though no trust was expressed in his will, for the plaintiff Mrs. Strode, her daughter.

DARLEY v. DARLEY.

21 Nov. 1767. Ambl. 653, S. C.

A recovery after a will, though professedly with a view to confirm it, held by the Judges, upon a case sent to them, a revocation of the will; and personal property, directed by the will to go with the real estate devised, held to be revoked also (see *Stuart v. Tichborne*, cited 1 Ves. jun. 602).

Vincent Darley, on his marriage with defendant Elizabeth Darley, settled upon the defendant Elizabeth Darley an annuity of £50 for her life, issuing out of certain lands therein mentioned, part of which estate was called Langstone.

He afterwards made his will, and thereby devised his real estates therein mentioned, called Battens, to the defendant Elizabeth Darley, in manner therein mentioned; and directed his leasehold estate called Bonds Wall, which was always used and went with Battens, to be conveyed to such persons for whose benefit he had devised his estate called Battens. And he devised to his widow the rents and profits of his chattel estate, in case she chose to reside at Battens; and the use of all his household goods, plate, and furniture at Battens, and stock, quick and dead; and [398] by his will devised to his wife the estate called Langstone, part of the estate out of which the annuity was to issue.

The testator, after making his will, by way of strengthening and bettering his title, suffered a recovery of Battens.

The plaintiff was the heir at law of the testator, and the bill was brought to be let into possession of the real estate of the testator, and for an account; insisting that the recovery was a revocation of the will.

Upon the cause coming on first to be heard, a case was directed for the opinion of the Judges; whether the recovery was a revocation of the will; and further directions were reserved.

The Judges certified it was a revocation; and upon their certificate it came on this day for further directions.

Several questions were made, but the question originally in the cause was settled by the Judges' certificate.

The second question arose on Bonds Wall, a leasehold estate, which, being purchased by the testator for its contiguity and convenience to Battens, and being always held and enjoyed with it, was directed by the will to be conveyed for the benefit of those who held Battens.

The plaintiff insisted, that as he was now entitled to and held Battens, he was also entitled to Bonds Wall.

On the other hand it was insisted it was a leasehold estate, and not affected by the recovery; and that, inasmuch as the plaintiff the heir had disputed and [399] prevented the will from having the intended effect, he was not entitled to any benefit under it.

Another question arose as to the effect of the devise of the live and dead stock at Battens, and the use of the testator's household goods, plate, and furniture at Battens to the defendant Elizabeth, in case she chose to live there, as, by the recovery and certificate of the Judges, there was an end of that choice.

Lord Camden, C., declared, the testator having suffered a recovery after the execution of the will, the said will, as to the devises of the real estate comprised in that recovery, was revoked, and that the same descended to the plaintiff, the testator's heir at law.

His Lordship also declared that the testator, having in manner before mentioned revoked *in toto*, the disposition of his freehold estate called Battens, the direction given by the testator to convey his leasehold estate, called Bonds Wall, for the benefit of those persons to whom he had devised this said estate called Battens, is consequently revoked also, and falls into the devise of the residue of his personal estate.

And his Lordship also declared, that the devises by the will to the widow of the rents and profits of all his chattel estate, in case she chose to reside at Battens, and the use of all his household goods, plate, and furniture at Battens, stock, quick and dead,

were become revoked by the revocation of the devise of the estate at Battens, and that the same consequently fell into the residue of his personal estate.*

[Mews' Dig. Fines and Recoveries, 3 m. See *Bridges v. Strachan*, 1878, 8 Ch. D. 558; *In re Towry's Settled Estate*, 1889, 41 Ch. D. 64.]

[400] *RIGGS v. SYKES.*

28 July 1768.

Where a trust to be executed vests in an infant, he doth not come within the statute of 7 Ann, to enable infants to convey, but he must be decreed to convey on a suit for that purpose.

John Nicholas conveyed an estate to trustees in trust to sell, and out of the purchase money, to pay incumbrances and other debts, and the surplus for his own benefit.

The grant contained a power of revocation save as to particulars; he afterwards made his will, and appointed his daughter residuary devisee and legatee; she married the plaintiff Riggs, and previously to the marriage, the estate in the grant, after discharge of the incumbrances, was settled to the use of the husband and wife, and the issue of the marriage; and if no issue, then for the benefit of the husband and wife, and the survivor: there being no issue, nor probability of issue, and the estate having been disencumbered; the plaintiff Riggs and his wife, contracted to sell the estate; and the representative of the surviving trustee, being an infant, they in March 1760, obtained the usual order, to refer it to the Master, to see if the infant, was an infant trustee or mortgagee within the Statute of the 7th of Queen Ann, entitled "An act to enable infants, &c., to convey." The Master reported he was an infant trustee; but on the report coming before the Court for confirmation, Lord Camden, C., was clear he did not come within the Statute, and said, a suit must be instituted, for the purpose of having the trusts decreed, which was done, and on hearing the cause, the 30th June 1760, his Lordship decreed the contract to be performed, and the infant to join in the sale, when he attained the age of twenty-one; and the purchaser to hold and enjoy in the mean time.

[401] *KEELING v. CARTWRIGHT.*

27 Feb. 1768.

Commissioner's certificate to be confirmed as a report.

The question was, whether a commissioner's certificate was conclusive, or was to be confirmed as a report: it was strongly argued by Mr. Yorke, and Mr. Cox for the plaintiffs; and Mr. Wedderburne and Mr. Madocks for the defendants.

Lord Camden, C., was of opinion, that it should be confirmed; and therefore ordered it to be confirmed, unless cause shewn the first seal before next term.

DINELY v. FOOT.

Lord Camden, C. 22 April 1768.

Master to enquire if a party had attained the age of twenty-one.

The age of the petitioner being disputed, it was referred to the Master to enquire whether the petitioner was of age, or not: and notice was to be given to Sir John Dinely, and others, of attending the Master, and they were to be at liberty to contest that matter before the Master.

MASON v. POLIER.

16 May 1768.

The defendant had left the kingdom two years preceding the filing of the bill. Upon an affidavit that the defendant continued abroad, as plaintiff believed, to elude justice; the defendant ordered to appear under the 5 Geo. 2.

The plaintiff and the defendant, had dealings together, and there were accounts between them. Above two years before the plaintiff filed his bill, the defendant left the kingdom, and went to, and settled in Spain, where he then resided.

* This decree was reversed as to the last points, on appeal to the House of Lords in 1774 (see *Ambl.* 654 [3 Bro. P. C. 359]).

The plaintiff having filed his bill against the defendant, on the above day, moved upon an affidavit [402] stating the above facts, and that he believed the defendant continued to reside abroad to elude justice; that his Lordship would, under the act of 5th of Geo. 2, c. 25, "to render process effectual against persons who abscond to avoid being served," be pleased to order the defendant to appear by a given day.

Lord Camden, C.—The legislature in passing the act, (as appears from the preamble), meant to relieve a plaintiff, from the hardship he had laboured under; who having a just demand against a defendant that had property in the kingdom, was still that time without remedy, if the defendant could not be found to be served, or absconded to avoid being served: in order to give a plaintiff that relief, the said act "enacts that if an affidavit should be made, to the satisfaction of the Court, that there is just reason to believe, that the defendant is gone out of the realm, or otherwise absconded, to avoid being served with process, (in other words, and which are synonymous, to elude justice), the Court may make an order, directing the defendant to appear by a certain day, &c."

I must own I have some doubts on this act of parliament; it is very penal against the parties: the grounds are, that the defendant is either gone abroad, or absconds to avoid being served; the defendant certainly does not abscond, because he is visible; it cannot be said he went abroad to avoid being served, for the plaintiff states, the defendant went abroad above two years before the plaintiff thought of filing the bill; and by the act of parliament, the defendant is to have been in the kingdom within two years [403] preceding the filing of the bill; but the plaintiff swears, he believes the defendant continues abroad to elude justice: the affidavit to be made under the act, is to be to the satisfaction of the Court; if it be, the Court may make the order. Upon consideration of the whole, I think I may order the defendant to appear; and therefore let him appear to the plaintiff's bill, on or before the first day of next.

[But query if warranted by the Act? There was a similar order by Sir Lloyd Kenyon, M. R., 29th June 1786, moved by Mr. Scott, and founded on the above precedent; but these cases have been since exploded.—J. D.]

AUBREY v. POPKIN.

(Reg. Lib. A. fol. 68.) 22d Jan. 1768.

Solicitor's bills of costs referred to be taxed, after a bond and mortgage executed for payment of the balance alleged to be due on the bills.

The plaintiff's late brother in 1757, employed Thomas Edwards of Cardiff, as his solicitor. In 1763, he delivered a bill to the plaintiff which amounted to £1963, and gave credit for monies paid him, whereby the said bill was reduced to £1408 for which Edwards required a bond: but the plaintiff declining to give his bond, Edwards sent the plaintiff word, unless he would execute a bond for the said balance, payable with interest at 4 per cent. he would decline proceeding any further in his business: the plaintiff, therefore, under that apprehension, was induced to give his bond.

Within twelve months afterwards Edwards insisted on a mortgage of his estate, and being in possession of the plaintiff's papers, and the plaintiff fearing to be abandoned, executed a mortgage in 1764.

[404] The plaintiff at the time of executing the mortgage never consulted his friends as to the justice of the bills; and being advised they were unconscionable; that several charges ought not to have been made at all, and others were unreasonable; the plaintiff preferred a petition to Lord Camden, C., praying that the said bill might be referred to a Master to be taxed.

The matter of the petition came on this day to be heard.

It was insisted on the part of Edwards, that the bill having been delivered, and the plaintiff having executed a bond, and mortgage, for the amount of it, it was to be considered as an account settled, and allowed by him; that it was not now to be opened, and consequently was not taxable.

On the part of the plaintiff it was said, that although it were true the plaintiff had given a bond, and executed a mortgage for the supposed amount of the bill; yet that he was imposed upon, and was induced to do so, from an apprehension of being deserted by Edwards, who had been concerned for, and knew the affairs of the family; that it

was no unusual thing to pay a solicitor's bill, in order to get the papers out of his hands, and then to tax the bill; that this was not more; that the paying of a bill was not a bar to taxation; that the bond and mortgage, were not to be considered as a security for what they appeared to have given, but only for what might eventually appear to be due on them.

His Lordship adopted the plaintiff's reasoning; and said further, that it was a gross imposition.

And therefore referred the bills to be taxed; the plaintiff submitting according to the act, to pay what [405] should be found due; and his Lordship restrained Edwards from proceeding against the plaintiff or his estate, upon the bond or mortgage, or otherwise, in respect of the said bill of costs, until after the taxation; and reserved the question concerning interest on the bond, and further directions.

WILLIAMS v. DUKE OF BOLTON; DUKE OF BOLTON v. BREWER.

6, 7, 8, 9, & 12 Dec. 1768.

As to a provision by one instrument being in satisfaction of a provision by another.

The bill in the first cause was to establish the will and codicil of the late Charles Duke of Bolton: to establish the deeds of the 10th of June 1765; to have the specific funds transferred to the plaintiff, as specific legacies; to have an inventory of the pictures, plate, &c., in the testator's houses at Hackwood, and in Grosvenor Square; for an account of timber felled, since the death of the testator; and for an account of the ore, lying on a part of the testator's estate, at the time of his death, and to have the same considered as personal estate.

The testator by his will, gives several specific and pecuniary legacies to the plaintiff Brown; and the wife of the plaintiff Williams; and limits his estate in remainder to the plaintiff Joan Mary Paulet.

By a deed dated 10th June 1765, he disposes of his leasehold estate in Grosvenor Square, and his plate, furniture, and pictures, &c., therein devised, to trustees for ninety-nine years; first for Mrs. Brown in case she so long live, and then he gives them over.

[406] By a second deed, dated the same 10th day of June, the testator demises his estate in Yorkshire to trustees, for two thousand years, to pay to the plaintiff Mrs. Brown £800 a year during her life, and the sum of £5000, and £600 a year to Miss Paulet till she attains twenty-one, and then £12,000.

By a third deed, dated the same day, he grants £300 a year to Mrs. Thornhill.

The cross bill was to have an issue, to try the will as to the real estate but so as not to impeach the bequests as to the personal estate; and to set aside the said deeds for fraud, imposition, and undue influence.

One question in the causes was, whether the provisions by the deeds, were in addition to the provisions in the will; or were to be considered, in part satisfaction of them.

The cases cited were, *Emmery v. Gould*, 2 Chancery Reports, *Lanoy v. Lanoy*, Select Cases in the time of Lord King, p. 48 (2 Eq. Ca. Abr. 773, S. C.); *Hale v. Acton*, 2 Chan. Reports, 85; *Jesson v. Jesson*, 2 Vern. 255; *Thomas v. Keymis*, 2 Vern. 348; *Bruen v. Bruen*, 2 Vern. 439; *Copley v. Copley*, 1 P. Wms. 147; *Hartop v. Whitmore*, 1 P. Wms. 681; *Mayor of London v. Russel*, Finch's Reports, 290 & 681; *Lord Pawlet v. Lady Pawlet*, 2 Chan. Reports, 286; *Jobson v. Scudamore*, Reports in time of Lord King, 63; *Brudenell v. Lord Boughton*, 2 Atk. 268.

Lord Camden, C.—There are several questions in these causes; the first relates to fraud, imposition, and undue influence, as to which there is no proof; therefore let the cross bill, so far as it seeks to set aside the three deeds on the ground of fraud and imposition, stand dismissed.

[407] The second question, arises on the will, and deeds; whether the plaintiffs in the first cause, are entitled to the provisions under the will, and deeds; and if only under one, under which; and as to that point, I am clear the plaintiffs are entitled only under one; and that is under the deeds, and not under the will.

As to double portions, the law is clear and settled, that the latter provision, is a satisfaction of the former.

Where a sum is given to a child being a debt by nature from a parent to a child, it is then a portion, the father being a debtor; but where it is given by a collateral relation, it is not so.

Standall v. Jekyll (2 Atk. 516) is a case in point: the cases stated related to portions.

Did it ever come in question on a wife's double portion?

Whether there is any case or not, I should certainly carry it to the one, as well as to the other.

Where a provision is made for a wife by one deed, and a portion or provision is made by another, and it is not expressed to be in addition to the first, it certainly will carry a presumption, that the latter was intended in satisfaction to the wife of the former.

And I am of opinion, that the provision for the plaintiffs by the deeds, was intended in lieu of the provisions made by the will; and that the plaintiffs must be bound by the disposition under the deeds, and that the provision thereby made for them, is to be deemed a satisfaction for what is given to them by the will; but as to the limitations over of the real estates by the will, I am clear they are not excluded by the deeds.

[408] GIBSON v. EGERTON; BUMSTED v. STILES.

22 April 1769.

Bond creditors not to have interest beyond the penalties of their bonds. *Vid. supra.*

These causes came before Lord Camden, C., on two sets of exceptions, to the report of Peter Holford, Esquire, one of the Masters of the Court: the first by William Bumsted plaintiff in the second cause; the other set by Nathaniel Ireson a creditor, who had come before the Master under the decree.

The plaintiff Bumsted's were first, for that the Master had allowed him only the sum of £1230, 19s. as his proportion of the principal and interest, on a bond mentioned in the fourth schedule, to bear date the 9th of April 1724; and on which judgment had been entered up in Easter Term 1740, the said Master having allowed only the penalty of the said bond, whereas the Master ought to have allowed the sum of £1900, 1s. 11d., being the said Bumsted's proportion of the principal and interest, computed to the 20th of November then next: Secondly, for that the Master had allowed the penalties of three bonds entered into by the testator, to Thomas Bumsted deceased, in the several penalties of £400, £400 and £480 condition, for the payment of £200, £200 and £240; whereas the Master ought to have allowed the said several principal sums of £200, £200 and £240 with interest for the same, after the rate of 4 per cent. from the dates of the said bonds to the 20th of November 1768.

The exceptions of Ireson were first, for that the Master had not allowed him interest on the sum of £1344 for which he had obtained a judgment in [409] Michaelmas Term 1741, in an action of covenant broken against Sir Francis Hoskins Stiles as administrator, with the will annexed of the testator Benjamin Hoskins; whereas the Master ought to have allowed him the said Ireson lawful interest on the said sum of £1344 from the 18th of December 1741, when the final judgment was signed.

Secondly, for that the Master had not allowed him the said Ireson, interest on the sum of £58, 4s. 4d. for which he had obtained a judgment of Michaelmas Term 1741, in an action of trespass on the case upon promises; whereas the Master ought to have allowed lawful interest on the said £58, 4s. 4d. from the 18th December 1741, when final judgment was entered up.

These exceptions were arguing on the 7th, 8th, 15th, and 22d April 1769; the Attorney General, the Solicitor General, and Mr. Graham, were Counsel for the exceptants; Mr. Wedderburne, Mr. Ambler, Mr. Madocks, and Mr. Perryn, for the other parties.

Lord Camden, C., over ruled all the exceptions, and was so clear, that he wished he had been warranted in making the exceptants pay costs: his Lordship relied much on the case of *Bromley v. Gooder*, 4th November 1743, in 1st Atk. 75, where Lord Hardwicke, C., in directing the Master to compute interest on the bonds, notes, &c., of Sir Stephen Evans, carrying interest, adds, but on the bonds no interest, beyond the penalties thereof.

[410] THOROLD v. CHARLOTTE HAY.

12 April 1769.

The defendant bribed a man, whom she scarcely knew, to marry her for the purpose of screening her against creditors. The Court considered her as a *feme sole*, and required her to answer a bill brought by one of her creditors, for a discovery, and payment of his debt.

The defendant being indebted to the plaintiff, and others, with a view to cover herself against creditors, agreed to give a man (said to be an Irish chairman), a sum of money to marry her; he accepted the proposal: they were married at a church in the city; they parted at the church door, and had no further intercourse.

The plaintiff filed his bill against her, to be paid and satisfied the demand he had on her, as an unmarried woman, and for a discovery: Being served with a subpoena, and not appearing, an attachment issued against her, and she was taken upon it.

On the 12th of April 1769, she applied to be discharged out of custody, with costs; and that the attachment might be vacated, insisting she was a married woman: that the plaintiff was informed of it, and therefore the attachment issued irregularly; and her counsel alleged, that had she appeared, it would have been too late to have objected to the propriety of the bill, and cited two cases, *Travers v. Buckley*, 8th February 1749 (1 Wils. 264,—1 Ves. 283), and *Jerningham v. Glass*, Hilary Term 1746—7 (3 Atk. 409).

Lord Camden, C. (Sir Thomas Sewel, the Master of the Rolls, being also present, and consulted).—The principal matter in this bill is to discover whether the defendant is married, or not. His Lordship then stated in what manner the marriage was effected: from the time of the marriage, she doth not mention one word of co-habitation: it is evident from her own account, the marriage was had with a man, whose name [411] she hardly knows, merely with a view to cover her against creditors; if the objection were to be allowed upon the single affidavit of the woman, every suit against a woman for discovery would be prevented: to vacate the attachment, would be a denial of justice: if she deny the plaintiff's allegations by answer, the plaintiff hath an opportunity of examining witnesses to falsify it.

The consequence will be, should I vacate the attachment, the plaintiff and every other creditor will be barred at law: I think the suit proper; therefore I will make no order for vacating the attachment.

LAMPLUGH v. LAMPLUGH; JOHN FOSTER LAMPLUGH v. COX;
COX v. JOHN FOSTER LAMPLUGH.

5, 6, 27, & 30 May 1769.

Securities set aside being unconscionable and oppressive, and obtained by taking advantage of the party's poverty, and distress.

The question in this cause arose on the second, and third suits.

The bill, in the second cause, was by John Foster Lamplugh, to have an account taken of all sums of money, really and *bond fide* advanced by the defendant James Cox to the plaintiff, and that upon payment of what should be found due with interest, from the time of advancing the same, all judgments, bonds, and other securities, which the defendant Cox had obtained from the plaintiff, might be delivered up, and be declared to have been obtained by fraud, imposition, and misrepresentation; and that the defendant Cox might reconvey the estate free from incumbrances; and the plaintiff stated the following case:

[412] That in the year 1742, he wrote in the office of John Rayner an attorney at law, for 12s. a week, at which time the defendant Cox, was an articled clerk to the said Rayner, and knew that the plaintiff was entitled to a considerable estate on the death of his mother.

That the plaintiff afterwards marrying, went into Yorkshire, and continued there till 1754, when having two children to maintain, and having no more than £50 a year, which was allowed him by his mother, and being in debt, he came to town, and applied to his old acquaintance the defendant Cox.

That Cox knowing his distressed circumstances, and the estate he was entitled to on the death of his mother, who from her age was not likely to live more than three or four years, proposed granting to the plaintiff an annuity of £100 upon his giving a bond for £1550 with interest at 5 per cent. and to allow him Cox 5 per cent. for insurance; and Cox was to execute a bond to pay the said annuity.

That the plaintiff being greatly distressed in his circumstances, and fearing to be arrested, and relying on the integrity of Cox, was prevailed on to execute a bond, dated 21st December 1754, for payment of £1550 and interest out of the said estate; and another bond for payment of the sum demanded from the plaintiff for insurance, with a warrant of attorney to confess judgment, which Cox entered up: that Cox also prevailed on the plaintiff to execute a mortgage of his estate, and that Cox at the same time entered into a bond, to secure the annuity of £100 to be paid quarterly, which was all the security the [413] plaintiff had for payment of the annuity, Cox having no estate.

That the plaintiff being entirely under the influence of Cox, Cox on the 1st day of January 1756, drew out an account, in which he made the plaintiff debtor to him in £1550 the principal sum, £79, 12s. 4d. for interest, £79, 12s. 4d insurance, with other sums, said to have been advanced to the plaintiff, making in the whole £2077, 7s. 9d., which accounts Cox prevailed on the plaintiff to sign, and to give him a new bond for that sum, with a warrant of attorney to confess judgment; and also another bond, taking notice, that the plaintiff was only tenant for life, expectant on the death of his mother, to allow Cox 5 per cent. for insurance, and also to execute a mortgage for the same.

That in this manner Cox proceeded yearly, until the demand as claimed by him, amounted to £7000, to be relieved against which, the plaintiff filed his bill.

The defendant Cox by his answer, insisted on the justness of his demand; that it was free from fraud, imposition, and undue influence; and particularly insisted, that although he paid no money for insurance, yet as he ran the risque, he ought to be considered as the insurer, and to have an allowance for it.

And by his bill, prays to have the said John Foster Lamplugh's estate, and interest sold, and thereout to be paid what is due to him on his security.

On hearing these causes, Lord Camden, C., was clearly of opinion, that Cox not having paid any money for insurance, was not entitled to an allowance for insurance; and declared that the contract for the purchase [414] of the annuity of £100 for the life of the plaintiff, ought to be set aside, as unconscionable and oppressive, and obtained by Cox, by taking advantage of the poverty and distressed circumstances of the plaintiff; and ordered all the deeds and securities, except the mortgage of the 1st of January 1756, and the two judgments, to be delivered up to be cancelled; and the said mortgage and two judgments to stand as a security for what should be found justly due from the plaintiff to Cox.

The Master to take an account of all sums really advanced and lent by Cox to the plaintiff, and to compute interest from the time of advancing the same at 5 per cent.

And upon payment of what should be found to be due, Cox to reconvey.

The plaintiff, to pay the other defendants their costs; Cox to repay the plaintiff those costs; also to pay the plaintiff his costs; and Cox's bill dismissed with costs.

ATTORNEY GENERAL *v.* DOWNING.

17 June and 3 July 1769. Ambl. 550 and 571, S. C.

Devise in mortmain by a will made before the Stat. 9 Geo. 2 is good; and it being of lands to build, and endow a college, held it might be carried into execution, on a grant of a charter from the Crown.

Sir Jacob Gerrard Downing, was seised and possessed of freehold estates, of leasehold estates for terms of years, and of copyhold estates, not surrendered to the use of his will, and of estates purchased after the will.

He made his will dated the 20th day of December 1717, and thereby devised all his manors, lands, tenements, and hereditaments, whereof he was seised of any estate or inheritance or freehold, to the Earl of Carlisle, Lord Letchmere, John Pedley, and

Robert [415] Pulyn, to the use of his cousin Sir Jacob Garrett Downing for life; with remainder to his first and other sons in tail male; with remainder to Thomas Barnardiston, and his heirs male, in the same strict manner; with remainder to the said trustees, and their heirs in trust to purchase with the rents and profits, the inheritance of some piece of ground in Cambridge proper for the erecting of a college, and to build all such houses, erections, and buildings, as should be fit for that purpose; which college should be called Downing College; and to obtain a royal charter for the founding of such college, and incorporating a body collegiate, by that name in the University of Cambridge, which should consist of such head, or governor or governors, and of such fellows, scholars, members, and other persons for the time being; and should be maintained, governed, and ordered, by such laws, rules, and orders, and in such manner, and should be professed and taught such useful learning as his said trustees and their heirs, with the consent of the Archbishops of Canterbury and York, and the Masters of St. John and Clare Hall, in the University of Cambridge, in being at the founding the same college, should direct and appoint; and from and after the founding and incorporating such college, or body corporate, the said trustees and their heirs, should stand, and be seised of all and singular his manors, &c., in trust for the said collegiate body, and their successors for ever; and he gave his leaseholds upon the same trusts.

In 1722, the trustees conveyed back to Sir George all his estates.

[416] Sir George died on the 10th June 1749, leaving Sir Jacob his heir at law.

Sir Jacob and all the remainder-men being dead without issue, an information was filed, to have the will of Sir George established, and the trusts performed; and was brought against Lady Downing, who was the widow of Sir Jacob, and devisee of all his estates; and against the heirs at law of Sir George, and of Sir Jacob.

Several questions arose in the cause, the first and principal question was, whether the devise of estates in mortmain to establish a college, was illegal, and void.

Upon this question, Lord Northington, C., called to his assistance Sir Thomas Sewel, M. R., and Lord Camden, the Chief Justice of the Common Pleas.

This question was branched into three points.

First.—Whether the trust was illegal, and void.

Secondly.—If not illegal, and void, Whether it was not contrary to the policy of the realm, and of such a nature and under such circumstances, that this Court ought not to assist it.

Thirdly.—If it were illegal and void, and of such a nature, as that this Court would not assist the trust; whether this Court will not apply it to some other charity *ejusdem generis*.

It was held not to be affected by the Statute of the 9th of Geo. 2, having been passed subsequently to the making of the will; and that it was a trust that might be carried into execution, if his Majesty would be pleased to grant his charter for that purpose.

[417] And as to the persons who should apply to the Crown and should have the regulation of the charity, it was held that the heirs at law of the testator were the proper persons.

The other questions in the cause, stood for judgment till this day (3 July 1769).

Lord Camden, C. The principal question being determined, the remaining questions are,

First.—Whether the annuity to Mrs. Bagnell is charged on the real estate only.

Secondly.—Whether the leasehold estates, renewed after the will, and before the testator's death, passed by the will.

Thirdly.—Whether the copyhold estate not surrendered passed by the will.

Fourthly.—Whether the codicil is a republication of the will; so as to pass estates purchased after the will.

As to the first question, whether the annuity is charged on the real estate, in exemption of the personal estate; nothing but the apparent intention of a testator will exempt his personal estate.

An annuity I consider as a legacy; the personal estate is the natural fund for answering it, and nothing can exempt the personal estate, but express words or implication.

There are no words in the codicil that will bear that construction; this annuity is only a charge on the real estate, in case the personal estate be not sufficient; and therefore the personal estate must be first applied.

The second question is, as to the leasehold estates, whether they pass by the will;

this is settled in the [418] case of *Abney v. Miller*, in *Atkins* (2 Atk. 593), by Lord Hardwicke, C., which I adopt; therefore these leases must go to the residuary legatee.

The third question respects the copyhold devised to the charity; but which the testator did not surrender to the use of his will; whether the Court will supply the defect of the surrender, for the benefit of the charity; I am of opinion it will not, and that it must descend.

The last question respects the republication of the will by the codicil, so as to pass the after-purchased estate; and as to this point, the case of *Litton v. Lady Falkland* (1 Bro. P. C. 229 [2nd ed. 3 Bro. P. C. 24]); and *Lady Lansdown's case*, Rep. Eq. 115; 10 Mod. 96, are applicable; and I am of opinion, the will is not republished by the codicil; because there is nothing in the contents of the codicil, that indicate an intention of the testator to republish it. *Beckford v. Pannin*, 1st Rolls Abr.; *Alford v. Alford*, 2 Vern. 209, and 3 P. Wms. 168; *Attorney General v. Barnes*, 2 Vern. 597, and 3 Chan. Cases, 81, 150; *Lord Lansdown's case*, 3 Chan. Rep. 179; *Steed v. Berrier*, 2 Jones, 135 (1 Freem. 292, 477); *Acherly v. Vernon*, P. Wms. 783.

A codicil *quod* a codicil, doth not act as a republication of a will, unless it contain express words, or words of implication, that the testator meant it as such.

The codicil on which the question arises, doth not speak an intention in the testator to republish the will, nor is so mixt with the will, as to make it consequential.

As to the question, who hath the right to conduct the charity, I am of opinion, the heirs at law have the best right to have the conduct of it.

[419] Declare the will and codicil well proved; and that the trusts ought to be carried into execution, in case the King shall be pleased to grant his charter to incorporate the college, and his royal licence for such incorporated college to take the devised premises in mortmain; and let the heirs at law be at liberty to apply to the Crown for that purpose.

And declare the freehold premises, purchased after making the will, did not pass by virtue of the codicil, the will not being thereby republished.

And declare that the leases which were renewed, or were run out, after making the will, and before the testator's death, did not pass by the will, but fell into the residue of the testator's personal estate.

And declare, that the copyhold estate, not surrendered to the use of the testator's will, descended to the testator's heir at law, living at the time of his death.

And it being suggested, that there were several buildings on part of the devised premises, so constructed, as to be made moveable from place to place, it was referred to the Master, to enquire what was the nature of such buildings, and to report his opinion, and all circumstances to the Court.

[*Mews' Dig. Charity*, I, 4, b, 1; III, 1; *Copyhold*, G, 1, c.; *Trust and Trustee*, C, 3, c, 1; *Will*, VI, b, 2; IX, k, c, ii. See *In re Smith*, 1890, 45 Ch. D. 638.]

DUFOUR v. PEREIRA.

18 July 1769.

A mutual will by the husband and wife if revoked, must be revoked jointly; or if revoked separately, notice must be given to the other party of such revocation.

This cause stood this day for judgment.

The case on which the principal question arose, stood thus: Mrs. Camilla Rancer, the wife of Rancer, being entitled to a legacy under the [420] will of her aunt, she and her husband agree to make a mutual will, which they do, and both execute it.

The husband died; the wife proved his will, and afterwards made another will. And the question was, whether it was in the power of the wife, to revoke the mutual will.

Lord Camden, C. This question arises on a mutual will of the husband and wife; the will is jointly executed by them.

What the wife disposes of, is the residue of her aunt's estate, given to her by her will.

I do not find the cases go so far, as to consider a legacy to a wife, as excluding the husband by implication; but there is no occasion to determine that question.

The question is, as the husband by the mutual will assents to his wife's right, and makes it separate, whether the second will by the wife is to be considered as void.

It struck me, at first, more from the novelty of the thing than its difficulty.

The case must be decided by the laws of this country. The will was made here ; the parties lived here ; and the funds are here.

Consider how far the mutual will is binding, and whether the accepting of the legacies under it by the survivor, is not a confirmation of it.

I am of opinion it is.

It might have been revoked by both jointly ; it might have been revoked separately, provided the party intending it, had given notice to the other of such revocation.

[421] But I cannot be of opinion, that either of them, could, during their joint lives, do it secretly ; or that after the death of either, it could be done by the survivor by another will.

It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract ? Certainly not.

The defendant Camilla Ranceer hath taken the benefit of the bequest in her favour by the mutual will ; and hath proved it as such ; she hath thereby certainly confirmed it ; and therefore I am of opinion, the last will of the wife, so far as it breaks in upon the mutual will, is void.

And declare, that Mrs. Camilla Ranceer having proved the mutual will, after her husband's death ; and having possessed all his personal estate, and enjoyed the interest thereof during her life, hath by those acts bound her assets to make good all her bequests in the said mutual will ; and therefore let the necessary accounts be taken.

[Mews' Dig. Will, V, a. See *Denyssen v. Mortert*, 1872, L. R. 4 P. C. 253,—8 Moo.

P. C. (N. S.) 524 ; *Dias v. De Livera*, 1879, 5 App. Cas. 123.]

[422] ATTORNEY GENERAL, at the relation of the Master and Scholars of Pembroke Hall, Cambridge, Informant ; and SARAH PARKIN, DAVID SHARPE, GRACE HIS WIFE, AND CHARLES ADAMSON, Defendants.

(Reg. Lib. A. fol. 111.) 15 Nov. 1769. Ambl. 566, S. C.

A copyhold estate devised to Pembroke Hall, Cambridge, not having been surrendered to the use of the will, the defect decreed to be supplied by the heir at law, to whom the testator had devised freehold estates. Mortgages and other securities being also devised to the said College, some of which had been called in by the testator, and others paid voluntarily, and laid out by the testator ; the money so called in and paid, declared to belong to the College, with interest from one year from the testator's death, at 4 per. cent. See *Ford v. Fleming*, 3 P. Wms. 469.

The Reverend Richard Parkin having been educated at the said College, and having no issue, on the 17th of June 1759, made his will, of his own writing (which was duly executed), as follows : " I give and bequeath to my sister Sarah Parkin, my house and freehold lands in Buton Bendinch, in Norfolk, for life ; and after to the Master, Fellows, and Scholars of Pembroke Hall, Cambridge : Also, I give to her my copyhold lands in West Durham, for her life only (which he had not surrendered to the use of his will) ; and on condition she settle the same after my death on the aforesaid Hall, and give such security in a month after my death so to do, as the said Society shall see proper ; otherwise, I give the same to the said Master, Fellows, and Scholars above mentioned at my death."

And taking notice, there were due to him, upon mortgages, bonds, and notes, several sums of money, which he particularly specified, and the persons from whom due, he proceeds thus : " And out of the interest to arise from those mortgages, bonds, and notes, I give to my sister Sarah £60 per annum, upon condition she doth not marry ; but if she doth, or acts in any manner to controvert my will, or make any further claim

[423] or demand, then I revoke all that is hereby given to her." And then, out of the interest of the same funds, he gives £16 per annum to his sister Grace for her life, upon condition she doth not controvert the will, or make any further claim ; if she doth, all given to her by the will to be void. " And after the death of my said sisters, my will is, that all the mortgages, bonds, and notes aforesaid, be vested in the Master,

Fellows, and Scholars of Pembroke Hall : and I do hereby give and grant them to the said Master, Fellows, and Scholars aforesaid, together with what shall remain yearly out of the annual interest of the said mortgages, bonds, and notes, after payment of the said £60 a year and £16 a year to my said sisters : and as either of them shall die, the legacy that was paid yearly to them shall cease, and be vested immediately in the said Master, Fellows, and Scholars in trust as aforesaid."

The will then goes on to point the particular uses for which he had made the said devise, and bequest to the relators.

And taking notice, that a considerable sum of money was due to him for interest on three of the above mortgages (which the testator names), he goes on : " My desire is, the same be paid my sister Sarah and John Adamson (whom he appoints executors), as soon as possible ; and with the money arising from my goods and chattels, which I hereby order to be sold (except some particulars, which he specifically bequeaths to his said sister Sarah), to be put out on good security, and the yearly interest to be paid to his said sister Sarah during her life, and after her death the whole property to be paid to the relators, in trust for the uses [424] before mentioned ; and appoints his sister and John Adamson, two of the defendants, executors."

On the 27th of August 1765 the testator died, without issue, leaving the said Sarah Parkin and Grace Sharpe his sisters, his co-heiresses at law, and next of kin.

The executors proved the will and possessed the testator's estate, and paid the debts and legacies, except what was given to the relators ; and having refused to account with the relators, the relators filed their information to establish the charity, and for an account of the testator's estate.

The defendants, as a ground for their refusal to account, insisted that there had been great variations, alterations, and addition to the testator's personal estate, after making his will ; the same at his death consisting principally of money due to him on mortgages and other securities made to him ; and that many of such were made, and the money lent after making his will ; and that the relators were entitled only to such mortgages and securities, or the benefit thereof, as were particularly described in the will, and were subsisting and unsatisfied at his death ; and not to any part of the money due on the mortgages or securities made to him after the making of his said will ; but that the residue of the testator's estate was to be considered as undisposed, and that they his sisters, as his next of kin, were entitled thereto.

The relators insisted, that under the said will they were entitled to all the residue of the said testator's personal estate at the time of his death (except what was specifically bequeathed) ; and that the testator, after making his will, received the money due on several of the securities particularly mentioned in the [425] will, and placed out the money, and other money he had saved at interest, on other securities, and which remained due and unreceived at his death ; that all the money that remained due thereon at his death, was and ought to be deemed to pass as part of the residue of his personal estate, by and under his will, and that the relators ought to have the benefit thereof.

The cause came on to be heard on the 7th and 8th days of November 1769, and stood for judgment till this day (15 Nov. 1769. (Reg. Lib. A. fol. 111)).

When *Lord Camden, C.*, declared the will well proved, &c., and directed the charitable trusts therein to be established and carried into execution ; and directed Sarah Parkin to surrender the copyhold estate comprised in the will to such trusts, and uses as the testator had thereby directed, and declared the defendants, the testator's sisters, were entitled to the clear residue of his personal estate.

And declared that, with respect to such of the several debts bequeathed to the relators, as were paid unto the testator between the time of making his will and his death, be such payments voluntary, or compulsory, the same were not adeemed by such extinction of these debts, but ought to be satisfied out of the testator's general estate.

The decree then goes on to direct an account of the testator's personal estate not specifically bequeathed, and of his debts, funeral expences, and legacies ; and in such account the Master was to compute interest on such of the several debts bequeathed to the relators remaining unpaid at his death, as carried interest, after the rate of the interest they carried. And the Master was to give credit to the relators for all such [426] sums of money as should appear to have been paid the testator before his death by any of the debtors, on the several securities specifically bequeathed to the relators,

and the interest thereof as aforesaid; and for that purpose the Master was to compute interest on such of the specific legacies as should appear to have been paid to the testator before his death, at the rate of 4 per cent. per ann. from a year after the testator's death; and it was ordered, that what should be coming for interest of such of the debts specifically bequeathed as were at that time standing out, together with interest at 4 per cent. on such of the debts as had been paid in as aforesaid, should be applied in the first place in payment of the aforesaid two annuities of £60 and £16 to the testator's said two sisters, the defendants Sarah and Grace; and that the surplus should be paid into the Bank, subject to further order.

And the relators were to lay a scheme before the Master for carrying the charity into execution.

Costs to be paid out of the estate, and liberty to apply.

[Mews' Dig. Condition, 6, c, d; Executor and Administrator, IV, b; Will, IX, k, 15; 16, b. See *In re Bridle*, 1879, 4 C. P. D. 341; *In re Robe*, 1889, 61 L. T. 499.]

HOWEL v. HOWEL.

Cause heard at the Rolls. The decree appealed. The cause heard on the appeal: afterwards appeal reheard by Lord Camden, C., though at first objected to as against rule.

[427] REYNOLDSON v. PERKINS.

6 Dec. 1769. See Ambl. 564.

Objection at the hearing that remainder-men were not parties.

Lord Camden, C.—Where the first tenant in tail is a party, it is not necessary to make any other of the remainder-men parties, and they will be bound by the decree.

DENN v. RUSSEL.

7 Dec. 1769.

A pauper can have no more than pauper's costs.

The defendant was a pauper: the bill was dismissed with costs for want of prosecution.

The defendant, as soon as he had obtained the order for dismissal, gets the pleadings stamped, and pays Counsel, and others divers fees: And carries in his bill to be taxed, which the Master taxes.

The plaintiff takes exceptions, which came on to be argued.

The question was, whether the plaintiff should pay such increased costs.

Lord Camden, C., and *Sir Thomas Sewel, M. R.*, were both of opinion, that the defendant was entitled to such fees as he had paid, and what he had disbursed at the time of the order, and no more; and therefore allowed the exceptions.

[428] BORRET v. GOODERE.

13 Dec. 1769. 6 Bro. P. C. 364 [2nd ed. 4 Bro. P. C. 679], S. C.

Interest refused on the balance of a mutual account, and held to be a simple contract debt

This cause stood this day for judgment on an appeal.

Lord Camden, C.—The question before me relates to interest.

The demand is, a balance of an open and mutual account, and on simple contract, as all the particulars are on simple contract. Indeed if the account had consisted of particulars, some whereof had been specialty and some simple contract, yet the balance found due would be a simple contract debt.

And there is no instance where interest is given on an open mutual account, without some particular circumstances; and it would be unjust to turn it into the nature of a specialty, so as to carry interest.

If interest is claimed from the time the debt became due, or from the filing of the bill, there must be shewn an unjust detention of the debt: but that is not proved in this case: neither fraud, nor trust, nor any proof that interest has been made of the balance.

If any part had earned interest, the Master should in the account have computed interest; and if the Master had refused to compute interest duly, that would have been a matter of exception.

Here I am precluded by the report from saying interest should be paid for any part of the balance; and if interest were presumed to be made on the balance of an open account, it would lead to mischief.

But if it is proved, the consequence is plain: if it is presumed, it must be under particular circumstances: [429] for the balance of an open mutual account doth not, nor ought it, to carry interest.

Such is the present case; and therefore I am of opinion it doth not carry interest.

JEFFERY v. BOWLES.

(Reg. Lib. A. fol. 267.) 17 March 1770. *Trusler v. Comyns*, 11 May 1773. The like decreed in *Carnan v. Bowles*, 24 Nov. 1785.

Injunction to stay the printing of a book. On shewing cause to continue the injunction, it was referred to the Master to see if the books published by the plaintiff, and defendant were the same, or in what respect they differed.

WHARTON AND HIS WIFE AND CHILDREN v. MASSEY.

(Reg. Lib. B. fol. 280.) 16 May 1770.

A surviving trustee of funds absconds: the Court directs the dividends of those funds to be paid to *cestui que vie*.

Upon the marriage of the plaintiff Thomas Wharton the elder, with Judith his late wife, £1000 old, and £1000 new South Sea annuities, by indenture dated the 22d of May 1757, were vested in Dudley Baxter, since dead, and the defendant Massey, upon trust to pay the dividends to the plaintiff Thomas the father for life, to his wife for life; and after the death of the survivor, to the use of the children of the marriage.

The marriage was had, and the wife died, leaving the plaintiffs her children her surviving. Baxter being dead, and the defendant Massey having left the kingdom to avoid his creditors, the plaintiffs file their bill to [430] restrain Massey from transferring the funds or receiving the dividends, and on the 18th of July 1768, obtained an order for that purpose.

Soon after the marriage, the said Baxter and Massey executed a letter of attorney to William Pimlet to receive the dividends, and to pay them to the plaintiff the father. Pimlet received and paid the dividends till November 1761, when he died; and the authority thereby ceasing, the South Sea Company refused to permit the plaintiff Thomas Wharton, the *cestui que vie*, to receive the dividends.

The defendant Massey still absconding, and the dividends being considerably in arrear, the plaintiff Thomas Wharton the father this day applied, that the South Sea Company might pay him the dividends, and fished for the opinion of the Court in respect to transferring the capital to the Accountant General. But Lord Camden, C., was clear it was impracticable: that the transfer could only be by Massey personally or by attorney, and seemed to apprehend the plaintiff was without remedy; and at first doubted as to ordering the dividends; but at last he made the order, and put the case of a sequestration issued against the defendants, or of a receiver's having been appointed: the order of directing him to receive would have been an authority, and indemnity.

And upon reading the settlements, and the said order of the 18th of July 1768, the Six Clerk's certificate, and an affidavit of the facts, his Lordship, after a pause, having at first a doubt, ordered the South Sea Company to permit the plaintiff Thomas Wharton the father, to receive the dividends and future dividends of the trust annuities.*

* *Buzlo v. Bank of England*, 18 April 1774, a similar order.

[431] GASCOINE v. DOUGLAS.

26 May 1770.

Sale of a plantation at St. Christopher's decreed for satisfaction of money charged on it.

KAYE v. BANKS.

June 1770.

Injunction granted to stay cutting down sapplins, wavers, and fruit trees.

TOTHIL v. PITT.

11, 12 May & 23 June 1770. 6 Bro. P. C. 450 [2nd ed. 7 Bro. P. C. 453], S. C. [1 Madd. 488.]

Whether a limitation in a will was a perpetuity.

Robert Tothil, Esq. was possessed of £4000 Bank stock, six Exchequer orders, and four leasehold houses.

He by will, after devising his real estates, gave the Bank stock, Exchequer orders, and leasehold houses, to Sir William Pinsent for life ; and after his death to pay the interest to Leonora Pinsent during her life, and after her death to the heirs male of her body lawfully begotten for ever ; and for want of such issue, to the plaintiff, and if the plaintiff married and had issue, to his heirs male for ever ; and for want of such issue, he gave the same to I. S.

And his diamond ring, gold repeating watch, plate, and books, the testator directed should be kept safe, [432] until it was apparent who, by virtue of his will, would have a right to enjoy his estate.

Afterwards Sir William Pinsent died, and by his will devised all his estates to the defendant the Earl of Chatham.

And under this will the defendant claimed and possessed, amongst other things, the Bank Stock, Exchequer orders, leasehold houses, and diamond ring, watch, plate, &c.

The plaintiff filed his bill to have the said Bank Stock, Exchequer orders, and leasehold houses transferred and assigned to him.

The question in the cause was, whether the limitation in the will was not, in effect, a perpetuity.

The cause was heard before Sir Thomas Sewel, M. R., and the bill dismissed.

It came on before the Lords Commissioners Smith, Aston, and Bathurst, upon an appeal, and stood this day for judgment.

Lord Chief Baron Smith, after stating that part of the will on which the question arose, proceeded thus :

The rule for the construction of wills is, that they shall take place, if agreeable to the rules of law.

A limitation that will create a perpetuity is void ; therefore personalty cannot be bound.

The questions are, what was the intent of the testator ; and whether his intention will create a perpetuity ; whatever may be his intention, no operation of law will give an estate tail in the premises : In *Webb v. Webb* (2 Vern. 668. 1 P. Wms. 132) ; and *Villers v. Villers* (2 Eq. Ca. Abr. 305), it was so determined.

If this case doth not differ, I shall think myself bound by those determinations.

It is plain the testator meant to give Miss Leonora Pinsent only an estate for life ; it is plain that heirs [433] of the body are words of purchase ; and therefore I am of opinion, the order of dismission was wrong.

Lord Bathurst, C., said further, that heirs male of the body, must be considered as children.

Therefore the order of dismission was reversed, and the Bank Stock and Exchequer orders, were directed to be transferred to the Accountant General, and the interest paid to the plaintiff for life.

And the money produced by the sale of the leasehold houses, to be paid into the Bank, and laid out in Bank annuities, and the interest paid to the plaintiff for life.

And the Master was to enquire into the value of the large diamond ring, gold watch,

&c., directed by the will of the testator, Robert Tothill, to be kept safe, until it was apparent, who, by virtue of his will, would have a right to enjoy his estate, and to compute interest, on what he should find to be the value thereof; which value and interest were to be paid into the Bank, and laid out for the benefit of the person, to whom they should thereafter belong.

The cases cited on the part of the plaintiffs, were *Leacock v. Spooner*; *Ward v. Bradley*, 2 Vern. 23; *Smith v. Cleaver*, 2 Vern. 38, 59; *Fonnereau v. Cleaver*, Easter Term 1754; *Wachel v. Wachel*, 1 Chan. Cases, 130; *Ward v. Saunders*, Forrester's Reports, 135; *Jones v. Westcombe*, 1 Eq. Ca. Ab. 245; *Stanley v. Lee*, Michaelmas Term 1732, 2 P. Wms. 686; *Saberton v. Saberton*, Forrester's Reports, 235, and 2 Stra. 1072, Michaelmas 1736; *Gower v. Grovesnor*, 2 Eq. Ca. Ab. 327.

The cases cited on the part of the defendant, were *Backhouse v. Bellingham*, Poll. 33, 16 Chas. II.; [434] *Burgess v. Burgess*, 1 Mod. 114; *Higgins v. Dowler*, 1 P. Wms. 98; *Hordell v. Busy*; *Duke of Newcastle v. Pelham*; *Bullock v. Knight*, 1 Chancery Cases, 265; *Theebridge v. Kilburne*, 1750; 2 Ves. 233.

[*Mews' Dig. Will*, IX. k. 2, c. ii. *Reversed* in H. L., *sub nom.* *Chatham* (Earl of) *v. Tothill*, 7 Bro. P. C. 453.]

PEACOCK v. MACKERICHES.

Trin. 1770.

Upon hearing the cause, an issue was directed: the defendant having made default, a doubt arose as it was not a solemn judgment, but only an interlocutory order to satisfy the conscience of the Court, whether the defendant should have a day to shew cause against it; by the direction of the Lords Commissioners Smith, Aston, and Bathurst, I attended Sir Thomas Sewel, M. R., for his opinion; he was clear the order should be *nisi*.

Upon making this opinion known to the Lords Commissioners, they perfectly coincided with his Honour, and directed the order to be *nisi*. (*Harman v. Spotteswood*, 28 June 1773, S. P.)

SALWAY v. SALWAY.

12 & 23 Nov. 1770. Lords Commissioners Smith, Bathurst, and Aston.

Ambl. 692, S. C.

On a question whether arrears of a rent charge incurred in the life time of the plaintiff's late husband, and money due on a judgment recovered by her late father, of whom she was surviving executrix, belonged to the plaintiff, or to the representatives of her late husband; held they belonged to the plaintiff, as his widow.

The plaintiff, the widow of Mr. Salway, her second husband, brought her bill to have an account taken of the arrears of a rent charge, due at Michaelmas 1757, at the time of the death of her first husband Mr. Cartwright; and also to be paid the sum of £153. 3s. due on a judgment recovered by her late father, of whom she was the surviving executrix.

[435] The question in the cause was, whether the rent charge due at the death of the said Mr. Cartwright, was a surviving debt to the wife; or a right vested in Mr. Salway her second husband, and belonged to his representatives.

On the part of the plaintiff it was contended, that it was an interest which survived to the wife; and that the husband was not a purchaser.

On the part of the defendants, it was insisted, that Salway the husband, by the settlement he made on his wife, became purchaser of every interest she was entitled to.

The following cases were cited, *Rudyard v. Nearn*, 2 Vern. 503, Prec. Chan. 209; *Burnett v. Kinnaston*, 2 Vern. 401; *Meredith v. Wynne*, 2 Eq. Ca. Abr. 352; *Lord Carteret v. Paschall*, 3 P. Wms. 197; *Adams v. Cole*, 2 Eq. Ca. Abr. 143.

Lord Commissioner Smith. The bill is brought by the plaintiff, as the widow of Cartwright her first husband.

Two questions have arisen: First, whether this is not such an interest as survived to the second husband: Secondly, if the plaintiff's second husband is not to be considered as a purchaser.

That it is a chose in action, there can be no doubt; Mr. Salway might have received the arrears, if he had thought fit; he did not receive them, and it was his own neglect.

In whose name must any legal step have been taken to recover them? Not in his name; it must have been in the names of the trustees.

The arrears of the rent charge, are therefore certainly a chose in action, and not having been reduced [436] into possession, consequently belong to the plaintiff: and I am equally clear in my opinion, she is entitled to receive the arrears, the money received since, and also the money due on the judgment.

Therefore declare the plaintiff is entitled to the sum of £1058; the arrears of her rent charge of £300 a-year accrued in the life time of Thomas Salway, her late husband, and the arrears incurred since his death, in respect of the said rent charge; and that the plaintiff is likewise entitled as surviving executrix of her late father, to the sum of £150 and 63s. costs, mentioned in the judgment obtained by the late father against I. S.; and let an account be taken thereof; and let what shall be found due, be paid to her accordingly.

COMBE v. ACLAND.

10 Nov. 1770. Lords Commissioners.

The question in this cause was upon accumulated interest, from the confirmation of the report, *Bacon v. Clarke*, 1 P. Wms. 478; *Brompton v. Alkis*, 2 Vern. 566; *Mills v. Banks*, 3 P. Wms. 1, were cited.

But the Court would not break through the rule.

[437] SMITH v. EARL OF POMFRET.

23 Nov. 1770.

To make an order in the nature of a decree, on an interlocutory application, it must be made by consent.

The bill in this cause was for an injunction to stay the defendants from proceeding at law.

Upon shewing cause for continuance of the injunction before Lord Camden, C.

His Lordship without consent directed an action of trover to be brought in order to try the right: if it were not brought, the injunction was to continue. It was brought, and a verdict was found in favour of the plaintiff.

The defendant applied this day for a new trial, having suffered the time to elapse, within which, by the rules of a Court of law, he had to apply there for a new trial: The following cases were cited, *Edwin v. Thomas*, 2 Vern. 75 (1 Eq. Ca. Abr. 378, S. C.); *Lomax v. Ryder* (2 Bro. P. C. 258 [2nd ed. 7 Bro. P. C. 145]), an appeal to the Lords in 1721, because the Court of Chancery had refused to grant a new trial, where it affected the inheritance, which the appellant insisted that the said Court was bound to do.

I took the liberty, being sent for by the Lords Commissioners Smith, Bathurst, and Aston, to suggest that there was a difference between an issue directed by the Court, and where a party is left at liberty to bring an action to ascertain his right.

The first is in order to satisfy the conscience of the Court:

The latter to ascertain the party's right to come here.

The Court having directed the trial in the first instance for its own satisfaction, it is necessary to [438] know if the Court is satisfied with the verdict found upon it; and for that reason it is, that an application is made to this Court for a new trial: in the last instance, this Court hath nothing to do with the trial, or the verdict; the verdict is the authority for this Court to go by; if it be wrong, the party aggrieved, should have applied to the Court at law for a new trial: the defendant in this case, hath not done so; and therefore he hath no business here.

The Lords Commissioners on this suggestion, all seemed satisfied, that they had nothing to do with it: however, they heard the point argued, and refused a new trial.

From this judgment Lord Pomfret appealed; and upon the argument in the House of Lords, Lord Mansfield took this distinction; that where the Court makes an order by consent of the parties in an early stage of the cause; it operates as if regularly brought to hearing; but that it is otherwise if the order be made without consent; that this was the case here, and therefore Lord Pomfret was not bound. He afterwards came back to this Court, and by consent, an issue was directed to be tried at the bar of the Court of King's Bench.

(But query if his going to trial on that order, was not an assent to, and a confirmation of it; however this was the result.—J. D.)

CATOR v. BUTLER.

1 Feb. 1771. *French v. Baron, supra* [Dick. 138], S. P.

Bill to have the trusts of a will executed by sale of the real estate: the heir at law was abroad: and had been so for so long a time, as not to come within the Statute of the 5th Geo. 2, "to render process effectual against persons who abscond, &c."

[439] *Lord Bathurst, C.*, first taking notice, that the will was duly executed, though he did not establish the will, directed the real estate to be sold, in aid of the personal estate.

Braithwaite v. Robinson, 16 June 1734, was a similar case.

FREEMAN v. CARNOCK.

15 March 1771.

Service of a subpoena on an infant personally, not good.

It was held that service of a subpoena to hear judgment, personally on an infant, is not good service. It is necessary to serve his guardian *ad litem*, who is assigned for the purpose of answering, and defending the suit; and this is agreeable to the language of the order assigning him the infant's guardian.

ORD v. ORD.

15 March 1771.

Legacies to be paid at twenty one or marriage to infants, two of whom did not attain twenty one or marry: if the personal estate had been sufficient (which was not the case), it was contended that the legacy would have vested, and therefore it was proposed to throw another legacy on the real estate, in order to leave a sufficient personal fund. But the Court refused so to do, and declared that the representatives of the deceased legatees were not entitled to have their legacies raised out of the real estate.

William Ord by his will gave £5000 to four daughters to be paid at twenty-one, or marriage, and interest at 5 per cent. for maintenance; and charged his real estate with the payment of the same.

Upon hearing the cause the 6th July 1768, the Court declared the four daughters at twenty-one, would be entitled to be paid the legacy of £5000 each; and the saving of the interest, after allowing for their maintenance; and directed an account of the personal estate; and the £5000 to be paid into the Bank, and laid out.

On the 18th February 1771, the Master made his report, and thereby certified, that the personal [440] estate would be deficient to answer the legacies; and therefore part of it was a charge on the real estate.

After the decree, Elizabeth and Susanna, two of the daughters, died under twenty-one.

The cause came on this day for further directions.

The plaintiffs the other daughters, contended, that the said deceased infants, if the personal estate had been sufficient, would clearly have had a vested interest in their respective legacies; but they being a charge on the real estate there was a doubt; and being a doubt, it was pressed to take the legacy of £10,000 given to the plaintiff Jemima, out of the personal estate, and apply it in payment of the two deceased sisters' legacies, and turn Jemima's legacy on the real estate, which was charged with it.

The cases cited were, *Jackson v. Ferrand*, 2 Vern. 121; *Bradley v. Powel*, Forrester's Reports, 193. 2 Eq. Ca. Ab. 253, 657; *Deltrich v. Carthen*, 1 Levin. 224.—*Dyer* 214, 44; Anonymous case, 2 Vern. 403; *Cotton v. Cotton*, by Lord Harcourt, 2 Vern. 290; *King v. Withers*, Forrester's Reports, 117, and 3 P. Wms. 414; *Whitfield's case*, 2 Vern. 513; *Graves v. Mattison*, reported in Sir Thomas Jones, 201; *Hutchins v. Foy*, Comyns Rep. 716; *Bruen v. Bruen*, Prec. Ch. 195; *Prowse v. Abington*, 1 Atk. 482.

Lord Bathurst, C., said, he was clear the legacies of the deceased infants did not vest; that he never heard of marshalling assets where only one fund was chargeable:

And therefore declared, that the late plaintiffs, Elizabeth, and Susanna, having died under the age of twenty-one, and unmarried, the defendant Ann Ord, [441] as their personal representative, was not entitled to have their legacies of £5000 raised out of the testator's, their late father's, real estates.

VERE v. GLYNN.

15 March 1771.

Amending a bill after a plea is not allowing the plea. If after an injunction the plaintiff amend his bill, the amendments cannot be used in support of the injunction.

After the defendant had pleaded, the plaintiff amended his bill. Upon arguing the plea this day, it was contended, that amending the bill after a plea is allowing the plea.

By Mr. Perrin, for the defendant, it was said, that amending a bill puts the original bill out of Court, and the proceedings are on the amended bill; and if you plead to the amended bill, you must plead *de novo*.

Lord Bathurst, C.—This cannot be: for the original, and amended bill are but one record: the time of filing the original bill is not altered; and it is only amended, and written on: amended by virtue of an order dated on a day specified. A bill of supplement is a distinct record.

And as to what is said, that after a bill is amended the proceedings are on the amended bill, that is, on the original bill so amended; if a plaintiff obtains an injunction on his original bill, and the defendants answer, and the plaintiff amends his bill, the proceedings to get rid of the injunction are on the original bill, and the answer to it; and the amendments cannot be used in support of the injunction.

Therefore, over-rule the plea.

[442] DOOLITTLE v. WALTON.

10 May 1771.

Injunction to prevent transfer of stocks, not granted till after the defendant's appearance, or being in contempt, and upon notice.

On the 8th instant, a motion for an injunction was granted as of course.

When instructions were left to draw up the order, it was then, for the first time, discovered, that it was to prevent the defendants transferring stocks, and that the defendants had not appeared. Upon my refusal to issue the order, Mr. Fleming served me with a notice, and this day moved that I might be directed to draw up the order: it was moved by the Attorney General Mr. Thurlow.

Lord Bathurst, C.—There are four kinds of injunctions under the head of waste: working of mines, printing and publishing books, &c., cutting down timber, or ploughing up ancient meadow, and presenting to livings; but this Court will not grant an injunction to prevent the transferring of stock till after the defendants have appeared, or the defendants are in contempt for want of it, and upon notice; and therefore the Register did right in suspending the order.

WELBY v. THE DUKE OF RUTLAND.

3 June 1771. 6 Bro. P. C. 575, S. C. [2nd ed. 2 Bro. P. C. 39].

Bill for an issue to try a right to a manor, dismissed.

Bill to have an issue directed to try a right to the manor in question.

The cases cited were, *Bush v. Weston*, bill *quia timet*, Prec. in Ch. 530; *Duke of Dorset v. Serjeant Girdler*, Prec. in Ch. 530; *Corporation of York v. Pilkington*, 5th Dec. 1737; re-argued 13th March 1737-8.

The bill was dismissed, and the dismissal, on appeal, affirmed by the House of Lords.

[443] NEWTON v. NEWTON.

5 June 1771. Lord Bathurst, C.

An issue directed to try whether the plaintiff, or the defendant was heir at law.

HOPKINS v. ADCOCK.

6 May 1772.

Effects sequestered falling short of a duty decreed, the order for the Serjeant at Arms reserved for the residue.

Effects sequestered, amounting to a very small part of the duty decreed : the plaintiff obtained an order, for payment and delivery of the sequestered goods, and that the order for the Serjeant at Arms and warrant, should be renewed for the residue. It was admitted, that at law, after a *fieri facias* executed, if other effects are discovered, another *fieri facias* may regularly issue, or a *capias ad satisfaciendum*. (*Sed Qn.* if in the same county.—J. D.)

If a *capias ad satisfaciendum* is executed, no *fieri facias* can issue ; but after a *fieri facias* is executed, the plaintiff, if not satisfied, may sue out a *capias ad satisfaciendum*.

ADAMS v. GOULD.

10 June 1771. Lord Bathurst, C.

The defendant, an infant, who was the devisee of the equity of redemption of a copyhold estate, and decreed to join in a sale at twenty one, (after much consideration), had liberty to shew cause against it when he attained the age of twenty-one ; and he was to be served with a subpoena for that purpose.

[444] WAINWRIGHT v. HEALY.

28 June 1771.

Interest to be computed on the sum reported due to the plaintiff, not confining it to the principal.

Bill by the first creditor by judgment on the estate of James Newsome Craggs. There had been a decree in another cause for an account of the personal estate, and of the debts of the said James Newsome Craggs, under which decree the plaintiff had come in, and the Master had taken an account, and reported what was due to him. On hearing the cause the above day, Lord Bathurst, C., ordered the Master to compute interest on the sum reported due to the plaintiff, from the foot of his report.

SEAL v. TICHENER.

4 July 1771.

On the point, whether legacies were a charge created, and whether vested and transmissible.

The bill was filed by the representatives of two legatees to be paid two legacies of £20 each, given by the will of Henry Sheffield, payable after the death of the testator's wife, they having died in the life-time of the widow.

The cause stood this day for judgment.

Lord Bathurst, C. This bill is brought by the plaintiffs as representatives of two legatees under the will of Henry Sheffield. He by the will devises two houses to his wife for life, and after his death to the defendant Tichener, he paying thereout £20 a-piece to Henry Thornton, and Thomas Thornton, with interest from the end of three months after the death of the wife ; the wife survived, and the legatees died in the life-time of the wife.

[445] The questions in the cause are, first, whether the words in the will, he paying thereout, create a charge :

Secondly : whether the legacies vested and were transmissible.

Hutchins v. Fox, Comyns Rep. 716 ; *Buckly v. Stangate*, Forrester's Rep.

The words, he paying thereout, I am of opinion make the legacies a charge on the houses, as they are given to the defendant *cum onere*, and were transmissible.

Hodgson v. Rawson, 9th December 1747, 1 Ves. 44 ; *Wilson v. Spencer*, 3 P. Wms. 172.

Therefore declare the two legacies of £20 a-piece given to Henry Thornton and

Thomas Thornton by the will of Henry Sheffield, vested in them, and were transmissible to their representatives, and are a charge on the two houses devised to the defendant, and let the Master compute interest on the said legacies; and let the principal and interest of the said legacies be raised by sale or mortgage of the said two houses, and be paid to plaintiffs, together with their costs.

CHRISTOPHER v. CHRISTOPHER.

Serjeants Inn Hall. 6 July 1771.

Alteration of a testator's circumstances, namely, marrying and having a child, held to be a revocation of the will. Perrot, Baron, *contra*.

This cause stood for judgment.

Mr. Baron Perrot.—This bill is brought by the heir at law of Daniel Christopher deceased to have a will made by him revoked; to have an account of the profits of his real estate, and an account of his personal estate, and to have an allowance settled for his maintenance upon this case.

[446] Daniel Christopher, by will, dated 17th December 1757, being at that time a married man, but without issue, devised his real, and personal estate to his then wife for life; remainder to his brother the defendant Christopher in fee, and absolute property.

The wife died in 1761, and on the 10th of November 1763 the testator married Elizabeth, a defendant in this cause, and died in 1764, leaving his said wife, and one child, the plaintiff, and without having revoked his will.

The Baron said, he found he differed in opinion with his Brothers; but this he was the less concerned at, as perhaps it might be the means to carry to the last resort a question which he thought of the greatest consequence to the subject, and by these means every Court would in future be uniform in their opinion upon it.

That the Spiritual Court had already determined the will in question to be revoked by the alteration of the circumstances, in which the testator was as above mentioned; but he was of opinion it was not a revocation of a will of lands.

Every one knew, he observed, that both before and since the statutes enabling a man to devise lands, such wills might be revoked by parol, or any other such mode, which manifested an alteration of intent, in the mind of the testator. This led in many inconveniences at the expence of perjury, and occasioned the making of the Statute of Frauds, the preamble of which the Baron stated, and the 5th section of the mode of devising lands, and observed the difference between the penning of the two clauses, relating to [447] revocations of devises of lands, and of personal estate: The first is, an express exclusion of all other manner of revocation: the other is a restriction upon the method of revoking a will of personal estate, by words, or writing, having all other methods existing; the words of the first, are both negative and affirmative, excluding all other manner of revocation, as by accident, &c. He said he could not find any substantial difference between revocations by deed, and by alteration of circumstances; he thought the statute meant to exclude all parol evidence in every case of revocation, except that necessary one, of the alteration of the attestation of the instrument of revocation, and that the reason of the several cases, why incomplete deeds, as feoffment without livery, bargains and sale without enrolment, release without lease, well put together in Gilbert's Devises, p. 93, will operate as a revocation, depends upon this, that wills being ambulatory till the death of the testator, the several informal acts above referred to, countermand, and determine the will: he thought the present case was one within the statute, and as open to perjury as any other, that is, the dispute concerning the reality of a subsequent marriage, the legitimacy of the children, and that the statute meant to have an actual, not a presumptive revocation; that it would let in proof of declarations of the testator, that he intended his will to stand, notwithstanding such alterations of circumstances; that in *Parsons v. Lanoe*, 1 Ves. 189, Lord Hardwicke, C., seemed not well satisfied with the case of *Lugg v. Lugg*, 1 Lord Raymond 441, that marrying and having children afterwards was a revocation of a will of personal estate; that the case of *Brown [448] v. Thompson*, 1 P. Wms. 304, 1 Eq. Ca. Ab. 413, was taken up without argument: He said, he thought the present bill a reasonable one (but did not state in what particular), and relied on the inadmissibility of parol

evidence ; that in the only instance where it had been received, that of *Brown v. Thompson*, two great men, Sir John Trevor and Lord Keeper Wright, differed in what such alteration of circumstances consisted, as appears in 1 P. Wms. 304, in the note, and observed that from that time, (which was in 1701) to the present, there was no determination in favour of any such implied revocation ; that there was a great deal in the case, which spoke to the feelings of humanity, but still Courts could not determine from principles of peculiar hardships ; it was their duty *ius dicere, non dare*, and so concluded against the plaintiff.

Mr. Baron Adams.—I am of opinion, the alteration in the circumstances of the testator, amounts to an implied revocation ; true it is, the testator was married at the time of making his will ; but I shall consider that matter, as if he had been then a bachelor.

I hold it as a rule, that wills do not take effect from the time of the execution, but the death of the testator ; that till then they are ambulatory.

The doctrine of revocation of wills, hath arisen from cases since the statute of wills : there can be no revocation, but by express declaration of the testator, or by implication of law ; by the latter, by acts done contradictory to, or inconsistent with such wills ; upon this principle, that they shew the intention, that lands should not pass by such will : even deeds not fully executed, or improperly, as for want of attornment, &c., are a revocation, *Rolls Abridgment*, Tit. [449] Devise, fol. 614, 615, not as actual, but implied revocations : so as to inconsistent acts, *Cook v. Bullock*, Cro. Car. 49 : so by subsequent acts, though the fee returns to, or remains in the testator, *Rolls Abridg.* 660 ; and *Parsons v. Freeman*, 3 *Atkins* 741. These cases shew how the law watches the intention of the testator, that it should continue as before, until his death.

Thus matters stood until the Statute of Frauds : for no provision being made in the Statute of Henry the 8th. concerning revocation, the Judges allowed of parol proof, which being inconvenient, that statute meant to provide against it ; but left implied revocations as before.

My learned Brother Perrot, thinks this lets in the mischiefs, the statute meant to prevent : I think it doth not : declarations made by a testator lie open to perversion ; but in this case, it is not declarations, but facts (as a subsequent marriage, and having children), are to be proved, which are notorious matters.

Before the Statute of Frauds, the will of a single woman marrying afterwards, was held void, 4th Co. ; and though there hath been no such determination since the statute, I doubt not the resolution would be the same.

It must be admitted the statute is strong, but yet it hath been determined in many cases, that it hath not taken away revocations by implication, *Dister v. Dister*, 3 *Levins*, 108 ; and *Lord Lincoln's case*, 1 *Eq. Cases Abridged* 411, *Sparrow v. Harcastle*, 3 *Atk* 798, and *Eccleston v. Speke*, *Carthew Reports*, 79. Here the circumstances of the testator, are to be considered : when he was without a child he had left his estate [450] to his nearest relation, his brother ; but when he had a child, it became dependent on him for support : moral duty, and natural love called upon him to give it a preference to every body.

It is therefore a necessary presumption, that he intended his fortune for the benefit of his child, and if a bare alteration by an incomplete feoffment, &c., shall be a presumption of a change of intent : shall not marriage, and a child born be a sufficient presumption ?

So it was held in *Brown v. Thompson*, 1 *Eq. Ca. Abr.* 413, and the determination of *Love v. Love* in the Ecclesiastical Court, whereby marriage, and the birth of a child are a revocation of a will of a personal estate, is a foundation for us ; and this opinion is contradicted by no cases.

In *Parsons v. Lane*, 1 *Ves.* 189, there was a child only, without a subsequent marriage : In *Jackson v. Hurlock* (*Ambl.* 487), before Lord Northington, C., a will was made immediately before marriage, and in contemplation of it.

I will not give any opinion, what would be the consequence of a marriage only, or having a child only after making a will : but in this case, both marriage, and issue happening after the will, I think those alterations of circumstances, a revocation of the will.

Mr. Baron Smith said he was of opinion, that this was an implied revocation of the will : that the oldest method of devising was by custom ; next by feoffment to

the uses of the last will ; then the Statute of Henry 8th gave a general power ; then came the Statute of Frauds, which let in a testamentary construction.

[451] That at common law a favourable construction is to be put upon the intent of parties : and in equity, where a man, being *cestui que trust*, having only a daughter, declared that after his death she should have his lands, but had a son afterwards, it was held the son should have the land, as cited in Shelly's case, 1 Co. 100 b. ; which case is also cited with approbation since the Statute of Frauds, in 2 Vern. 416 : that revocations, by operation of law, though not actually, yet were virtually excepted in the Statute of Frauds, as in Levins 108, 3 P. Wms. 163 and 170 : that the danger of perjury lay in allowing of parol proof of declarations, not of facts : and that even under the statute, there must be parol evidence admitted ; as where a will is burnt, torn, cancelled, or destroyed, by the testator's directions : and so concluded for the plaintiff.

Lord Chief Baron Parker agreed with Mr. Baron Adams and Mr. Baron Smith, and founded himself much on the case cited by Mr. Baron Smith out of 1 Co. 100 b., and in 2 Vern. 416 ; and in addition mentioned Roper against Ratcliffe, in 1712 (2 Eq. Ca. Abr. 771), where a devise to a papist, though incapable of taking, was held a revocation.

And the Court declared that a subsequent marriage, and a child born were a revocation of the will, and that the estate descended to the daughter, subject to the wife's dower ; and that the personal estate was to be divided (agreeably to the determination concerning this will in the Spiritual Court) according to the statute, and that the plaintiff the daughter was entitled to two thirds ; and ordered an account accordingly, and directed costs to be paid out of the estate.

[Mews' Dig. Will, V, 1. See now Wills Act 1837 (7 Will. IV. & 1 Vict. c. 26), s. 18.]

[452] FELL v. HORNBY.

11 July 1771. Lord Bathurst, C.

Bill for an account of the defendant's personal estate, and of what he had given, or agreed to give to another with his daughter ; he having, on the marriage of one of his daughters with the plaintiff, engaged to make his daughters equal. The defendant demurred : the demurrer was over-ruled. *Smithson v. Lewis*, 1 Vern. 398, 399, was cited.

YOUNG v. DENNET.

11 July 1771.

The testator devised all his estates to James Holmes his brother (who was his heir at law) in fee, subject, and liable to the payment of his debts and funeral expences, and appointed him executor. Lord Bathurst, C., held the devise to him as heir, to be void, and that the estate consequently descending to him was legal assets, in conformity to the case of *Fremoult and Didire*, 1 P. W. 429.

VERNON v. WELLS.

13 July 1771.

Exceptions to an award under an order of reference to an arbitrator.

Lewis Chauvet Esquire, a purchaser of part of the estates in question, on the 30th of October 1770, preferred his petition to the then Lords Commissioners for the custody of the Great Seal ; shewing (*inter alia*) that he had been reported the best purchaser of lot 2d, in the particular mentioned to contain 106 acres, at the price of £4700, but that such lot did contain no [453] more than 84 acres ; and therefore prayed a proportionable allowance out of his purchase money.

On the 22d December 1770, the petition came on to be heard, and was ordered to stand over ; and in the mean time it was ordered that the defendants' solicitor should, according to his undertaking in Court, shew to Elliot Bishop Esquire, at such time as he should appoint, the land, according to the particular under which the petitioner purchased, and Mr. Bishop was to certify his opinion.

On the 12th March 1771, the defendants preferred their petition to the Lord Chancellor, setting forth (amongst other things), that the defendants' solicitor had shewn the land to Mr. Bishop, and that he was ready to make his report concerning the same; and therefore prayed, that Mr. Chauvet's petition might be set down to be heard upon Mr. Bishop's report and that the same might be dismissed, and the defendants paid their costs.

On the 20th March 1771, both petitions came on, and Mr. Bishop attended in his place at the bar, and delivered in Court a report in writing, which was offered to be read, but objected to by the Solicitor General (Mr. Wedderburne), Counsel for Mr. Chauvet, who insisted that the report ought to be filed, and confirmed, before the defendants had a right to ground any order upon it; and that Mr. Chauvet, after the report was filed, had a right to take exceptions to it. Mr. Ambler, for the defendants, insisted that the reference was only to procure better evidence of a fact, than had been made out by affidavit, and that Chauvet had not any more right to require this evidence, in the shape of a report to be filed, and confirmed, than he would have had to require Mr. [454] Bishop's affidavit to be filed, and confirmed, if he had thought fit, to make one to the same effect as his report; * and that he might have done so if he had pleased, or even made a verbal report at the bar, or none at all; for that the Court did not require him to make any report, but only directed the petition to stand over until the defendants' solicitor had shewn the land: and that any exception Mr. Chauvet had to the report, might be taken at the bar.

The Solicitor General in reply insisted, that Mr. Bishop was, in fact, an arbitrator between the parties; that any reference to an arbitrator required an award, or report in pursuance of it: that, by the course of the Court, such award, or report ought to be filed, that any party aggrieved might except thereto, so as to put the whole matter upon record; and that, if it were otherwise, the injured party would be without evidence upon an appeal. Upon his Lordship's consulting the bar, and Mr. Howard, who then sat as Register, they coincided with Mr. Solicitor General, and the report was ordered to be filed.

The report was accordingly filed; and on the 9th of April 1771, an order was made to confirm it nisi; Mr. Chauvet filed exceptions to the report, which were argued on the 15th July 1771, and over-ruled.

BOTTS v. VERELST.

(Reg. Lib. A. fol. 327.) 19 July 1771. Lord Bathurst, C.

Application to examine a witness *de bene esse*, upon affidavit he was going to Scotland. After long debate, it was ordered; Scotland, although not [455] out of the realm, being out of the jurisdiction of the Court to compel the witness to attend to be examined, when he arrived there.

[Mews' Dig. Evidence, VII, 4, a, ii. See Blackwood v. Burrowes, 1842, Flm. & K. 630.]

SMITH v. CLARKE.

24 Aug. 1771. Lord Bathurst, C.

Notice of motion for an injunction to stay the working of coal mines, saved, until the first seal after Michaelmas, the defendant undertaking not to do any thing in the mean time. After the seals subsequent to Trinity Term were over, the defendant began to sink a pit. On application by petition, an injunction was granted.

GOODESON v. GALLATIN.

10 Dec. 1771.

The origin of the jurisdiction of this Court in regard to injunctions, and to what extent.

Upon application for an injunction:

Lord Bathurst, C., said, that when this Court first granted injunctions, it seems to

* Mr. Ambler was mistaken; for had it been by way of affidavit, by the standing orders of the Court, no affidavit is to be given in evidence until it is filed, and put upon record; which seems highly proper: for should a deponent be found to have sworn falsely, his affidavit, unless filed, might not be forthcoming, on which to indict him.—J. D.

have taken its jurisdiction from the writ of prohibition of waste ; and to have extended it against a tenant for life, or a tenant for years from ploughing ancient meadows, from throwing down ancient inclosures, which, though not strictly, is of the nature of waste ; from printing books, and from exercising new inventions ; from the working of mines, possessing bills now out of use in this kingdom, but still in use in Ireland ; and this Court will grant an injunction whether covenant, or no covenant. The grantor of a common overstocks it ; this Court will grant an injunction. 2 Vern. 116.

[456] DURAND v. HUTCHINSON.

20 Jan. 1772.

Motion to amend a bill by striking out a party, and making him a defendant, after bill dismissed.

The Court gave the plaintiff leave to amend, paying all costs.

ERRINGTON v. EVANS.

7 Feb. 1772.

The testator's making of a bond debtor one of his executors, does not extinguish the debt.

The question in this cause was, whether a bond debt due to the testator from one of the defendants, who was one of the executors, and proved the will, was extinguished.

It was argued by Mr. Attorney General, that a personal estate, of which the bond is part, is in law a gift to the executor ; but that it was a gift operating only by conclusion in law, and not as the intent of the testator.

In *Wankford v. Wankford*, in *Salkeld* 299, it is expressly laid down, that making a debtor an executor, is making him a specific legatee as to the debt, and not to be taken away from him to make other legatees equal to him, nor for the benefit of a residuary legatee.

In *Brown v. Selwyn* the words of the will were : " As to the rest, residue, and remainder of my personal estate, I give the same, and every part thereof, unto such of my executors as shall duly take on him, or them the execution of my will."

[457] *Lord Chancellor*.—I take it upon the foot of the will.

Where an obligee makes an obligor one of the executors, and takes no notice of the bond, but devises the residue of the estate to others, I am clear it is not an extinguishment of the debt, though at law it will be so, because a personal demand once suspended is not to be resumed.

Therefore, declare that the bond is to be considered as a debt subsisting at the death of the testator, and to be accounted for as his personal estate : and let the defendant *Evans* account accordingly.

CLARE HALL v. ORWIN.

22 Feb. 1772.

The question in the cause being between persons in their ecclesiastical capacity, this Court would not interfere, but left it to the Ecclesiastical Court, as being the proper Court to determine it.

The bill was filed against several lessees, and vicars for tythes in kind.

By the defendants it was contended, that the question being between ecclesiastical persons, it ought to be determined by the Ecclesiastical Courts.

The plaintiff, on the contrary, insisted, that a Court of Equity had a jurisdiction, and, in reality, was the proper Court, and quoted a passage out of *Bishop Gibson's* works.

The Bishop says, though there is not any reason that the lay fee should not be subject to ecclesiastical jurisdiction, as well as the Exchequer ; yet the Courts at Westminster have so often determined against it, that it is evident the Ecclesiastical Courts have not such jurisdiction.

[458] The cases cited were, *Twiss v. Brazen Nose College*, 328 ; *Brook. Tit. Jurisdiction*, placito 9 ; *Drake v. Taylor*, *Strange Rep.* 87.

Lord Chancellor.—This bill is brought by *Clare Hall* against lessees, and vicars for tythes of corn.

The vicar sets up a right to tythes in kind.

About three centuries after the conquest, the isle of Ely was one of the most fertile parts of England, till the floods broke in upon it; but at what particular period that happened, antiquarians differ.

The question between the vicar, and rector is, who shall be entitled to all the great tythes.

It is rightly laid down, that, *primâ facie*, the rector is entitled to all great tythes: it is, therefore, incumbent on the vicar to prove his right, contrary to the rector.

The question then is, whether the vicar has shewn a title.

If the dispute arise between ecclesiastical persons, it is right for the Spiritual Court to determine it; and it is so laid down in 1 Leonard 58.

Suppose that there had been an action, or a dispute between an hospital and vicar, as to great tythes in any particular lands, it would have been determined in the Spiritual Court.

Coming into lay hands, the Spiritual Court could not determine it.

This matter evidently occurs between ecclesiastical persons: therefore, let the bill be dismissed.

[459] BLAKE v. BLAKE.

(Reg. Lib. A. fol. 164.) 28 Feb. 1772.

Application to approve of the marriage of an infant, under the stat. 26 Geo. 2. The testamentary guardian being in parts beyond the seas.

Andrew Blake, by his will, dated the 1st of July 1760, appointed Sir William Gage, Robert Harland Esquire, now Sir Robert Harland, and Sergeant Hooper, trustees, and guardians of his younger children. Mary Ann Blake was one of such children. Sir William Gage acted as guardian till his death, when Patrick Blake was appointed guardian by the Court, for the purpose of receiving, and applying the money allowed for the maintenance, and education of the infants; Hooper having been dead many years, so that Sir Robert Harland was the surviving trustee.

A marriage having been proposed between Lord Montfort, and the said Mary Ann Blake, the same was, upon a reference to the Master, approved, and ordered to be carried into execution. Sir Robert Harland, the only surviving testamentary guardian, being the commander of a squadron of ships in the East Indies, so that his consent could not be had to the intended marriage, as by the statute of the 16 Geo. 2 is required, the said Mary Ann the infant preferred her petition to Lord Bathurst, C., stating to the above effect, and praying that, in case, upon examination, the said intended marriage should appear to be proper, that his Lordship would declare the same to be so, pursuant to the said act of parliament.

Upon this petition the parties were ordered to attend his Lordship on the above day, which they did: and the petitioner Mary Ann Blake having attended him, by his direction, at his house, his Lord [460]ship having conversed in private with her respecting the said intended marriage, and having given her time to consider thereof until this morning, and having received a letter under her hand, desiring his Lordship's consent to the said intended marriage, declared the same to be a proper marriage.

LLOYD v. —.

27 March 1772.

One of the defendants was a lunatic. The committee of his estate was also a defendant: he refusing to put in an answer for the lunatic, Mr. Kenyon moved, on behalf of the plaintiff, that the committee might put in an answer for the lunatic by a given time; or that one of the Six Clerks might be appointed guardian of the lunatic *ad litem*. Sir Thomas Sewel, M. R., said, the proper course was, to proceed against the lunatic; and if the committee refused to answer, to apply to the Great Seal to appoint a new committee of the estate.

BATHURST v. DE LA ZOUCH.

27 March 1772.

Bill against an executor for an account. The defendant had become bound with the testator in a bond for another person. The only question was, whether he should be at liberty to retain it out of the testator's estate.

Lord Chancellor, on a subsequent day (29 July 1772), determined that the defendant was entitled to retain the whole of what was due on the bond.

[The accuracy of this report was questioned by Romilly, *M. R., Boyd v. Brooks*, 1864, 34 Beav. 7.]

[461] HOOLEY v. HATTON.

16 May 1772. 1 Bro. C. C. 390 in not.

Where a larger legacy, by a codicil, was held not to be a satisfaction of a legacy by the will.

Lady Cecilia Isabella Finch, by her will, dated 30th August 1760, gives the plaintiff £500, payable in three months after her death, with interest.

By a codicil, dated 21st October 1768, she gives the plaintiff an annuity of £12 for her life.

By a second codicil, dated 21st October 1769, expressing it to be a codicil to her will, she gives the plaintiff £1000, but doth not direct any time of payment.

The plaintiff brought her bill for payment of both legacies; and upon hearing the cause at the Rolls, both were decreed.

The cause came on this day (16 May 1772) on an appeal from that decree; when it was insisted, that the legacy by the second codicil was to be considered as an ademption of the legacy by the will.

The cases cited were, *Masters v. Masters*, 1 P. W. 421; *Duke of St. Albans v. Beauclerk*, 2 Atk. 696; 1 Bro. C. C. 392, in not.; *Brown v. Duke of Bolton*, determined by Lord Camden.

The cause was afterwards (6 Feb. 1773) re-argued before the Lord Chancellor, assisted by Lord Chief Baron Smith, and Mr. Justice Aston.

Mr. Justice Aston.—The appeal is from so much of the decree as declares the plaintiff entitled to the legacy of £500 given by the will, and the £1000 given by the codicil; the defendants insisting, that the legacy of £1000 is a satisfaction of the legacy by the will.

The surest way to determine a case of this kind is, to consider the intention of the testator.

[462] The legacy of £500 is payable in three months, with interest. The legacy by the codicil is without any time of payment prefixed to it, or mention of interest; which, of course, will not be payable until a year after the testator's death.

Had she meant it as a satisfaction, it would have been easy for her to have said, I revoke the legacy of £500, and in lieu of it I give her £1000.

Many arguments have been urged, and many cases cited, but they leave the matter still neutral. Upon the whole, I conclude, the testatrix did not mean the legacy by the codicil to be a satisfaction of the legacy by the will; therefore, I think the plaintiff is entitled to both, and that the decree is right.

Lord Chief Baron Smith, for the reasons given by Mr. Justice Aston, concurred with him, that the plaintiff was entitled to both legacies.

Lord Chancellor.—When the matter was first brought on before me, I had some doubts; and it being a matter of consequence, I was desirous of having further assistance.

The question in the cause it is unnecessary to repeat.

This Court, in determining on personal estate, must be governed by the Ecclesiastical Court, where it has a concurrent jurisdiction.

Where there are two legacies given by the same will, it lies on the legatee to prove that the testator meant two legacies: but where they are given by two instruments, it lies on the *hæres*, to prove that such was not his meaning.

Now, in this case, is there any internal evidence? Nothing of that kind is to be collected; therefore, it must be determined by general rules.

[463] His Lordship cited *Wallop v. Hewett*, 2 Ch. Rep. 70; *Wyndham v. Wyndham*, Finch Rep. 267; *Governors of Christ's Hospital v. Gould*, 22 Feb. 22 Car. 2; *Newport v. Kinaston*, Finch Rep. 294; *Pitt v. Pidgeon*, 1 Ch. Ca. 301; as being all in point.

And the decree was affirmed.

JOHN ARDESJOFFE, Plaintiff; THOMAS BENNET, THOMAS CALVERTLEY, AND ELIZABETH WILSON, widow, Defendants.

(Reg. Lib. B. fol. 554.) 2 July 1772.

A. purchased a copyhold estate, which was surrendered to him out of Court, but he died before he was admitted. Q^u. Whether it passed by the will? The heir at law, a feme covert, to whom a legacy of £5000 was given by the same will, for her separate use, having constantly received the interest for five years, was held to have elected to take under the will; and it was determined that her infant heir, who had been admitted, held the premises in trust for the devisee.

William Dorrner, in consideration of £1200, paid by John Wilson on the 5th of September 1765, surrendered out of Court, into the hands of the Lord of the manor of Tottenham High Cross, in Middlesex, certain lands, held of the said manor, to the use of the said John Wilson and his heirs.

John Wilson, immediately upon the purchase, made his will, and thereby (amongst other things) devised the said copyhold estate to Elizabeth Wilson his mother, a defendant in the cause, in fee; and by his said will gave £5000 to trustees, to pay the interest to his sister Elizabeth, then the wife of the plaintiff, for her separate use, and the principal, after her death, to her appointment; and in default of her appointment, to her executors or administrators.

Before the said surrender was presented in Court, and before the said John Wilson was admitted, and consequently before he could surrender the copyhold premises [464] so purchased by him to the use of his will, he died; namely, on the 10th of October 1765, leaving his said sister Elizabeth his heir at law.

On the 19th of April 1766, at a Court then held, the said defendant was admitted to the copyhold premises as devisee.

She continued in possession, without interruption, till the death of Elizabeth, the plaintiff's late wife, which happened about five years after, when the plaintiff, as guardian to John, his infant son, the heir of the said Elizabeth, procured him to be admitted to the copyhold premises. Elizabeth, the plaintiff's late wife, the legatee, continued to receive the interest of her legacy of £5000 to her death; and she dying without having made any appointment of it, the plaintiff her husband took out administration to her; and in right thereof claimed the said legacy, and filed his bill to have the funds, in which the same was invested, transferred to him.

The defendants, by their answer, submitted, that as the legacy to the heir was of greater value than the copyhold, the devisees ought to be satisfied the value of the said copyhold premises, in case the devise thereof should be void, out of the said legacy.

The cause came on the 18th of June 1771 (Reg. Lib. A. fol. 394), before Sir Thomas Sewel, M. R., but John Ardesjoffe, the infant heir at law of Elizabeth the plaintiff's late wife, not being a party, his Honour declared, "the plaintiff as administrator of the said Elizabeth his wife, was entitled to the funds in which the said legacy of £5000 was invested, subject to any satisfaction, which upon the determination of the above question, the plaintiff might be liable to make to the defendant [465] Elizabeth Wilson, the mother of the testator, respecting the said copyhold premises; and by consent £1600 East India annuities were to be transferred to the Accountant General, to make good to the said defendant Elizabeth, what she might be deemed entitled to, in case she should lose the benefit of the devise"; and the heir at law not being a party in that cause, the said cause as to that matter, was ordered to stand over to be further heard, until the following cause, the said Elizabeth Wilson the devisee, plaintiff, the said Isaac Ardesjoffe the father, and John Ardesjoffe the infant heir, defendants, should be brought on, and both causes to be heard together.

Both causes came on to be heard (25, 29, & 30 June, & 2 July 1772).

The said Elizabeth Wilson by her bill stated the purchase of the copyhold estate by John her son; the surrender of it out of Court to the use of him, and his heirs; the devise of it to her in fee; and his death before he was admitted; and her admission to the said premises as devisee thereof, as before stated; and insisted, that though the said John Wilson was not admitted, and consequently could not surrender the copyhold premises to the use of his will, yet the devise was good, for the vendor having surrendered the same out of Court, and John Wilson the purchaser, having died before the surrender could be presented, and before he, by any act of his, could be admitted;

therefore the legal estate, and interest in the said premises, until the surrender was presented, and the said John Wilson, or some other person, was admitted to the said estate, under the said surrender, remained in the said William Dormer the vendor, as a trustee for [466] the said John Wilson; and as the said John Wilson could not procure the legal estate and interest, in the copyhold premises, in order to surrender the same to the use of his will; and by reason thereof, being only seised of a trust, or equitable interest therein, such interest was well devised, and passed by his will; and she insisted, that the legacy of £5000 to the said Elizabeth Ardesoife was in lieu of all claim in respect of the said copyhold estate; that she lived five years after the plaintiff the devisee was admitted to the said copyhold premises, without setting up any claim, and having constantly received the interest of the said legacy to the time of her death, it was and ought to be considered as making her election to take under the will; and that the same ought to be binding and conclusive on the defendant John Ardesoife the husband and administrator, and on John Ardesoife her infant heir.

The bill therefore prayed, that the will and the devise to the plaintiff, might be established; and that the copyhold premises might be surrendered to the plaintiff; and that the defendants might account for the rents and profits.

The defendant Ardesoife by his answer, admitted the will of John Wilson, his purchase of the copyhold estate, and the devise of it as before stated to the plaintiff Elizabeth Wilson; and also that the testator gave such legacy of £1000 and in such manner to Elizabeth his sister, and heir at law, as stated in the bill; he also admitted, that the said copyhold premises were surrendered out of Court, to the use of the said testator in fee; and that he died before [467] such surrender was presented for admission; but insisted, the testator might have been admitted, if he had used due diligence, by having a special Court, for that the said surrender was on the 5th of September 1765, and he died on the 10th of October following; and further insisted, that the said legacy of £5000 was not in lieu of all claims on the estate of the testator; and that Elizabeth his, the defendant's, late wife, had not elected to take under the will, as suggested by the bill.

On this day (2 July 1772, Reg. Lib. B. fol. 554), his Honour declared, it appeared from the evidence, that Elizabeth Ardesoife, had made her election to take the £5000 which appeared to be of greater value, than the copyhold premises, and therefore she was bound by such election; and that the defendant John Ardesoife the infant heir, who had been admitted to the said copyhold estate, as customary heir, was likewise bound thereby; and that the plaintiff Elizabeth Wilson was in equity entitled to the benefit of the said devise; and decreed the infant, when he attained the age of twenty-one years, unless he shewed cause to the contrary, to surrender the said copyhold estate to the said Elizabeth Wilson, and that she should hold and enjoy it in the mean time; and Isaac Ardesoife the father was to account for the rents and profits, and to pay the balance to the said Elizabeth Wilson.

[*Distinguished*, Campbell v. Ingilby, 1856, 21 Beav. 582.]

[468] BETTENSON v. WINDER.

17 July 1772.

Payment by an executor, or administrator of simple contract debts, not having any notice of debts by specialty, good payment, and no *devastavit*.

On the 16th of June 1737, John Kerril executed a bond to Ralph Boswel; Ralph died, and appointed Henry Boswel his executor; Henry died, and made the plaintiffs his executors, who proved his will: In 1776, John Kerril died intestate, seised of real estates, which descended to Ann his heiress at law, the wife of William Hughes one of the defendants; Mary the wife of the defendant, obtained letters of administration of Kerril, the intestate's personal estate, and possessed it, and being ignorant of the said bond, applied the personal estate in payment of debts by simple contract: the plaintiff filed his bill against the heir at law, and also against the administratrix, for an account of her intestate's personal estate; and to be paid by her personally his bond debt, she having, as was insisted by the Solicitor General Mr. Wedderburne, been guilty of a *devastavit*. The Attorney General Mr. Thurlow was counsel for the defendants; he argued first, that from the length of time since the bond was entered into, it was to be presumed to be satisfied, but payment of interest on the

1st of July 1748, being proved, and also a letter from the intestate in 1752, being an acknowledgment of it, that argument failed.

As to the *decastatid*, the Attorney General said, that where an executor, or administrator does an act, ignorant of a prior demand, and without fraud, or collusion, devastation was not to be imputed to him.

Lord Bathurst, C., was clear, that simple contract debts paid by an executor, or administrator, without [469] notice of a bond, was a good payment, and directed an account of what was due on the bond, from the 1st of July 1748, the time to which interest appeared to have been paid, and of the intestate's other debts; and likewise an account of the intestate's personal estates; and the administratrix to have credit in such account, for such part of the personal estate as had been applied in payment of simple contract debts, before she had actual notice of the plaintiff's demand, and the personal estate, to be applied in a course of administration.

INGE v. LIPPINGWELL.

20 July 1772.

On motion for an injunction, in order to shew that an agreement in writing, may be waived by parole, the case of *Pitcairn v. Hopgood* was cited; and the injunction was granted.

GREAMES v. STRITHO.

21 July 1772.

Relief where there is a mistake in a verdict.

Motion that the sheriff might be restrained from paying money levied by him; and if any money paid, that it might be refunded, upon the ground, that there was a mistake; and that the plaintiff had a right to set off.

Lord Chancellor. When an action is brought at law, and a verdict, and a mistake, this Court will sometimes interfere to have the account properly made out.

[470] The action was brought in 1768, and after great delay, the plaintiff in the action recovered a verdict: After a writ of error, the defendant at law files a bill in this Court, charging loss of papers, and obtains an injunction.

After dissolving the injunction, the defendant at law files a new bill, charging that the plaintiff at law hath recovered more than is really due to him.

A party may bring his action for what sum he pleases, without making any allowance, but the defendant hath liberty to set off.

The question is, whether this Court ought to interfere in this case.

If a party at law hath obtained a verdict, and the party hath any equitable demand in this Court, this Court will grant a *ne exeat regno*.

If the party is abroad, this Court will impound the property.

Therefore upon the plaintiff's paying the sum admitted to be due, and so much more, as is the amount of the sum recovered into the Bank, the injunction shall be granted.

MATTHEWS v. MATTHEWS.

25 July 1772. Lord Bathurst, C.

The plaintiff, the widow of the testator, was entitled to an annuity of £100 charged on freehold, and leasehold estates; and by an indenture of settlement, dated 9th of February 1762, her husband covenanted to convey the same of value to answer it; the husband dying, and the rents and profits not [471] being sufficient to answer the annuity, the plaintiff filed her bill to have the deficiency made good.

On hearing the cause, the Master was directed to take an account of what remained due to the plaintiff for her annuity, deducting what she had received of the rents and profits of the freehold and leasehold estates; and if the rents and profits were not sufficient to answer the annuity, the deficiency was to be made good out of her said husband's personal estate, an account of which was directed, and sufficient of the personal estate to answer the deficiency, or so far as the same would extend, was to be paid into the Bank, and laid out in the Accountant General's name in Bank annuities, in trust in the cause; and the interest to accrue thereon, and so much as the rents and profits of the freehold and leasehold estates would make up of the clear yearly sum of £100 was to be paid to her, and in case the interest or annual income of the

personal estate should not be sufficient for the purpose aforesaid, the plaintiff was to have the deficiency made good out of the capital of the personal estate, and if that were not sufficient, then out of the freehold and leasehold estates in the said indenture mentioned.

ASKEW v. TOWNSEND.

30 July 1772.

Where a perpetual injunction is decreed, it is not necessary to revive upon the death of a party, for the purpose of keeping on foot the injunction.

Bill to stay proceedings at law, on an ejectment under pretence of a forfeiture of a lease.

On hearing the cause, the Court directed the injunction that had issued to be perpetual, and the defendant to pay costs, which were not taxed; the [472] plaintiff dies; his representative files a bill of revivor, under pretence of continuing the injunction; but with a view to the costs; the defendant demurred, for that no duty remained, but payment of costs; and not being taxed, the suit could not be revived for costs only; the demurrer came on to be argued. It stood over, and after consideration, Lord Bathurst, C., allowed the demurrer, upon this ground, that the decreeing of a perpetual injunction, were it necessary to revive upon every abatement, would be in effect, decreeing a perpetual suit; besides, though a suit abate, the injunction that may have issued doth not drop; the order of course, that the representative of a deceased plaintiff may revive in a given time, or that the injunction may be dissolved, evinces it.

The case of *Yeomans v. Kilvington* in the Exchequer, 7th April 1762, was produced (*supra* [Dick. 351]).

[*Mews' Dig. Injunction*, C. 7, b. See *Andrews v. Lockwood*, 1847, 2 Ph. 401.]

GOMME v. WEST.

6 August 1772.

Application to discharge an order by the Master of the Rolls, for a person to come in, and be examined *pro interesse suo*, touching a claim on an estate, of which a receiver had been appointed by this Court; such order it was insisted, being only granted, when in the hands of sequestrators, and therefore irregular.

Lord Chancellor.—I am clearly of opinion with his Honour, that this Court will order a person to come in and be examined *pro interesse suo*, as well against a receiver appointed by this Court, as against sequestrators.

[473] *Ex parte* CHEVELEY.

3 Nov. 1772.

Mr. Perrin on behalf of one Cheveley, prayed to supersede a writ *de excommunicato capiendo*.

The Court refused to interfere, but ordered Cheveley to pay the costs of the application, to be taxed.

BIRT v. WHITE.

10 Dec. 1772. Lord Bathurst, C.

A witness going to the West Indies, an order was obtained to examine him; and he was accordingly examined: application was made to publish his deposition; but it being known that he was in Ireland, and publication not having passed, it was refused; it being held he must be examined in chief.

BACON v. GRIFFITH.

(Reg. Lib. A. fol. 40.) 14 Dec. 1772.

The defendant put in his answer to the original bill; afterwards the plaintiff obtained an order to amend his bill, and accordingly amended it.

The defendant obtained an order, for time to answer the amendments; but not answering, and being in contempt to a sequestration for not answering the amendments, the plaintiff applied this day to Sir Thomas Sewel, M. R., by motion, for the Clerk in Court to attend with the record, to take the bill *pro confesso* against the defendant as to the matter of the amend-[474]-ment: The defendant objected the irregularity, and argued on the absurdity of doing so.

But his Honour was clear, that there was no absurdity, and that it would be absurd not to do it; and therefore ordered the Clerk in Court to attend with the record. *Hawkins v. Crook*, 2 P. Wms. 556, was cited.

The plaintiff moved this day, to discharge the order: Mr. Perrin for the defendant; Mr. Madocks for the plaintiff; and Lord Bathurst, C., held the same to be improper; the original and amended bill being but one record.*

CEAL v. ASHURST.

16 Jan. 1773. Lord Bathurst, C.

On hearing the cause, it was referred to a Master to settle a case, for the opinion of the Judges of the Court of King's Bench, grounded on references of the like kind, in Lord Nottingham's time, mentioned in Finch's Reports.

SUMPTER v. LIFE.

23 Jan. 1773.

There is no way of getting rid of an award in this Court, but by bill.

Matters in difference had been referred to arbitrators; they made their award: the defendant this day moved, that the Accountant General might, pursuant to the award made under arbitration bonds, transfer some funds standing in his name to the defendant.

The plaintiff opposed the motion, and objected to the conduct of the arbitrators.

[475] *Lord Bathurst, C.*—In Courts of law, where an award is made a rule of Court, the practice is, to sue out an attachment against the party, to enforce the execution; thereby putting him upon impeaching the award, if he think fit.

Here there is no other way to impeach the award, but by bill (see *Spettigue v. Carpenter, supra* [Dick. 66]). Therefore take nothing by the motion.

[For subsequent Proceedings, see S. C. 1774, Dick. 497.]

COBRINGTON v. EARL OF SHELburne.

24 Jan. 1773.

A feme covert being the heir at law of the testator, and living separate, and answering separately from her husband, in pursuance of an order for that purpose; her admission of the will was held by Lord Bathurst, C., sufficient ground for the Court to establish it.

[*Mews' Dig. Husband and Wife*, III, 6; *Will*, VIII, b. *Not followed*, *Brown v. Hayward*, 1842, 1 *Hare*, 432.]

HILLIARD v. TAYLOR.

8 Feb. 1773. Ambl. 713, S. C.

Decree of the Master of the Rolls directing assets to be marshalled, in order to let in a bequest to a charity, reversed by the Lord Chancellor.

The cause was heard before Sir Thomas Clarke, M. R., and his Honour marshalled the assets, so as to preserve the personal estate, to satisfy the charity.

It came on an appeal to the Lord Chancellor from the decree; and stood this day for judgment.

Lord Bathurst, C.—All hath been said, which can be said, on behalf of the charity.

[476] The question is, whether marshalling of assets shall be let in, for the purpose of answering a charity.

I must be governed by precedents: In *Mogg v. Hodges*, 2 Vesey, 52; in the *Attorney General v. Forster*, 25 June 1766; in *Soresby v. Hollins*, 2 Burn's Eccl. Law, 508, the charity was thrown on the personal estate.

In *Dalton v. James*, decided by Lord Hardwicke, 5 February 1745, the testator devised his real estate, to pay debts and legacies, if the personal estate was not sufficient; and gave £1000 to a charity: the personal estate turning out not to be sufficient to pay the whole, the assets were marshalled for the charity.

In *Gastrel v. Baker*, 30 March 1747, determined by Lord Chancellor Hardwicke;

* *Qu.* If the plaintiff be not left remediless.—J. D.

in *Vaughan v. Purrier*, 26 February 1750; in *Attorney General v. Graves*, Nov. 1752 (Ambl. 155); and in *Attorney General v. Bethlem Hospital*, cited in it; Lord Hardwicke as to the marshalling of assets, was clear the old way of marshalling assets was to let in the legatee for satisfaction, out of a fund only applicable to the payment of his legacy, and to throw the other legacies on the other fund.

In the *Attorney General v. Tomkin*, 4th March 1754 (Ambl. 216), and in the *Attorney General v. Tindale*, 10th of Nov. 1759 (Ambl. 614), assets were marshalled to let in a charity: The decree was reversed by Lord Northington, 6th March 1764. *Forster v. Blagden*, 12th and 13th Nov. 1771 (Ambl. 704), decided by Lord Chief Baron Smith, sitting as one of the Lords Commissioners of the Great Seal, is in point: The plaintiff, the executor and trustee in the will, in that case brought his bill, in the nature of an interpleading bill, against the heir at law, and other charity legatees, for direction how to act; the Court would not marshal.

[477] If the marshalling of assets to let in charity, were to be tolerated, the Court would be doing that *per obliquum*, which it would not do *per directum* *Arnold v. Chapman*, 1 Vesey, 108.

Therefore let the decree, so far as it marshals the assets, be reversed.

WILLIAMS v. JOHNS.

12 Feb. 1773. Lord Bathurst, C.

This was an application without notice, to commit the defendant for a contempt, in making the person, who served him with a subpoena to appear and answer, eat the same, and otherwise ill treating him; the defendant ordered to stand committed, unless cause; but by reason of his ferocious and terrible disposition, no one being willing to hazard serving him, leaving the order at his house, was to be deemed good service.

WILSON v. WOMBWELL AND NOTTINGHAM.

20 Feb. 1773.

The question in this case was, whether the next of kin, or the executors, were entitled to the residue [of] the personal estate, undisposed of.

Lord Bathurst, C.—The question is, whether the executors are to take by the express words of the will; or take the residue by operation of law.

I take it to be law, that after satisfying debts, and legacies, if nothing is given to the executors, and no [478] apparent intention to the contrary, the residue will belong to them.

In the present case, it is evident nothing was intended for the executors, but what they had.

Therefore his Lordship directed the account of the personal estate; and declared the clear residue to belong to the next of kin; and to be divided accordingly.

RUGG v. FLOYER.

1 March 1773.

Service on the Clerk in Court on the defendant, with a notice of motion, that he might stand committed, for breach of an injunction; ordered to be deemed good service.

CALVERT v. ADAMS.

(Reg. Lib. A. fol. 136.)

A receiver appointed of two-fifths of an estate.

[But in *Willoughby v. Willoughby*, Lord Northington, C., refused to appoint a receiver of an undivided moiety, putting this question: how could a receiver let, set, or distrain, or take any step without the consent of the other co-parcener?—J. D.]

[479] *Ex parte* COLE.

15 March 1773.

A prisoner committed by commissioners of bankrupt for not answering a question relative to the bankrupt's estate, brought up by *habeas corpus*, and remanded until he would answer.

Thomas Miller having been committed by a warrant of commissioners of bankrupt, for not answering questions put to him, relative to the bankrupt's estate, under the

statute of the 5th of Geo. 2. s. 18, is brought up by *habeas corpus*, according to which the Court cannot bail, but must discharge, or remand the prisoner.

The counsel for the defendant alleged, they had various objections to the warrant of commitment ; and therefore prayed, the prisoner might be discharged.

Lord Bathurst, C. This is a question, whether the warrant is sufficient for me to remand the prisoner.

The statute of the 5th of Geo. 2 has taken care that the warrant shall not be quashed for want of form ; but here is a defect in point of form.

It is objected, that the commissioners did not qualify, but that is not to be presumed : It is also objected, that the question put is not relative to the bankrupt's estate : on the contrary, I think the question put is clearly pointed, and relative to the bankrupt's estate : and the summons is for his appearing, and answering questions relative to the estate of the bankrupt, and he will not answer ; therefore let the prisoner be remanded.

[480] *BROMFIELD v. CHICHESTER ; RAW v. DUTHELLY.*

27 Feb. & 2 & 3 March 1773. *Lord Bathurst, C.* *Ambl.* 715, S. C.

On a question as to leases renewed by an executrix after the term had expired, whether for her own benefit, or for the benefit of the estate of the testator, and a secret trust to her executors, they were declared to result for the next of kin.

Richard Raw, the husband of Frances Raw, being possessed of and entitled to certain estates in Cornwall, held by lease from the Crown, of which thirty-one years were then come, and which would expire at Lady-Day 1747, made his will dated the 29th day of December 1716, and thereby bequeathed the leases to Frances his wife, during so many years of the terms granted in and by the said several leases, as she should live, and after the death of his wife, if the terms granted by the said leases should then exist, he gives the same to his brother William Raw, for so many years of the term granted by the said leases, as he should live ; and after the death of William Raw, if the terms existed, he gives the same to such of the children of William Raw, as should be living at the time of his death, and after giving legacies, he gives the residue of his estates to his wife the said Frances Raw, and appoints her executrix.

In 1718 the testator died.

On 7th of February 1719, Frances Raw applied for, and obtained a lease of a spot of ground called Collier's Yard, as executrix of Richard Raw, contiguous to and inclosed in the part of the leasehold premises granted to her husband, and which ought to have been held by her husband, but in fact was not, and to commence from the 7th of February 1719, to the 25th of March 1747, to make it concurrent with the other leases.

[481] On the 6th April 1734, she applied for a renewal of the lease of Collier's Yard, as well as the other estates, and obtained a grant of both in her own name, so as to make up the term thirty-one years, and paid a fine of £1000, the rent reserved, being £16, 10s. 9d. for Prince's Meadow ; for Collier's Yard, £2.

On 22d June 1749, she obtained a grant for an additional term of fifteen years, to expire at Lady Day 1767 ; the fine she paid was £900 ; the same rent was reserved.

These leases recited the title of Frances, under the will of her husband.

She afterwards granted leases, and took fines ; in which leases, William Raw, and Ursula Raw, devisees in remainder of the said estates in the will of the testator Richard Raw, after the death of Frances, the widow, joined.

On the 18th of October 1760, Frances being then turned of eighty years, and of weak mind, and a great bigot in her religion, being a papist, was prevailed upon by one Pointz a jesuit, to execute a will prepared by him, and which he carried down to her, whereby after giving some legacies, she gave the residue to the defendants, Chichester and Hutton, the executors named in the will (whom she had never seen), upon such trust, and for such uses as they knew ; and they possessed her estate, and Pointz, who had procured her to appoint him the receiver of her estates, was permitted to continue in the receipt, but he never accounted.

Upon this case, the plaintiffs in the first cause, the devisees in remainder, under the will of the testator [482] Richard Raw upon the death of the said Frances the widow, and who claim the leasehold estates devised by the will of Richard Raw, have exhibited their bill to have an account of the rents and profits of these estates, accrued since the death of Frances.

The defendants in the second cause claim the said estate, as part of the estates of Frances the widow, they being her next of kin ; and have filed their bill against the executors, amongst other things, for an account of her estates, charging, that she had devised to her executors only a legal estate, and had not disposed of the equitable interest ; and by their bill particularly prayed, a discovery of the trust for which the estate was given to them.

The defendants pleaded to the discovery, but their plea was overruled.

They were at length, after three or four insufficient answers, driven to admit, that they did not claim any beneficial interest in the testatrix's estate ; and that the trust reposed in them, was a secret trust, now known to have been the College of Jesuits at St. Omers.

The questions in the causes principally are, whether Frances the widow, had a power to devise the leasehold estates ?

It was argued, that being a papist, nothing could vest in her beneficially, but only as executrix ; but supposing she had a power to devise, then a question arises, whether she hath devised ?

But the primary question is, whether the renewed leases are the estate of Richard Raw, or of Frances his widow ?

[483] Let us see whether this comes within the general rule, that old leases pervade renewed leases, and are considered as in the nature and quality of the old leases, and subject to the same terms and conditions as the old leases ; or whether there is any particular reason, to take this case out of that general rule ; and I am of opinion there is not. Her application was as executrix of Richard Raw, and though the leases are granted in her name, yet in the reciting part, they take notice of her being executrix.

Upon the general rule I before mentioned, the cases are numerous : *Cook v. Duckenfield* (2 Atk. 562) ; *Adlington v. Cann*, 14 May 1743 (3 Atk. 141), both decided by Lord Hardwicke. *Holt v. Holt*, 1 Chan. Cas. 190 ; *Luckin v. Rushworth*, Finch's Reports, 392 (2 Ch. Ca. 113, S. C.) ; *Patnur v. Young*, 1 Vern. 276 ; *Walley v. Walley*, 1 Vern. 484 ; *Witter v. Witter*, 3 P. Wms. 99 ; *Mason v. Day* (2 Eq. Ca. Abr. 494) ; *Norton v. Crop*, 2 Atkins, 74 ; *Verney v. Verney*, 1 Vesey, 428 ; *Hall v. Veal*, before Lord Camden.

Therefore declare, that the renewal of the leases of the estates in question, except Collier's Yard estate, of which Frances obtained an original lease, and which is to be considered as part of her estate, are to be considered as renewed for the benefit of the estate of the testator Richard Raw, and to go according to his will ; and the estate of Frances must have an allowance, for what she paid for fines, &c., on renewal ; and an account must be taken of what she received for fines and rents from under lessees ; and as to the residue of the estate of the testatrix Frances [484] Raw, declare Chichester and Hutton the executors, and to be considered only as trustees ; and that the beneficial interest in such residue results for the benefit of the next of kin of the said testatrix.

[*Mews' Dig. Trust and Trustee*, B. 5, c. S. C. *sub nom.* *Rawe v. Chichester*, Amb. 715. Followed on point as to interest, *Bradford v. Brownjohn*, 1868, 37 L. J. Ch. 198.]

MITFORD v. LARK.

10 May 1773. At Westminster, in Petty Bag, before Lord Bathurst, C.

On motion by Mr. Stainsby, on behalf of the defendant, that his bail might justify after being sworn, and examined ; his Lordship allowed of one, and disapproved the other.

FELL v. CHAMBERLAIN.

10 May 1773.

Bill retained in order that the plaintiff might indict the defendant for perjury.

The bill was for an injunction, to stay proceedings at law for a breach of covenant, in not assigning and delivering all the premises, which the defendant insisted, by an agreement in writing, and a lease in pursuance of it, were to be assigned ; the plaintiff states by his bill, that though the agreement was for all the premises, yet the defendant, at the time of the execution of the lease, to prevent delay, and to save the trouble and expence of a new lease, agreed, that three pieces of land should be excepted ; but the defendant by his answer, denying the fact, and insisting on the extent of the written agreement,

the plaintiff examined several witnesses to prove the fact ; which they did ; but their evidence being objected to at the hearing, they were not admitted to be read ; his Lordship, however, [485] retained the bill for twelve months, with liberty for the plaintiff to prefer a bill of indictment for perjury against the defendant, if so advised.

PEIRCE v. WATKIN.

24 May 1773.

Application to Sir Thomas Sewel, M. R., that the Register of the Episcopal and Consistory Court of Hereford, might deliver an original will to the plaintiff's solicitor, to be produced at the hearing of the cause ; the cause stood twelve out of the paper ; ordered, upon giving security to return the will in six weeks from the delivery.*

KINGSCOTE v. BAINSLY.

8 June 1773. Lord Bathurst, C.

Liberty given to the defendant to amend his answer, by striking out the admission of the plaintiff's pedigree, after publication.

FAWEL v. HEALIS.

14 June 1773. Ambl. 724, S. C.

If the vendor of an estate take the purchaser's bond as a security for the purchase money, and the purchaser becomes insolvent, the vendor hath no lien on the estate for the consideration money, but must abide by his security.

This cause stood for judgment this day.

Lord Bathurst, C. The question in this cause arose on the sale of an estate ; the vendor at the time of the conveyance took the purchaser's bond for the [486] money : before it was paid, the purchaser became insolvent, and a bankrupt.

The question is, whether the purchaser hath a lien on the estate for the consideration money ?

It hath been laid down as a general principle, that a vendor hath a specific lien on the estate ; that the same equity lies against trustees as against the principal.

In order to prove this point, three cases have been cited. *Chapman v. Tanner*, 1 Vern. 267, which as cited is certainly a very strong case, but upon looking into the Register's book, it is very different.

Polluxten v. Moore, 3 Atkins, 272, is very inaccurate ; therefore I had recourse to the Register's book for it.

And *Fordiffe v. Schrugam*, 8 December 1769, Reg. Lib. B. fol. 453.

I do not find an instance where a bond has been taken for the consideration money. It is evident he had an opinion of the purchaser at the time, otherwise he would not have let the money remain in his hands : I consider it as a transaction distinct and independent of the purchase : he lends him the money, and he chuses his security, and I think he must abide by it ; therefore let the bill be dismissed.

[487] RUCKER v. HAGEN.

21 June 1773. Ambl. 672, S. C.

A surety having paid the money for which he was bound, after a commission of bankruptcy had issued against the principal, held not to be barred of his demand against the bankrupt, by the commission, and certificate.

This cause stood this day for judgment.

Lord Bathurst, C. The bill is brought by the plaintiff Rucker, against the executors of Hagen, to recover what is due to him, on eight notes for £100 each, payable at different times.

The case is this : In 1766, Hagen applied to Baker, to borrow £10,000 Reduced Bank annuities ; which Baker lent, and Hagen gave his note, to re-transfer it on a month's notice.

* On a similar application in *Williams v. Floyer*, 16 July 1757, there was a similar order (*vid. Moore v. Roach, supra* [Dick. 65]).

The plaintiff Rucker, binds himself to Baker by bond, as a collateral security.

Baker received from Hagen one half year's interest of the annuities; but before he demanded of Hagen to re-transfer the annuities, Hagen became a bankrupt, and a commission issued against him, and he was found a bankrupt, and Baker proved his debt, and in April there was half a year's interest due on the annuities: The plaintiff Rucker paid £150 for such interest, and continued to pay two or three more half years' interest, and then pays to Baker the residue of the money, and takes up from Baker the notes given to him by Hagen.

Hagen obtains his certificate, and afterwards dies, having made his will, and the defendants his executors, who proved the will, and possessed his effects.

The question in the cause is, whether the plaintiff be, or be not entitled to come in upon the effects of Hagen for payment of the notes.

[488] Two objections are made to such claim: First, It is said, that the debt is discharged by the commission of bankruptcy, and the certificate; and being so discharged, secondly, That the notes under which the plaintiff claimed, were a debt proveable under the commission, and the engagement, and payment by the plaintiff being voluntary, he is not entitled to come in upon the effects of Hagen.

It is a general rule, if a debt can be proved under a commission of bankruptcy, it is discharged by the certificate.

If it is such a debt as cannot be proved, it is a subsequent debt.

What is this debt?

The plaintiff had no demand at the time of the commission of bankruptcy, because he had not been called upon as a collateral security, until after the commission (see *ex parte* Marshal, 1 Atkins, 131).

I am therefore of opinion, that the plaintiff Rucker's demand, was not a debt until after the commission, and consequently could not be proved under the commission: therefore let an account be taken of what is due to the plaintiff, and let him be paid out of the assets of Hagen.

MANLY v. HAMMET.

15 July 1773.

Injunction granted before the right was established at [law].

Bill for an injunction, and to stay the defendant from pulling down the walls, on which the timbers of the plaintiff's warehouses were placed.

The plaintiff obtained an injunction.

[489] On the hearing of the cause, the bill was retained with liberty for the plaintiff to bring an action of trespass against the defendant, for pulling down the walls: It was prayed to continue the injunction, which the Court did; to which it was objected, that the plaintiff ought first to prove his right.

Bush v. Weston, Prec. in Chan. 530; Mayor of York v. Pilkington, 1 Atkins, 282, were cited, to shew this Court will grant an injunction, before the right is established at law.

PALMER v. MURE.

23 July 1773.

Question respecting a double plea to discovery and relief, against a decree, and account taken in another Court.

This bill was a general account, and production for fraud, and for a discovery.

Plea to both relief and discovery.

Sir Thomas Sewel, M. R.—This comes before the Court upon a double plea as to relief, and discovery after a decree, and an account taken in another Court.

This is not a case of jurisdiction, or a competition between two Courts.

A bill to have a general account, for so general an act of fraud, to me seems improper: It ought only to have been to correct any thing that had passed unsettled through fraud.

This is not like the case of *Foster v. Vassel*, 3 Atk. 587. We must take the facts, as stated in the bill, and answer, and plea, to be true.

[490] The bill, by praying general account, prays too much: It ought to have been, to correct any errors, and to falsify any charge.

The bill also prays a discovery of what hath been suppressed.

The plea to the discovery, I think not good.

The bill is also to be relieved against fraud, to which a plaintiff is in all cases entitled,

if he makes it out : But then the charge of fraud must be pointed, and not a general charge.

Where a bill charges fraud, by the suppression of any fact in the surcharging of the defendant, which ought to have been discovered ; the defendant ought to answer particularly to the fact, either to admit or to deny it ; and therefore I think the plea as to the discovery bad, and that it ought to be overruled.

As to the relief, if the case be made out, the plaintiff will in my opinion be entitled to relief ; it is not new to pray relief by an original bill, against a decree and an account taken in a former cause.

There are many cases upon that head : *Abbot v. Green*, before Lord Hardwicke, decree set aside by original bill ; *Shelden v. Fortescue*, 3 P. Wms. 104, decree set aside by original bill ; *Kent v. Bridgman* (Pree. Ch. 233), after trial at law ; *Robinson v. Bell*, 2 Vern. 116, after a verdict ; *Humphreys v. Humphreys*, 3 P. Wms. 395 ; *Blackhall v. Combe*, 2 P. Wms. 70 ; *Lloyd v. Mansell*, 2 P. Wms. 73, set aside by original bill ; *Countess of Gainsborough v. Gifford*, 2 P. Wms. 424.

Lord Bathurst, C. I ought to apologize for keeping the matter so long before the Court : At first I differed in opinion with his Honour, but he hath now convinced me, and I entirely concede to [491] his Honour's opinion, and am first to thank him for the great pains he hath taken upon the occasion.

The prayer of the bill is too large, but there is no reason why he should not have some relief.

In the case of *Wells v. Lord Ambrose*, 16th December 1747, the defendant pleaded a bill in the Exchequer of Ireland, touching the same matters ; the plea was held good, but the Lord Chancellor nevertheless reserved a power to give liberty for the plaintiff to proceed in this Court, if so advised.

As to the discovery, I think with his Honour, that the plaintiff is entitled to it : therefore let the plea as to the discovery be overruled.

And as to the relief, let the plea stand for an answer, with liberty for the plaintiff to except, and save the benefit to the hearing : By the rule of the Court, the exceptions can be put in only two Terms before the plea is argued ; the two Terms are expired, and therefore unless the words, liberty to except be added, the plaintiff cannot except.

The case of *Snell v. Lewis*, by Lord Talbot, was cited upon the last head.

GAYNER v. WILKINSON.

15 & 19 Nov. 1773.

Husband a bankrupt : a contingent legacy to the wife vested, but not reduced into possession, the husband being dead, held not to vest in his assignees.

The bill was filed by the assignees of Andrew Pearson a bankrupt, to be paid a contingent legacy to the wife, by the will of Robert Smith ; the husband being dead, before it was reduced into possession, on the following case :

Robert Smith by his will, gave £2000 to the defendant Wilkinson in trust, to pay the interest to his nephew [492] James Atlee during his life, and from his decease in trust for the use and benefit of James's children Ursula, Mary, Elizabeth, and James, when they should respectively attain twenty-one, or marry ; and if any of them should die before their shares became payable, the same to go to the survivors, and be payable as their original shares.

Ursula and James died in the lifetime of the testator, leaving Mary and Elizabeth their sisters them surviving.

Mary intermarried with Andrew Pearson ; he became a bankrupt in 1768, and his estate and effects were assigned to the plaintiffs his assignees.

Elizabeth married John Atlee, who died never having reduced the legacy into possession, and afterwards Elizabeth died, and Mary Pearson became her administratrix.

James Atlee the father died, and soon after, the said Andrew Pearson the bankrupt died.

The plaintiffs as the assignees of the said Andrew Pearson, claimed the legacy, and the question was, whether the contingent legacy of £2000 given to the wife, not reduced into possession, should go to the assignees of the husband, who died before it was reduced into possession.

The cause stood over for judgment to this day (19 Nov. 1773).

Lord Bathurst, C., after stating the case, and facts as before cited, proceeded thus :

The assignees claim the whole £2000 as having vested in Mary Pearson the wife of the bankrupt ; and insist, that as assignees, they are entitled to have a transfer of the whole.

[493] It is given up, that John Atlee was entitled to a moiety of it.

At first it was given up, that the plaintiffs the assignees were entitled, and stood over, for the parties to agree to make an allowance to the widow.

I have not heard any case, where the question hath been between the assignees of a bankrupt, and the wife after the bankrupt's death.

The case of *Wenman v. Mason*, before Lord Northington, is not in point.

I shall consider this question upon the principles of law, and on those which prevail in this Court.

Whatever a bankrupt can release, or dispose of, is in the assignment from the Commissioners.

In *Miles v. Williams*, 1 P. Wms. 249, a bond executed to the wife *dum sola*, was held assignable by the Commissioners for two reasons ; one that the husband might assign : the other that he might release it to the King, to bring it within the statute.

So in the case of *Boswell v. Brandon*, 1 P. Wms. 558. The same point was determined in *Baker v. Dandy*, by Lord Hardwicke, C., on the authority of *Boswell v. Brandon*, stated in 2 *Atkins*, 207. The case of *Lord Carteret v. Pascal*, 3 P. Wms. 197, is to the same purpose.

In the case of *Carteret v. Pascal*, it must be noticed, that the wife was dead ; had the wife been living, it might have been determined otherwise.

There is a difference between an assignee for a consideration, and the assignees of a bankrupt : because a general assignee must sue in his own name ; a particular assignee must bring an action in the name of the husband.

[494] Therefore if the husband dies before it is recovered, the assignee for a valuable consideration, will lose all legal remedy, and must come into this Court for its assistance.

Particular assignments have been sometimes supported, but not generally : This Court will not strip a widow and children.

But be that as it may, in this case, the interest of the wife, was not such a legal interest as the husband could assign : he must have come into this Court. *Watson v. Marshall*, 19th March 1732, at the Rolls, 2 Vern. 270 : That case is not like this. In the case of *Wenman v. Mason*, 18th June 1765, before Lord Northington, C., the husband and wife assigned over a legacy given to the wife, to different persons ; the wife joined in the assignments. The bill was brought by the assignees merely as to priority. Not thinking of any doubt as to their interest, the husband and wife answered jointly. In December 1765, the cause came on again, when the wife was examined. On the 29th January 1768, the cause came on again, when the assignees agreed to allow her £300. *Grey v. Kentish*, as stated in 1 *Atkins*, 280, is errant nonsense : It must be read, as corrected by the Register's book, 21 July 1743, fol. 522.

Therefore let this bill be dismissed with costs.

[495] YATE v. BOLLAND.

12 Feb. 1774.

A plaintiff cannot set down a cause until after publication is passed, unless it be enlarged at the instance of the defendant, and so as not to hinder the plaintiff's setting down the cause.

Application was this day made to strike the cause out of the paper, or to discharge the order for enlarging publication, and to suppress the dispositions, upon this ground : that by the rules and course of the Court, as was said, a plaintiff cannot enlarge publication, and examine witnesses, after he has set down his cause.

Sir Thomas Sewal, M. R.— I am clear a plaintiff cannot set down his cause for hearing, until after publication is passed, unless publication is enlarged at the instance of the defendant, with the proviso, so as not to prevent the plaintiff from setting down the cause : If publication is passed, the plaintiff may set down the cause ; and if no witnesses have been examined, the plaintiff may afterwards enlarge publication, and examine witnesses : This was the case in the present instance ; and therefore take nothing by the motion.

C. r.—12*

HITE v. SALTER.

Hil. 1774. 7 Bro. P. C. 1, 208, S. C. [2nd ed. 7 Bro. P. C. 189].

On hearing the cause, an issue *decisum vel non*, was directed to be tried at the assizes; application by the plaintiff to have it tried at the bar of the Court of King's Bench: which was ordered, upon the plaintiff's agreeing to accept *nisi prius* costs, in case a verdict should be found in his favour.

[496] *PIGOT v. STACE.*

1 March 1774.

Where a bill is for a discovery, and relief, and the defendant answers to the relief, and pleads to the discovery, it is not necessary the plea should be argued, before the plaintiff can except to the answer.

The bill was brought for an injunction, and a discovery: the defendant pleaded to the relief, and answered as to the discovery: the plaintiff took exceptions to the answer, and obtained an order to refer the exceptions: the defendant on the above day, applied to discharge the order, to refer the exceptions for irregularity, insisting that according to the constant course of the Court, the plea should have been argued, before the plaintiff had taken exceptions.

Sir Thomas Seael, M. R., said he would go upon the reason of the thing, and put this question, could not the plaintiff have allowed the plea, and put the defendant upon the proof of it, by replying? That cannot be denied: the plea and answer therefore are distinct: and he held it not necessary, where the bill is for a discovery and relief, and a plea is put in to the relief, that the plea should be set down to be argued before the plaintiff can refer the answer for insufficiency. His Honour cited the *London Assurance Company v. East India Company*, 3 P. Wms. 326, 17 Dec. 1754, before Lord Hardwicke, bill for relief and discovery: plea to the whole, allowed as to the relief, overruled as to the discovery; and cited also *Turner v. Mitchell*, 9th February 1754, determined by Lord Hardwicke, C., where on a bill for an account of real and personal estate, there was a plea to the whole, which was overruled so far as it related to the personal estate, but allowed as to the real estate.

[497] *SUMPTER v. LIFE.*

9 March 1774.

Award not to be set aside but for partiality, and misbehaviour of the arbitrators, or for their exceeding their commission.

Bill to set aside the award (*vid. supra* [474]) in this case.

Lord Bathurst, C. There is no instance of setting aside an award, except on the grounds of partiality and misbehaviour, or for that the arbitrators have exceeded their commission.

The question here is, whether the arbitrators have misbehaved. I am clear they have not. The only ground for relief against the award is, for that the arbitrators have allowed £250 for costs: The matter being before them, who can be so proper judges of the costs?

Therefore let the bill be dismissed.

GOODWIN v. CLARKE.

(Reg. Lib. A. fol. 289.) 8 March 1774.

Bill to have a specific performance of an agreement, and that the defendant might pay £1900, the remainder of the purchase money; £100 having been paid; the defendant threatening to go abroad, a writ of *ne exeat regno* was granted, to be marked in the sum of £300 (*Qu. Why that sum?—J. D.*).

[The above case was cited by Mr. Selwyn, the 21st of June 1784, Anon. on an application to Lord Thurlow, C., for a *ne exeat regno* on the like grounds; his Lordship put this question, how doth it appear, that the plaintiff can make a title? And although he go abroad *non constat*, he hath not property here; and in what sum am I to order the writ to be indorsed? Therefore take nothing by the motion.—J. D.]

[498] YEO v. YEO.

24 Jan. 1774. Lord Bathurst, C.

Bill by a wife against her husband, for a specific performance of articles, and for alimony ; she by his cruel treatment, being obliged to leave him ; application that he might pay her £1000 for her support, and to carry on the suit : £500 were ordered to be paid to her in a month, for the purpose of carrying on the suit, without prejudice.

YARROWAY v. HAND.

29 April 1774.

At the hearing, the cause went off for want of parties, with liberty for the plaintiff to amend ; neglecting to amend, he was ordered to do so by a given time, or the bill to be dismissed.

HANCOM v. ALLEN.

2 May 1774.

If a trustee lay out trust money in a fund which the Court does not adopt, and such fund afterwards sinks in its value, this Court though there were no *mala fides* will throw the loss upon the trustee ; otherwise if laid out in the fund which the Court adopts.

The bill was to have some trust money laid out pursuant to the trusts of a deed bearing date 1740 : The trust money had been laid out by the trustees in funds, which sunk in their value, without any *mala fides* ; but the same not being laid [499] out in the fund in which the Court directs trust money to be laid out, the trustees were ordered to account for the principal, and to pay it into the Bank, and then that it should be laid out in Bank 3 per cent. annuities.

The following case was cited, *Trafford v. Boehm*, before Lord Hardwicke, C. (3 Atk. 440), where a trustee laid out trust money in the South Sea annuities, which afterwards sunk in their value ; it was considered as a departure from the trust, and the trustee ordered personally to make good the deficiency to the trust-estate.

[In *Adie v. Fennilliteau* [1 Cox, 24], by the Lords Commissioners Lord Loughborough, Ashhurst, and Hotham, in April 1783, a trustee laid out trust money in South Sea annuities ; they afterwards fell in their price, and though it was in the same fund in which the greatest part of the testator's personal estate was at his death invested, their Lordships held it to be an improper investment : and that the trustee should abide the loss.

In *Peat v. Crane*, before Lord Thurlow, C., the trustee laid out trust money in Bank 3 per cent consolidated annuities, the fund the Court adopts (with a view to benefit the trust, so that it might not lie unproductive), the said annuities afterwards sunk in their price, the trustee claimed an allowance for what he had so laid out ; his Lordship at first doubted as to making the allowance, but after consideration was clear he was entitled to an allowance, according to the price at which the annuities were purchased.—J. D.]

[*Mews' Dig. Trust and Trustee*, C, 6, c, i ; 11, b, i ; *Reversed* by H. L. *sub nom.* *Allen v. Hancorn*, 7 Bro. P. C. 375, q. v. See also *Lewin on Trusts*, 10th ed. p. 332 *et seq.*]

[500] BLOUNT v. SWINNERTON.

16 May 1774.

An issue *devisavit vel non*, having been tried, the defendant who was the heir at law, applied for a new trial, which was granted on his payment of the costs at law.

Afterwards on the 20th of December 1774, there was another trial of the same issue, between the same parties, at the instance of the heir at law, upon the same terms.

DIGBY v. LEGARD.

6 June 1774.

Testatrix devises her estates to trustees to sell, to pay debts, and devises the surplus to five persons, one of whom dies in her life-time ; on the question, whether the share

given to the person dying was to be considered as land, it was held land, and to go to the testatrix's heir. Renewal of leases for lives, a revocation of the will as to those leases, but not of leases for years, they being personalty.

The question in this cause arose on the will of Elizabeth Biersly : she by her will dated the 19th of April 1763, begins with directing her funeral expences, debts, and legacies to be paid, and charges all her estates with the payment : and for that purpose devises all her estates in Yorkshire and Durham, to trustees to sell, and also devises all her leasehold estates for lives to the same trustees to sell, and bequeaths to them her personal estate to turn into money, and directs the money to arise from all the said funds to be applied in payment of her debts, funeral expences, and legacies : she then gives several legacies, and as to the residue of her personal estate, and the money to arise from the said freehold and leasehold estates, and rents and profits, she gives as follows : To Lady Legard the plaintiff, one fifth : to Jane Fisher, another fifth : to Lady Cayley, another fifth : to Mary Cartwright, another fifth : and to Henrietta Digby, another fifth.

[501] By a codicil dated the 2d of November 1764, duly attested by three witnesses, reciting the disposition of the surplus of her real, and personal estate, in fifths by her will : she revokes the disposition of the fifth to Mary Cartwright, and gives that fifth to Lucy Osbaldiston.

After the will, and codicil, the testatrix surrendered the freehold leases for lives, and obtained new leases.

She also surrendered leaseholds, held for terms of years, and took new leases for further terms.

Lady Cayley, to whom the testatrix gave one fifth part of the surplus money, to arise from the sale of her real and personal estate, after payment of debts, &c., died in the life-time of the testatrix.

Three questions were made in the cause.

One was, whether the surrender of the freehold leases for lives was a revocation of the will, as to those leases.

The same question was made as to the surrender and renewal of the leases for terms of years.

These points were barely mentioned, and given up : And it was admitted on all hands, that the surrender of the freehold leases was a revocation of the will as to those leases, and that they descended to the heir at law.

And that the leaseholds for years were personalty : that as to personal estate, a will did not take effect till the death of the testator, and comprehended the personalty, let it be improved as it might, since the time the will was made.

The third question was, whether the fifth of the surplus money arising from the real estates devised to [502] Lady Cayley, was to be considered still as land, and descended to the heir at law of the testatrix Elizabeth Biersly, as undeviseed, or was to be considered as personal estate, undisposed, and to go to her next of kin.

On the part of the next of kin, it was insisted, that the said testatrix having deviseed her real estates to trustees to be sold, they were to be considered from the moment of her death as sold, and part of her personal estate.

On behalf of the heir at law, it was insisted, that the testatrix had only charged, and subjected her real estates, with the payment of her debts, &c., in case the personal estate were not sufficient : that the personal estate was the primary and natural fund for the payment.

That the sale of the real estates was to take place only in case of the deficiency of the personal estate.

That it might happen, there was not occasion to sell more than a part of the real estate, if any of it : And would it be said, supposing there was not any occasion to have recourse to the real estates, that the trustees must sell it ? Might not the residuary devisees, as the said estates are only subjected, and charged with debts and legacies, have exonerated it themselves, and called upon the trustees for a conveyance ?

It was therefore insisted that Lady Cayley's share must be considered as land, and she dying in the testatrix's life-time, it must be considered as undisposed, and to have descended to the heir of the testatrix.

Lord Bathurst, C., was of that opinion, and declared, the fifth given to Lady Cayley,

who died in the testatrix's life-time, was to be considered as land undisposed, [503] and to belong to the defendant Jarvis, the heir at law of the said Elizabeth Biersly.

His Lordship also declared, that the leasehold estates held of the Bishop of Durham for lives, the leases of which the testatrix had renewed after her will, was a revocation as to the devise of those leases, and descended to her heir. And also declared, that the devise of the leases for years, was not affected by the renewal of those leases after the will, but that they were to be considered as personalty, and as such to pass by the will.

The following cases were cited, *Durour v. Motteux* (1 Ves. 320); *Emblyn v. Freeman* (Prec. Ch. 541); *Stonehouse v. Evelyn* (3 P. Wms. 252); *Mallabar v. Mallabar* (2 Eq. Ca. Abr. 431).

Ex parte DUNCOMBE.

20 June 1774.

Where the demand is legal, this Court will not grant a writ of *ne exeat regno*.

Application to discharge an order, dated 20th April 1774, for a writ of *ne exeat regno*. *Pearne v. Lisle*, April 1749 (Ambl. 75); *Robinson v. Wilkie*, 18 June 1753 (Ambl. 177), were cited.

Lord Bathurst, C.—This Court is not to be too exact in granting a writ of *ne exeat regno*, since to refuse it, may be attended with irreparable damage, and as it is only till answer, and further order, it is the defendant's own fault in not answering, if it hangs over him.

In this case the matter in question is merely legal: and it is not enough to say, that some of the parties will not join in an action; and therefore I am entitled to a writ of *ne exeat regno*.

[504] There is no case where this Court hath interposed in a legal demand, to hold a party to bail, because a party will not join with the plaintiff in an action.

Therefore let the writ of *ne exeat regno*, and the order for the same be discharged.

BROWN v. GREENLY.

22 June 1774. *Lord Bathurst, C.*

A witness examined *de bene esse*. At the time he was examined he was disinterested: he afterwards became interested by the death of his brother. His depositions were ordered to be published.

TAYLOR v. BOUCHER.

21 July 1774.

In this cause it was said, a pauper cannot appeal. On inquiry of the Bar that proposition could not be disproved, and, in fact, was assented to.

[See *Drennan v. Andrew*, 1866, L. R. 1 Ch. 301, n., where the authorities are collected.]

BARROW v. BARROW, et e contra.

13 July 1774.

Settlement in consideration of marriage procured by fraud and imposition in which the wife was not concerned, shall not be set aside.

These causes stood for judgment till this day.

Lord Chancellor.—The question in these causes depends on the soundness of the understanding of *Lawrence Barrow*, and the practices on him.

He was a man of extraordinary understanding till the beginning of the year 1761, when he had a stroke of the palsy; after which his intellects were quite im- [505] paired, and he was not fit for business of any kind, being in a state of childhood.

James Baker, the father of the defendant *Charity*, brought about a marriage between the said *Lawrence Barrow* and the said *Charity*; and he was made to execute the settlement in question in this cause: first, to himself for life, subject to waste; then to his wife for life, without impeachment of waste; then to sons; then to daughters, with remainder in fee to the wife.

This estate was subject to a mortgage at that time, and he was made to covenant that the estate was free from incumbrances.

As to his personal estate, if he did not make any appointment between that time and his death, the wife was to have it.

When the day for the celebration of the marriage arrived, Charity, the intended wife, revolted.

The father, being sensible it would take time to make new deeds, ordered Charity's name to be erased, and Mary, the name of another daughter, to be inserted in its place. Afterwards Mary revolted, and Charity was prevailed upon to marry the said Lawrence Barrow, and then her name was again inserted.

Lawrence Barrow being dead, Samuel Barrow, the heir at law of the said Lawrence Barrow deceased, and his personal representative, filed his bill, amongst other things, to set the said settlement aside for fraud and imposition, and taking advantage of the man's weakness.

The question is, whether there is sufficient ground to set aside, or to send it to a jury for further inquiry, which hath been pressed.

[506] The first consideration is, whether this be such a case as a Court of Equity will interfere in. Unless it be a gross, glaring imposition and fraud, the Court will not interpose.

Whatever fraud or imposition might have been practised by others, Charity the wife was not concerned in it; and I never knew an instance where a settlement in consideration of marriage hath been set aside, and I will not make a precedent for it.

Therefore, let the bill, so far as it seeks to set aside the settlement, be dismissed.

KINASTON v. KINASTON.

18 July 1774. 1 Bro. C. C. 457 in not. S. C.

Question, whether the personal estate was exempted from debts, and whether there was a resulting trust in the estate devised in trust, after the trusts are executed for the benefit of the heir at law.

The testator by his will charged his whole estates with the payment of all his debts, legacies, and funeral expences: and, for that purpose, he devised particular lands to trustees in trust to sell the same, and pay his debts, legacies, and funeral expences; and he gave to his wife all his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate.

Lord Bathurst, C. This bill is brought by the heir at law of the testator against his widow, to establish the will of the testator.

The first question is, whether the personal estate is exempted from the payment of the testator's debts. The personal estate is the natural fund for the payment of debts, unless it be exempted: and by the words of the will I am clear it is exempted. See the case of *Wainwright v. Bendlows*, 2 Vern. 718.

[507] The second question is, whether there is a resulting trust in favour of the heir at law, in the estate devised for the payment of debts, and whether any thing undisposed of is any part of the trust undisposed of.

The estate is worth £30,000, the debts £16,000; so that the surplus must go to the heir at law, except there are words in the will to pass it. The words of the will are clear.

Thompson v. King, August 1739, founded on *Wheeler v. Walrond* (1 Eq. Ca. Abr. 210; 3 P. Wms. 63 in not.).

The only question remaining is, whether the personal estate is given to the wife for life only, or absolutely: and I am of opinion she is entitled to an absolute interest in it.

Richards v. Baker, 8 Geo. 2 (2 Atk. 321).

The plaintiff being the heir at law, and bringing the bill to establish the will, it is not necessary to establish it: and let the bill, so far as it seeks an account of the testator's personal estate, and to have the same placed out, and that prays to be let into possession of such part of the real estate devised to be sold as shall remain unsold, after the trusts of the will concerning the same are executed, be dismissed; and declare the widow is entitled to the rents and profits of the residue of the said real estate during her life, and to the whole of the personal estate absolutely.

[508] JOHN BROWNING AND LOUISA HIS WIFE, the widow of the Testator, Plaintiffs ;
JAMES BARTON AND OTHERS, Defendants.

(Reg. Lib. A. fol. 482.) 28 July 1774. See *Sawyer v. Bowyer*, 1 Bro. C. C. 388.

A witness examined in chief before the hearing, cannot afterwards be examined before the Master without a special order, and then not to any matters he had been before examined to, or in which he may be interested, and the Master is to settle the interrogatories. See *Sawyer v. Bowyer*, *infra* [Dick. 639].

By the decree dated 6th March 1773, it was referred to Mr. Pratt, one of the Masters, to enquire what part of the plate and jewels belonging to the testator, was at his house at Penwickham at his death, and of what the paraphernalia of his wife consisted, and to state the same.

The evidence and proofs taken previously to the hearing not being sufficient to enable the Master to state the aforesaid matter, the plaintiff, on the Master's certificate, obtained an order for, and sued out a commission to examine witnesses, which was executed and returned.

The defendant Barton afterwards discovering that John Le Gross and his wife, and Sarah Prescott (which Sarah was examined, previously to the hearing, on the part of the plaintiff only, and the said Le Gross and his wife had been examined by both sides), could give very material evidence respecting the above enquiry :

Mr. Ainge, on the part of the defendant James Barton, this day (9 July 1774) moved the Master of the Rolls, sitting for the Lord Chancellor, as of course, for leave to examine the said Le Gross and wife, and Sarah Prescott. His Honour, without the least pause, said it was contrary to rule ; or, if not, that it was not of course, and denied the motion ; but, being told there had been similar orders upon petitions, his Honour directed me, if any such order were produced, to [509] draw up an order. One or two were produced, but they not being satisfactory, the statement not being full, and seeming to have passed *sub silentio*, I desired Mr. Lee, the clerk in Court, who was concerned in the cause, to turn the motion into a petition to his Honour, and pointedly to state the case, and what he prayed. He did so ; and his Honour, after consideration, said he was more confirmed in his opinion, and rejected it ; but observed, the party might, if so advised, move it specially.

Accordingly, on this day (28 July 1774) Mr. Perrin, on behalf of the defendant, after stating the case as above, and alleging that, by the rule of the Court, the defendant could not examine the said witnesses, as they had been examined in chief previously to the hearing, without an order for the purpose, moved that the said John Le Gross and his wife, and Sarah Prescott, might be examined before the Master, on interrogatories to be settled by him, on behalf of the said defendant Barton : which, after hearing Mr. Solicitor General and Mr. Holt for the plaintiff, Lord Bathurst, C., ordered, with this addition : that the said witnesses were not to be examined to any matter they had been before examined to, nor to any matter in which they might be interested, and the Master to settle the interrogatories. His Lordship said he had been apprised of the motion by his Honour, and had talked with him upon it, and perfectly coincided with him that it was not of course, and if granted, to be granted with caution.

[510] WOOD v. THOMPSON.

23 July 1774. Lord Bathurst, C.

Demurrer filed, held on argument, not good ; and a demurrer at bar good ; the defendant is not to have costs.

ORD v. HUDDLESTON.

25 Jan. 1775. Lord Bathurst, C., assisted by Sir Thomas Sewel, M. R.

Question, whether to a plea the plaintiff had a right to reply generally, and examine at large.

Bill against the defendant for an account, and relief. The plaintiff founds his claims as representative of Ann Salkeld.

The defendant pleaded, that Ann Salkeld, under whom the plaintiff claimed, was living.

The plaintiff replied, and entered into a general examination to prove his case.

The defendant applied this day to suppress the depositions, except such as related to Ann Sakeld's being alive, and that the plaintiff might pay the costs of the *respondeas ouster*. Mr. Perrin and Mr. Madoeks for the plaintiff; Mr. Attorney General, Mr. Solicitor General, and Mr. Kenyon, for the defendant.

It was said by the plaintiff, that a plea in abatement puts the whole matter of the bill in issue, and that the plaintiff had a right to prove his whole case; so that should the plea be falsified, the plaintiff might have relief upon the whole of his bill.

[511] *Sir Thomas Stork, M. R.*—I see no difference whether a plea be over-ruled for want of relevancy, or for being falsified. A replication puts every matter in issue.

For the plaintiff it was said, there are three kinds of pleas: first, to the jurisdiction; secondly, in bar; thirdly, to the person. The question is, what kind of plea this is, and what will be the consequence if determined one way or the other?

That this is to be considered as a plea in bar. A defendant may make as many defences as he pleases; and if he chuses to rest upon one defence, he is bound by it: as to pleas in abatement, if a plea is over-ruled upon proof, it seems as if the defendant should have a *respondeas ouster*.

Lord Bathurst, C.—I wish there had been precedents, but there being none, the Court must act in such a way as not to do injustice to either side. What is the plea? It is, that the person under whom the plaintiff comes before the Court, as his administrator, is alive. To this the plaintiff hath replied.

* If the plea is true, it is impossible for the plaintiff to stir.

This is the only matter in issue, and the plaintiff hath entered into evidence to support his case.

The question is, whether the plaintiff having gone into this examination, the depositions shall be suppressed.

It hath been argued on the part of the defendant, that an ill use might be made of them. I do not see that: for if the bill is dismissed, the plaintiff will have his [512] costs: and to speak my sentiments, when a plea goes to the plaintiff's right of bringing a suit, it bars the defendant from making any other defence.

Were it otherwise, in many cases the greatest inconvenience would result to a plaintiff, as it would prevent him from making any discovery.

Suppose the plea should be disproved, what is the Court to do? I am in some doubt, because his Honour seems to think the Court may make a decree upon a plea being disproved.

As this Court will permit a plaintiff to examine *de bene esse*, upon filing a bill, in this case I do not see any inconvenience can arise from what the plaintiff hath done. He hath indeed been misadvised. But it doth not appear that he hath examined with any ill view.

If the bill is dismissed where the plaintiff hath no right in equity, the depositions are not permitted to be read at law.*

There can be no inconvenience to the parties to let the depositions stand. If they appear not to be relevant, they will have no effect.

Sir Thomas Stork, M. R.—The replication filed by the plaintiff strikes me to be a general replication; and I think it necessary, whether the plea be to part, or to the whole bill, that the plaintiff should reply to the whole.

Sometimes special replications are put in: such a replication admits every other part of the answer not replied to.

I take this to be a plea in bar; for it is an absolute denial of the plaintiff's or any person's right: it is [513] therefore incumbent on the plaintiff to prove his right. I conceive, therefore, the plaintiff had a right to reply generally; and having filed such a replication, he is well founded in entering into a general examination.

Lord Chancellor.—Take nothing by the motion.

* *Qu. tamē.* It has been said, that if a bill be dismissed out of Court for irregularity, the whole is irregular, and the depositions shall not be read.—J. D.

NEAL v. CUST.

10 Feb. 1775.

Settlement set aside as being contrary to articles, and a new settlement to be executed agreeably to the articles.

Bill to have a settlement set aside, as being contrary to articles, and to have new settlement made according to the articles.

The cases cited were, *Powel v. Price*, 2 P. Wms. 535; *Burton v. Hastings*, 1 Eq. Cas. Ab. 393; *Meredith v. Leslie*, in House of Lords (6 Bro. P. C. 209) [2nd ed. 6 Bro. P. C. 338]; *Chambers v. Chambers*, Fitzgibbon, 127. and in *Viner's Abridg.* under *Tit. Contract*; *Parkins v. Robins*.

Lord Bathurst, C., declared the settlement to be contrary to the articles; and a new settlement to be executed agreeably to the articles, so far as the uses were existing, and capable of taking effect.

GEMMEL v. BLOCK.

6 March 1775.

Bill by two plaintiffs dismissed as to one of them.

Bill brought by Gemmel and Dallas, to be paid jointly a particular demand. The Court, upon hearing the cause, being of opinion that the plaintiff Dallas was not entitled to any thing, a doubt arose, as the demand was joint, whether the bill as to one [514] of the plaintiffs, could be dismissed. After two or three days' consideration, Lord Bathurst, C., dismissed so much of the bill as related to the plaintiff Dallas.*

KETTLEBY v. KETTLEBY; RUNDLE v. PETTIT, by bill of revivor.

31 March 1775.

Bond creditors not to have interest beyond the penalty of their bonds.

The original bill was by the creditors of the testators, James Kettleby, Abel Kettleby, and Abel Johnston Kettleby, for an account, and to be paid their debts out of the respective estates, personal and real, of the said respective testators.

On hearing the first cause, the 6th of December 1765, the respective wills of the said James Kettleby, Abel Kettleby, and Abel Johnston Kettleby, were established; and it was referred to Mr. Montague, one of the Masters, to take an account of what was due to the several mortgagees, and incumbrancers on the estates; and also an account of the debts, funeral expences, and legacies of the respective testators; and the Master was to advertise for the creditors to come before him and prove their debts. An account was also directed to be taken of their respective personal estates, which were to be applied in a course of administration; and if deficient, the deficiency was to be raised by sale of the real estates, and all parties were to be paid their costs.

The estates were sold, and the purchase money paid into the Bank, and laid out in the purchase of £19,657 Bank annuities, in the Name of the Accountant Ge[n]eral of this Court, on which there having accrued £694, 13s. 3d. for interest, and the Master not having made his general report, the creditors, on the first day of July 1774, after stating the above facts, prayed, as the fund to pay the debts was abundantly more than sufficient, that the Master might compute interest from the date of the respective bonds, or otherwise on the principal of the bonds, from the death of James Kettleby the younger, and make a separate report of the debts by specialty, and also of the simple contract debts, and tax the costs of the creditors.

Mr. Madocks was counsel for Rundle and his wife, the plaintiffs in the revised cause.

Mr. Ambler for the other parties.

And after hearing what could be alleged, Lord Bathurst, C., ordered, on the above 1st July 1774 (Reg. Lib. A. fol. 387), that the Master should make a separate report of what was due to the creditors.

* *Mattison v. Mattison*, 28 July 1773, at the Rolls, was cited as in point, but *quæ*—J. D.

On the 1st of December 1774, the Master made his report, and certified that he had taken an account of what was due to the respective creditors, several of whom were creditors by bond; but it appearing that the principal of the bonds, and the interest thereon, exceeded the penalties, he had not allowed interest beyond the penalties; and certified that there were due to the several creditors, by bond, and simple contract, mentioned in the schedule to his report, the several sums therein mentioned, amounting together to the sum of £858, 12s. 2d., £12, 2s. of which was due to two simple contract creditors; the remainder to the bond creditors, whose bonds appear, by the same schedule, to be dated in 1701, 1704, 1705, and 1706.

[516] To this report the bond creditors took exceptions, for that the Master had not allowed them interest beyond the penalties of their respective bonds.

On the 31st of March 1775, the said exceptions were argued:

When Lord Bathurst, C. over-ruled the exceptions reluctantly, as he said, there being so over an abundant fund; but that he was tied down by the constant and uniform usage of the Court.

KNIGHT v. MACLEAN.

Before Mr. J. Buller, sitting for Lord Thurlow, C.

Similar exceptions, and upon the same ground, were taken to the report of Master Ord.

Mr. Justice Buller, on a determination of Lord Mansfield, thought the exceptions founded, and allowed them.

The exceptions coming on to be re-argued before Lord Thurlow, his Lordship said he would consider of it, and talk with the Judges: and, by his direction, I sent him copies of the cases of *Grosvenor v. Cook*, *supra*, *Gibson v. Egerton*, *supra*, and this case of *Kettleby v. Kettleby*; and on a subsequent day, he said he had conversed with the Judges, who were satisfied as he was, that a bond creditor was not entitled beyond the penalty of his bond; and therefore over-ruled the exceptions, which before had been allowed by Mr. J. Buller.

And in *Tew v. Winterton*, Lord Thurlow over-ruled exceptions taken on the same ground.—J. D.

BARRET v. GLUBB.

12 May 1775.

The purchaser of an advowson, knowing at the time of the purchase, that the incumbent was on his death-bed, and who, in fact, died the next day. *Qu.* whether the contract was simoniacal and void.

The bill was, to have a specific performance, and execution of the grant of an advowson to the plaintiff, and to restrain the defendant from commencing any suit, or *quare impedit* on this case.

John Glubb was surviving trustee for selling the advowson in question, and other estates of the defendant Roll.

[517] The other estate had been sold. The advowson had been long on sale, the price set being thought too high.

There were advertisements for the sale, with directions to apply to Roll.

The plaintiff applied by letter to know the lowest price.

The price being thought too high, the plaintiff wrote to Glubb, offering £1200. Afterwards he employed Clayfield, and commissioned him to go to the extent of £1400, who kept chaffering till 10th August 1772; when Clayfield finished the bargain with Roll for £1400, paid £20 in part, and took Roll's receipt.

After the contract was signed, the plaintiff employed his attorney to prepare deeds of conveyance, and tendered them for execution, and the remainder of the purchase money.

At this time there seemed to be a disposition in Glubb, and Roll to be off the bargain; and they offered Clayfield something to relinquish it.

During this parleying, Morgan the incumbent died, and the plaintiff presented.

It was insisted, that the purchase of an advowson when the incumbent is dying is void.

Lord Bathurst, C.—Let a case be made for the opinion of the Judges of the Court of Common Pleas, and let the question be, whether a man purchasing a rectory with

the cure of souls, having notice that the incumbent was on his death-bed, and uncertain whether he would live over the night, and, in fact, the incumbent dying the next day, and the purchaser presenting his clerk the living, such a purchase to be void, as being upon a simoniacal contract.*

[518] PARKINSON v. KERRIDGE.

15 May 1775.

Application to revive in a month, or to dismiss the bill against the surviving defendant, publication having passed ; denied upon consideration.

Bill against two defendants. The plaintiff proceeded to the examination of witnesses, and to pass publication. One of the defendants died. The survivor moved on the 19th of January, upon a notice, that the plaintiff might revive in a given time, or the bill be dismissed ; which, in the hurry of the seal, was ordered. The order being novel, and there being an objection to it, for that the suit did only abate as to the party that was dead ; and for that the surviving defendant might set down the cause, and it would not lie with the plaintiff to object for want of parties. I desired the party to have it mentioned again to the Court : accordingly, this day (15 May 1775). Mr. Kenyon moved the same *de novo*, and stated the Register's objections ; when the Court directed the order made the 19th January not to be drawn up.

ATTORNEY GENERAL v. HUTCHINSON.

26 May 1775.

A legacy to build a school-house, and to endow it, the parish having land on which a school-house formerly stood, held to come within the Statute of Mortmain.

The testator, by will, gives £1500 to erect and build a school-house, and other buildings, and £2000 to endow it.

The parish have a piece of land, on which a school-house formerly stood.

The question is, whether this is within the Statute of Mortmain ?

Mr. Solicitor General said, there was an anecdote handed down of the framers of the statute of 9 Geo. 2. [519] that they wanted to extend it to all gifts and donations.

Lord Bathurst, C.—This is, in all its circumstances a new case. It is charged by the bill, and proved, that there is a piece of land belonging to the parish on which a school-house might be built.

The question is, if land is already got, and there is no occasion to acquire land in mortmain, whether building a house upon such land, with money left for that purpose, is within the statute.

Money left to repair or rebuild upon land in mortmain, is not within the words, much less within the spirit, of the statute, and is not to be assimilated to the case of *Brodie v. Duke of Chandos*, 14th December 1773, which was to build a parsonage-house.

As to building on the land said to be charity land, it would be absorbing the charity. Therefore, let the bill be dismissed.

RAWSON v. TURNER.

27 May 1775, Qu. 1725. Ca. in Ch. 42. S. C. *semb.*

Before enrolment of the order made on arguing exceptions to a decree of charitable uses, it may be re-heard.

* The certificate of C. B. was as follows : [W.] Bl. Rep. 1052 : We have heard Counsel on both sides, and considered this case, and are of opinion the presentation is not void, it not appearing to us to have been made on a simoniacal contract.—W. De Grey, H. Gould, W. Blackstone, G. Nares.

[520] STARKIE v. SMITH.

(Reg. Lib. B. fol. 54.) 27 Nov. 1775.

Legacies to infants at twenty-one, the Court would not order them to be secured. *Qu.*

John Starkie, by his will, dated the 1st of October 1763, gave several pecuniary legacies, payable immediately, and gave to his eldest grandson, the plaintiff Richard Starkie, £3000 at twenty-one, and to his other grandchildren, to the number of four, £1000 each at twenty-one; and directed the residue to be placed out at interest for the benefit of his eldest grandson.

The executors proved the will, and possessed assets sufficient.

The plaintiffs brought their bill for an account, and to have their legacies secured.

The Court would not direct the legacies to the infants at twenty-one to be placed out, but gave the infants liberty to apply for their legacies when payable.

[Mews' Dig. Will. IX, k, 20. S. P. Palmer v. Maysent, Dick. 70.]

PENNY v. PENNY.

(Reg. Lib. B. fol. 277.) Feb. 1776.

Heir at law, not being the sole plaintiff, brings a bill to establish the will, the Court declared it well proved, and established the same.

William Penny the father of the plaintiffs, devised his real estates to the defendants in trust, to sell to pay his debts, and to divide the surplus of the money arising from the same equally among the plaintiffs, one of whom was his eldest son, and heir at law.

[521] The bill was brought to establish the will, and to carry the trusts into execution.

Upon hearing the cause, Sir Thomas Sewel, M. R., declared the will well proved, and that the same ought to be established.

[Mr. Lloyd mentioned this as a precedent to shew, that though an heir at law brings a bill to establish a will, the Court will declare it, upon evidence, well proved; that his Honour did it after doubting the propriety.

The reason is obvious: the heir at law is not the sole plaintiff: the other plaintiffs, whose interest it is to establish the will, join in the bill for the purpose. Had the heir at law been the sole plaintiff, I do not think his Honour would have done so, having heard it often declared by the Court to be improper, and unnecessary, and I believe no instance of it can be produced.—J. D.]

WILSON v. GINGER.

19 Feb. 1776. Lord Bathurst, C.

A defendant neglecting to name an attorney for the purpose of trying an issue out of this Court, was directed to do it in four days, or the issue to be taken as tried, and a verdict for the plaintiff.*

[522] MARY WHITE, devisee in trust, and executrix in the wills of BRIDGET WHITE, and JOHN WHITE, Plaintiff: and TAYLOR WHITE Esquire, son and heir of TAYLOR WHITE, who was brother and heir of JOHN WHITE, tenant for life of the estates devised by the will of JOHN, of which he had a disposing power, and tenant in tail of an estate in settlement, which JOHN, the only tenant for life of the same, devised: THOMAS WOLLASTON WHITE, the first son of the defendant TAYLOR WHITE, and the first remainder-man in tail of the devised estates, expectant on the death of his father, and Others, Defendants.

(Reg. Lib. B. fol. 650.) 8 March 1776.

Tenant in tail of estates in settlement devises those estates, and other estates of which he was seised in fee, to his heir at law, who was the next remainder-man in tail for life, with remainders over: and also a legacy of £1000: the heir claims the estates in opposition to the will. The Court would not put him to his election.

The bill was to have the direction of the Court how to act under the wills of the said Bridget White and John White.

* Constable v. Angel, 25 June 1777. The like order.

The bill, amongst other things, stated that the said John White, being seised in fee, or from an idea of his being so seised, of considerable real estates in the counties of York and Nottingham, gave life estates in part of them to particular persons, charged other estates with annuities, and created terms out of other parts of the estates, for the purpose of raising out of the rents, and paying £250 a-year to the defendant [523] Taylor White, during the joint lives of the said defendant, and his father (which was paid accordingly), and for raising certain legacies : And the testator, by his said will, gave £1000 to the defendant Taylor White. And subject to the said charges and terms, the testator devised the said estates, and all other his real estates, to Taylor White (the defendant) for life : remainder to trustees to preserve, &c. : remainder to his first and other sons in tail male, with other remainders : with remainder to his own right heirs ; and appointed the plaintiff and another executors : but the plaintiff alone proved the will.

After making the said will, the testator contracted for the purchase of other estates, and under an inclosing act of parliament, part of the estates devised were exchanged for other estates.

The defendants setting up opposite claims, the plaintiff filed her bill, as above, to have the direction of the Court, and prayed an establishment of the will, and an execution of the trusts.

Taylor White the father (an original defendant, since dead), by his answer admitted the wills, but said he did not know whether John his brother was seised in fee, or had only an estate tail in the estates devised by him, having never seen the writings.

In 1773 the said defendant Taylor White died. He left the above-named defendant Taylor White, his son and heir : and he claiming in opposition to the will of John White, the plaintiff filed a supplemental bill against him and the defendant Thomas Wollaston White, praying that the said defendant Taylor White might set forth his claims, and charging that he ought to elect [524] whether he would take under the will, or renounce all benefit under it.

The defendant Taylor White, by his answer, said he was the heir at law of Taylor White his father, who was brother and heir at law of the said John White, who was heir at law of Bridget : and that he claimed such estates of John, of which he died seised in fee, and that did not pass by his will.

The answer then states a settlement, dated in June 1685, made on the marriage of Richard Taylor with Bridget, by which the estates therein mentioned were settled to the use of the husband and wife for their respective lives, remainder to trustees to preserve, &c. : remainder to the first and other sons of the marriage in tail male : then to the daughters in tail general : remainder to the right heirs of the said Richard Taylor.

That there was issue of the said marriage only one daughter, who in 1690 intermarried with Thomas White the grandfather of the defendant Taylor White : that there was issue of that marriage the before mentioned John White the testator, Taylor White the defendant's brother, and Bridget White the testatrix.

That the said Thomas White the grandfather died in 1732, leaving the above issue of his said marriage.

That Bridget his widow died in 1761, having done no act to bar the entail of the estates in the said settlement of 1685.

That upon her death all the said estates came to the said testator John White, who did not bar the entail, but had nevertheless taken upon himself to devise the [525] estate so in settlement, which he had not any power to do.

That upon his death those estates came to Taylor White, the defendant's late father, as tenant in tail : that he did not bar the entail, and therefore, upon his death, the defendant took an estate tail in the premises : that he had since levied a fine of the premises, and had declared the uses to himself in fee.

That he had entered on the estates which did not pass by the will, which were after purchased, and the exchanged estates, and had cut down timber thereon, and insisted he was entitled, as tenant for life, to such of the estates devised by the will of John, as John had a disposing power over, and claimed the legacy of £1000, and further insisted, he ought not to be put to his election.

The cause came to be heard 7th and 8th March 1766 : and after hearing the said settlement of 1685, the wills of Bridget and John White, and the several contracts

entered into by the testator John White read, and the defendant Taylor White, the heir at law, admitting the wills of the said Bridget White and John, they were established.

The Lord Chancellor then proceeds to direct the necessary accounts, and the Master to distinguish the settled and unsettled estates devised : and though his Lordship doth not in express words say the defendant Taylor White is not bound to elect, he in effect says so, by decreeing payment to the defendant Taylor White, of the legacy of £1000, and the profits of the estate devised to him for life.

[526] HILL v. BISHOP OF BRISTOL.

6 May 1776. Lord Bathurst, C.

On marriage the wife's estate is settled on the husband for life, on the wife for life, remainder to the issue of the marriage in tail ; remainder in fee to the survivor of husband and wife : the husband and wife levy a fine, and mortgage the estate : the husband sues the estate to become absolute in the mortgagee, and dies : his widow held entitled to redeem.

Bill to redeem against the representative of Lord Carpenter.

The plaintiff, the widow of Hill, was originally entitled to the estate in her own right.

On her marriage, it was agreed to be settled on the husband for life, on the wife for life ; remainder to the issue of the marriage in tail ; remainder in fee to the survivor of the husband and wife.

After the marriage, the husband and wife levy a fine and mortgage the estate ; and the husband sues the estate to become absolute in the mortgagee, and dies.

The question in the cause is, whether the plaintiff hath a right to redeem ?

On the part of the defendant it is insisted, that Bilward the mortgagee having obtained a decree, and Lord Carpenter having bought him out, the estate is bound.

A volunteer is bound by the act of a mortgagee.

The question then is, whether the plaintiff is a volunteer, or a purchaser for a valuable consideration ? She certainly is not a volunteer, and consequently she is entitled to redeem.

But Lord Carpenter having a further charge on the estate for two annuities, is entitled to the estate after the plaintiff's estate for life.

Therefore the Lord Chancellor declared, that the plaintiff was entitled to redeem the estate, on payment of what, if any thing, remained due on the mortgage ; and in case she paid any thing, she was [527] to stand as a creditor for that sum on the reversion. And after the death of the plaintiff, the representative of Lord Carpenter was to stand as a creditor on the reversion, for the arrears of the two annuities.

MAY v. MAY.

19 July 1776.

The father, by his will, appointed guardians of his infant children. The will not being properly executed, the Master of the Rolls, upon hearing the cause, referred it to the Master to approve of a proper person to be appointed guardian of the infants, and preface the order thus : And it appearing by the said testator's will (as the will is set forth in the answer of A and B), that it is mentioned the said testator appointed the said defendants, &c., since deceased, guardians of his children ; but the said will not appearing, or having been proved to have been properly executed or attested, as a good and valid appointment of such guardians ; therefore, refer it as above.

HASSEL v. HASSEL.

Nov. 1776.

Testator begins his will : As to all my worldly estate, I give, devise, and bequeath as follows : he gives first household furniture to his wife ; then he goes on to give, devise, and bequeath, particular sums, as legacies to his younger children, with

maintenance ; and concludes by giving, devising, and bequeathing, all and singular his real and personal estate not therein disposed to his son the defendant : the legacies to the children held to be a charge on the real estate, in aid of the personal.

Thomas Hassel, the plaintiff's father, made his will as follows :

In the name of God, Amen. I, Thomas Hassel, do make this my will as follows : " And as touching and [528] concerning my worldly estate, I give, devise, and bequeath, as follows : First, I give my household goods, &c., to my wife for life."

I give, devise, and bequeath to Mary Hassel, £300 at twenty-one. Item, I give, devise, and bequeath, unto my daughter Frances, £300 at twenty-one. Item, I give, devise, and bequeath, to my sons William T. F. and John each £220, to be paid at twenty-one, with benefit of survivorship. Item, my will is, that my executor, with the advice of my trustee, shall place out my sons apprentices, and pay out of their aforesaid fortunes proper sums on that account ; and to be allowed out of their respective fortunes when of age. Item, my executor is to pay to my trustee £30 a-year for the education of the children. Item, I give, devise, and bequeath to my son Halford Hassel (the defendant), all and singular my real and personal estate not herein disposed, to him, his heirs, and assigns, and I appoint my brother Hassel overseer of my said will."

The testator died : the defendant proved the will, and possessed the personal estate, and entered on the real estates.

The bill was by the four younger children, to be paid the legacies given by their said father's will as portions, and if the personal estate were not sufficient, out of the real estates.

For the plaintiffs it was argued, that the testator having expressly declared it was his will to dispose of all his worldly estate, and having, on the giving of the legacies to his children, used the word devise, which is applicable to real estates, and having, by the residuary clause, given, devised, and bequeathed, all [529] and singular his real and personal estate not therein before disposed ; and having directed the legacies to be paid by his executor to whom he had given his real estate, it was manifestly the intent and meaning of the testator to charge the said legacies, and that the said legacies were charged, on the real estate.

For the defendant it was argued, that the legacies being money legacies were to be paid out of the personal estate ; and the real estate not being expressly charged with them by the will, the plaintiffs had no right to come upon the real estate for payment.

Lord Bathurst, C., held the legacies to be charged on the real estate in aid of the personal.

[Mews' Dig. Will, IX, k, 17. *Followed, In re Bawden*, [1894] 1 Ch. 693.]

CLARK v. ROSS.

27 Nov. 1773. Lord Bathurst, C. 1 Bro. C. C. 120, in not. S. C.

Legacy charged upon land, payable at a certain time : the legatee dies before that time ; but being charged, and the estate devised subject to that charge, the devisee must take it *cum onere*, and the legacy shall be raised.

J. D. Acres Mason Esquire, by his will, dated 18th November 1736, amongst other things, devised all his freehold and copyhold estates to trustees named in the will, to the use of Theodore Joseph Mason for life, remainder to trustees to preserve contingent remainders ; remainder to his first and other sons in tail male ; remainder to the daughters ; with remainder in fee to Captain Alexander Wilson : and willed, that if the said Captain Wilson, or his heirs, should actually come into possession of the premises, by virtue of the aforesaid limitations, that they should pay his daughter Catherine Wilson, £2000 : and thereby charged the premises with payment of the said £2000 to the said Catherine Wilson, at the end of two years after the said Alexander Wilson should come into possession.

[530] In 1737 the testator died.

In April 1743, the said Catherine Wilson died, having first intermarried with William Draper, in whom the said £2000 became vested ; and he died, having made his will, and the plaintiff sole executor and residuary legatee, who proved the will.

In 1750 a commission of bankruptcy issued against the said Alexander Wilson,

to whom the remainder in fee of the aforesaid estate was limited ; and his estate was assigned to defendant Ross his assignee.

In August 1769, the several antecedent limitations being spent, the ultimate remainder to Captain Wilson took effect, and the estates vested in the defendant Ross, the assignees of Wilson.

Two years being lapsed since the ultimate remainder in Wilson took effect, the plaintiff filed his bill to have the said legacy of £2000 raised, and paid.

It was insisted, that as Catherine Wilson died before the remainder-man in fee in the will came into possession, the said legacy being given out of land, was not to be raised.

The following cases were cited, Attorney General *v.* Milner, 1st February 1752 (3 Atk. 112) ; King *v.* Wilkinson ; Lowther *v.* Condon (2 Atk. 127, 130) ; Van *v.* Clarke (1 Atk. 519) ; Sirman *v.* Collins ; Bulkly *v.* Stanly ; Miles *v.* Leigh (1 Atk. 573), in Viner's Abridg. under title Charge, p. 463, 2 July 1729 ; Powlet *v.* Powlet (1 Wils. 224), first established, that where a portion is charged on land by deed, and the child dies, it is not to be raised ; in Smith *v.* Smith (2 Vern. 92, 178), the distinction taken was, that a portion under a will is to be raised, but not under a deed ; Hutchins *v.* Toy ; Hodson *v.* Rawson ; Hall *v.* Terry (1 Atk. 502) ; Thompson *v.* Dow (1 Bro. C. C. 193, in not.), 28th June 1763.

[531] *Lord Chancellor*.—I am of opinion the legacy vested in Catherine Wilson, and is a charge on the land. And the land being devised to Captain Wilson, subject to that charge, he must take it *cum onere*. Therefore, let the Master compute interest on the legacy from the end of two years after the ultimate remainder in Captain Wilson vested in possession, and let what shall be found due be raised.

PAWSEY v. EDGAR.

15 Nov. & 17 Dec. 1776. 1 Bro. C. C. 191, in not. S. C.

Estate given to the testator's wife for life, and after his death, to her son and his heirs, charged with a legacy : the legatee survived the testator, but died in the lifetime of the wife : the legacy held to have vested, and to be charged on the estate.

Devereaux Edgar, by his will, gave his real estate to Temperance his wife for life ; remainder to his eldest son Robert, the father of the defendant, for life ; remainder to his issue male in tail ; remainder to the said Robert in fee ; subject and charged, within six months after the death of the said Temperance his wife, to pay to his two daughters, Temperance and Mary Edgar, £600 each, with interest at 5 per cent. from the death of the said Temperance his wife ; and in default of payment, devised the estate to the legatees to hold till payment.

The testator died in 1730.

Robert Edgar the son died in 1750, and left the defendant his eldest son and heir, to whom the estate descended.

Temperance, one of the legatees, died in August 1754, and Mary, the other legatee, took out administration to her.

In 1754, Temperance the widow, died.

In 1774, Mary the other legatee died, having made her will, and the plaintiff her executor.

[532] The plaintiff contends the legacies vested, and are transmissible, and as executor of Mary, hath filed a bill to have the legacies raised and paid.

The defendant insists, that as Temperance the legatee, died in the lifetime of Temperance the widow, which was before the legacy became payable, it sunk into the reversion of the estate.

The same cases were cited in this cause as in the case of Clarke *v.* Ross, immediately preceding.

It stood for judgment to this day.

His Lordship for the same reasons, upon which he determined that cause, declared, that the defendant took the estate *cum onere*, that the legacy vested, and the plaintiff was entitled to it, and ordered it to be raised.

His Lordship observed, that the case of Hall *v.* Terry had been pressed upon him, and which was said to be confirmed by May *v.* Andrews, 30th June 1768, but that it was very different from the principal case.

RUSSEL v. ATKINSON.

23 Jan. 1777.

The time to examine to the credit of a witness is, after publication is passed, and the application for it is of course, and not founded on affidavit.

An order of course had been obtained, to examine to the credit of a witness, after publication had passed, and the cause was set down for hearing : the defendant applied the above day, to discharge the order as irregularly obtained : for that it was not founded on affidavit, and was after publication : and was not moved specially on notice, according to Lord Bacon's order, which says, these orders are to be granted sparingly, and upon special application. But Lord [533] Bathurst, C., and Sir Thomas Sewel, M. R., were both of opinion, that the order was regularly obtained : that it was necessary publication should have passed, for till then it could not be known, whether it was necessary to examine to the credit of the witness : that the order was of course, but if the party stayed a considerable time after, and did it merely for delay, it might be a ground to discharge the order.

NICHOLAS v. MILLS.

Hil. 1777.

Exceptions lie to the certificates of commissioners in commissions of partition, which certificates are confirmed, as reports are.

NORDEN v. JAMES.

20 Feb. 1777.

A general assignment of a debtor at Madras, in the East Indies, not an act of bankruptcy in this country.

MANNINGHAM v. LORD BOLINGBROKE.

10 Feb. & 14 July 1777.

Bill for discovery and relief, charging fraud. Demurrer over-ruled, the bill being for relief against fraud, the defendant must answer.

The question arose on a demurrer to a bill filed by a judgment creditor of the defendant Lord Bolingbroke : The creditor had brought an action of debt, and had obtained judgment : but before he had sued out execution, the defendant, as charged by the bill, had conveyed his estate, in order to prevent the execution [534] from having effect : the bill was for a discovery of the conveyance, and for relief : the demurrer was for that the plaintiff had not proceeded to an *elegit*, and therefore was premature.

The cases cited were, *Dowdeswell v. Tomkins*, 15th May 1740, 1 Siderfin, 91.—1 Keble, 368,—1 Salkeld, 118. —1 Eq. Cases Abr.,—1 Ventris, 398 ; *Lady Abergavenny v. Lady Abergavenny*, 2 P. Wms. 311,—1 Hobart, 47.

Lord Bathurst, C.—The bill being to be relieved against fraud, the defendant must answer ; over-rule the demurrer.

[*Mews' Dig.* Discovery, D. III. 2 ; Fraud and Misrepresentation, IV. 5. The accuracy of this report was doubted, *Neate v. Marlborough* (Duke of), 1838, 3 My. & Cr. 419.]

PALMER v. PALMER.

12 March 1777.

Surrender of a copyhold supplied, in order to pay a legacy.

Bill to be paid a legacy, and to have a copyhold devised, in aid of the personal estate, not having been surrendered by the testator, surrendered by his heir, to the uses of the will.

The cases cited were, *Hawkins v. Leigh*, 1 Atkins, 387 ; *Bradly v. Bradly*, 2 Vern. 163 ; *Wilkins v. Saunders* ; *White v. Nutt*, 1 P. Wms. 61.

The heir at law, upon terms, ordered to surrender the copyhold estate to the uses of the will.

[535] PENDERGRAST v. SAUBERGUE.

(Reg. Lib. B. 1776, fol. 217.) 18 March 1777. Lord Bathurst, C.

The defendant, to prevent his being brought up by an *alias pluries habeas corpus* as often as he was turned over to the Fleet, removed himself back to the King's Bench; ordered if he did not put in his answer by the time an *alias pluries* would have issued, the bill should be taken *pro confesso* against him.

The defendant being brought up by *habeas corpus*, and turned over to the Fleet, in order to proceed to an *alias pluries habeas corpus*, and to have him brought up, in order to take the bill *pro confesso* against him, for want of his answer, according to the usual course of proceeding, the defendant, in order to prevent it, as soon as he was carried to the Fleet, removed himself back again to the King's Bench. The Court was for some time under a difficulty how to proceed, but at last hit upon this expedient: It was ordered, that unless the defendant put in his answer on or before the last day of the then next term, which it was computed would be the time between each process, were the plaintiff to proceed regularly to an *alias pluries habeas corpus*, the plaintiff was to be at liberty to apply for the Clerk in Court, to attend with the record of the plaintiff's bill, in order to take it *pro confesso*, against the said defendant.

WILSON v. BOSWELL.

15 May 1777.

A writ of *ne exeat regno*, to prevent the defendant's going to Scotland.

[536] MASON v. MURRAY.

Trin. 1777.

An injunction doth not drop of course, on the plaintiff's amending his bill.

The plaintiff was the author of some poems; the defendant was a bookseller; the plaintiff filed his bill against the defendant, to stay him from printing, &c., some of his works, and obtained a special injunction; the defendant answered, and afterwards the plaintiff amended his bill; on application this term, a question was made, and insisted on by the defendant, that the plaintiff having amended his bill, the injunction was gone of course.

It stood over till this day, and Lord Bathurst, C., having directed me to lay before him my thoughts on the point, whether an injunction dropt of course, on the plaintiff's amending his bill, or on a demurrer being allowed, I wrote him a letter as follows:

"It was said, 'that the plaintiff having amended his bill, the injunction was gone of course, without application.'

"By Lord Bacon's twentieth ordinance, 'No injunction of any nature shall be granted, revived, dissolved, or stayed, upon any private petition'; from whence it may be inferred, that an injunction must be dissolved by order upon motion in open Court. In the Practical Register in Chancery, printed in 1714, it is truly said, that after an injunction hath been dissolved, that is for want of equity, the equity in the bill on which it is founded, and of which the Court hath judged, it cannot be revived, on the plaintiff's amending his bill, but on special application; but the distinction, that an injunction is gone of course upon bill's being amended, is novel; a bill may be amended for various purposes not connected with the injunction: An injunction [537] too is only one head of relief. The amendment may not in the least degree relate to the injunction. It, therefore, seems extraordinary to say, that if a plaintiff amends his bill, though in no wise to support the injunction, there is an end of it: Is not the Court to judge, and determine? Amending a bill, is certainly admitting the answer to it to be full, and that exceptions will not lie to the answer; and yet *non constat*, that there may not be enough discovered, or admitted on the answer to support the injunction."

I then referred his Lordship to the case of *Mayne v. Hochin*, *supra* [Dick] 255, and then proceeded thus:

"A plea allowed is a full answer, yet the defendant always applies by motion to dissolve the injunction (though absolutely), in the first instance; *Phillips v. Langham*, 29th November 1750.

"The defendant's counsel said, that had he demurred before the injunction, it would not have been granted till the demurrer had been argued. *Rashleigh v. Buller*, 11th June 1752 (*supra* [Dick.] 153). The present demurrer hath not been argued: supposing it had been allowed, it was said, that cause was out of Court, and the injunction was gone; but with submission, as the injunction is under the Great Seal, can it be said to be gone, or dissolved, without an order for that purpose? An injunction suit abates by death, yet the injunction is not gone. Every day proves the contrary, by motion for the executor, or administrator to revive in a limited time, or that the injunction may be dissolved."

His Lordship did me the honour this day, to state to the Bar, what I had submitted to him as above, and de-[538]-clared, he was clearly of opinion upon consideration, and upon the case of *Mayne v. Hochin*, that the injunction did not drop upon the plaintiff's amending his bill.

[*Mews' Dig. Injunction*, C. 4, c. i. See *Ferrand v. Hamer*, 1838, 4 My. & Cr. 143.]

PEACH v. PHILLIPS.

17 Dec. 1777.

Mortgage to the devisee after making the will, no revocation of it.

Robert Cheshire made his will as follows: "I order all my debts, and funeral expences to be paid by my executor." He then gives legacies to the plaintiff and others, and then goes on: "And last I give and bequeath all the rest of my houses, messuages, lands, tenements, and hereditaments, and the rest of my personal estate to James Phillips (the defendant), and appoint him my executor."

After the will, the testator mortgaged his real estate, to secure the sum of £1500 to the said James Phillips.

On the death of the testator, Phillips proved the will, possessed the personal estate, and entered on the real estates, and received the rents and profits.

The plaintiff is the heir at law, and brings a bill, for an account of the rents and profits of the mortgaged estate; for an account of the testator's personal estate; and to have the estate in mortgage to Phillips, discharged of it, by an application of the personal estate.

The first question in the cause was, what estate Phillips took; whether an estate for life or in fee?

[539] Secondly, Whether the mortgage after the will, was not a revocation of the will, as to the real estate *in toto*?

The cases cited were, *Hopewell v. Acland*, Salk. 239, in which it was said, hereditaments will not carry a fee simple; in *Cook v. Bullock*, Cro. Jac. 49, a mortgage to a devisee, said to be a revocation; *Perkins v. Walker*, 1 Vern. 97; *Harkness v. Bayley*, Easter Term, 1719, Prec. in Chan. 514, in this case a mortgage to a devisee, was held to be a revocation of the will *in toto*.

The case was argued by Mr. Price for the plaintiff, and by the Attorney General Mr. Thurlow, the Solicitor General Mr. Wedderburne, and Mr. Madocks, for the devisee.

Lord Chancellor.—The intention of the testator is evident, to have his debts paid by his executor. To pay them, he must be furnished with the means: he gives him all his estates, and after payment, makes him the residuary devisee, and legatee. After making this will, he mortgages part of the estate. To whom? To the defendant his executor, by whom he had directed his debts to be paid: but this mortgage is said to be a revocation of the will: It may be *quoad* the mortgage; I would then ask in whom is the estate? The legal estate is in the defendant the mortgagee, under his mortgage. The equity of redemption is in him by the will. It cannot be said, the equity of redemption did not pass by it, and the will not being disputed, the equity of redemption did not pass to the heir. Therefore dismiss the bill.

[540] WEBSTER v. PAWSON.

15 Dec. 1777. Lord Bathurst, C.

A witness going to sea, was examined *de bene esse*, in order to make use of his evidence at law : Notice of trial being given, and the witness not being returned, his deposition was ordered to be copied, and published by the Examiner ; but he was not to publish any of the depositions of the other witnesses.

Ex parte BOSANQUET.

20 Dec. 1777. Lord Bathurst, C.

An infant, mortgagee of lands in the island of Grenada, in the West Indies, being found to be an infant mortgagee within the Statute of the 7th of Queen Ann, the report was confirmed, and he was ordered to convey.

HUNT v. PRIEST.

15 Jan. 1778. Lord Bathurst, C.

The mode of proceeding on examinations, *pro interesse suo*.

A party had been examined under an order for the purpose, *pro interesse suo*. He applied and pressed to have the merits determined upon a petition, which being opposed, as not agreeable to practice, Lord Bathurst, C., directed me to lay before him the mode of proceeding ; in obedience to which, I submitted a paper, of which the following is a copy :

" A party claiming an interest in estates sequestrated, or in the hands of a Receiver, an order is obtained [541] upon notice of motion, to come in, and be examined *pro interesse suo*, wherein a time is to be limited for filing interrogatories.

" After the examination, the other side hath liberty to examine witnesses, to falsify the examination, and a commission of course issues, if necessary, wherein the claimant may join if he thinks fit ; and the commission (if any) is returned. Publication passeth by order.

" Then an order is made to refer it to the Master, to look into the examination and depositions, and to certify whether the claimant hath made out any, and what, interest in the premises or in any, and what part thereof.

" The report the Master makes is set down to be heard for directions ; and the Court pronounces a final order.

" Cases proving the above mode, *Fawcett v. Fothergill* : Francis Calvert and Others, claiming a mortgage for £1000 on the estates sequestrated, by order dated 18th February 1699, entered Reg. Lib. A. fol. 396, they were to come in to be examined *pro interesse suo*, and the plaintiff was to exhibit interrogatories for that purpose.

" By an order dated 7th of January 1700, entered Reg. Lib. A. fol. 340, on the petition of the plaintiff, after stating that the claimants had been examined, and the depositions returned, it was referred to the Master, to certify what proof the claimants had made of their pretended right.

" The Master made his report : the matter of the said report came on to be heard, 8th April 1703, entered Reg. Lib. A. fol. 206, when his Lordship ordered the plaintiff to reply to the examination, and the examinant was to be at liberty to examine witnesses touching his claim, and to take out a commission, wherein the plaintiff was to join, if he thought fit.

" Witnesses having been examined, there was an order for setting the matter down to be heard on the report.

" The 26th October 1705, entered Reg. Lib. A. fol. 101, the matter of the report by which the Master found the claimants to have really and *bona fide* paid £400 and no more, came on to be argued. Upon debate of the matter, and hearing the exhibits, and the proof, taken in relation to the matter aforesaid, his Lordship conceived the sequestrators might redeem the mortgage, and directed an account as to £400."

" The above cause of *Hunt v. Priest*, being again brought on, after much litigation, his Lordship said he would adhere to the mode of proceeding, in the preceding cases,

and referred it to the Master, to see if the claimant had made out any, and what title to the premises claimed by him.*

NORRIS v. NORRIS.

25 March 1778.

If a mortgagee exhausts the personal estate, the legatees shall stand in his place.

[543] FIELD v. MOSTIN.

27 March 1778.

A legacy though greater than a debt due to the legatee, held not to be a satisfaction of the debt.

The testatrix in this cause being indebted to Mrs. Hutchinson in £141, made her will, and thereby gave to the said Mrs. Hutchinson the sum of £500; she also gave a legacy of £400 to a charity, and the residue of her personal estate to pay her debts and legacies; if the personal estate should not be sufficient, the deficiency to be raised by mortgage or sale of the real estate.

The question in the cause was, whether the legacy to Mrs. Hutchinson, was not a satisfaction of the debt to her. *Chauncey's Case*, 1717 (1 P. Wms. 408), was cited.

Lord Chancellor held that it was evident by the will she meant both debts and legacies should be paid, and therefore declared the legacies were not to be considered as a satisfaction of the debt. As to the legacy to the charity, the personal estate being deficient to pay the whole, the question was, whether it should be first applied in payment of those legacies: But his Lordship said he would not set up a new rule, and cited the *Attorney General v. Graves* (Ambl. 155), 4th Nov. 1752; the *Attorney General v. Tomkins* (Ambl. 216), 4th March 1754; *Arnold v. Chapman*, 1 Vesey, 108; the *Attorney General v. Jeanes*, Hilary, 1737 (1 Atk. 355).

[544] PARRY v. CARWARDEN.

20 May 1778.

In a conveyance, blood is no consideration within the Stat. of 27 Eliz.

In 1752, John Carwarden the husband of Magdalen, and the father of the defendant Benjamin Carwarden, being seised in fee of a real estate, by his will devised an estate to Magdalen in satisfaction of dower.

She entered, and enjoyed the estate till her death in 1776.

Benjamin the son, instituted a suit, thereby impeaching the will. An issue was directed, and a verdict found in favour of the will.

On the 21st of August 1773, Magdalen entered into an agreement with the plaintiff, for the sale of the estate devised to her, and £10 were paid down, and £1800 were to be paid on the execution of the conveyance.

As soon as the contract was known, Benjamin the son set up a voluntary conveyance from his mother by indentures of lease and release, of the 23d and 24th of April 1763, by which, after reserving a life estate, she conveys the fee to her son.

She instituted a suit to set aside the same, but died before the cause was at issue.

The plaintiff's bill was to set the deeds aside, as being fraudulent, and without consideration. And he insisted they were so, within the Statute of 27 Eliz.

The cases of *Redham v. Beaumont*, 3 Ch. Rep.; and *Compton v. Basset* were cited, to shew that blood is no consideration within that Statute.

The *Lord Chancellor* declared the plaintiff was entitled to a specific performance of the agreement, and that the indentures of lease and release, of the 23d [545] and 24th of August 1773, were void against the plaintiff, and were not to stand in his way.

* See *Cooper v. Thornton*; *Hamlyn v. Ley* [Dick. 94]; and *Bowles v. Parsons*, *supra* [Dick. 142].

CARTWRIGHT v. CARTWRIGHT.

1 July 1778.

Infant heir not bound by the admission in the deceased heir's answer, of the will of the testator.

The heir at law an adult, by his answer, admits the will, he afterwards dies, and the suit is revived against his heir at law an infant; the admission of the deceased heir at law will not bind the infant, and the will must be proved *per testes* against him. The question was made at the hearing of this cause, which was ordered to stand over, with liberty for the plaintiff to exhibit interrogatories to prove the will and codicils (*Sleeman v. Sleeman*, 3 March 1772 [Dick. 787], S. P.).

[The accuracy of this report questioned, *Lock v. Foote*, 1833, 4 Sim. 132.]

LORD SANDYS v. SIBTHORPE.

4 July 1778.

On a question on the disposition by will of some New River shares; it was agreed that New River shares were real property, and descendible to the heir.

BROWN v. LEE.

21 July 1778.

Service of a subpoena to revive on the defendant's clerk in Court in the original cause, refused.

Upon a bill of revivor being filed, the Solicitor General Mr. Wedderburne, moved specially, on an affidavit of the defendant's absconding, that service of a subpoena merely to revive, an answer not being [546] wanted, on his clerk in the original cause, might be deemed good service on the defendant. It was held to be improper, and refused; and it was said, the plaintiff must pursue the act for rendering process effectual against those that abscond.

[*Note.* This cause was afterwards heard on the bill of revivor in 1782; and the original suit and proceedings decreed to be revived.—J. D.]

[See next case.]

LEE v. WARNER.

30 Nov. 1778.

A similar application as in the above case, and refused after solemn debate, and great consideration.

A decree in the original cause for an account. In the course of proceedings before the Master, it was evident a balance would be due from the defendant; he went abroad. Afterwards the suit abated by the death of the plaintiff: his representative filed a bill against the defendant, who was a defendant in the original cause, merely to revive. The defendant not being to be found, the plaintiff presented a petition to Sir Thomas Sewel, M. R., praying, that service of a subpoena to revive on the said defendant's clerk in Court in the original cause, might be deemed good service.

His Honour as he expressed it, had not the least doubt.

But a paper having been left with the petition, signed by some of the clerks in Court, as a kind of certificate, of their opinion that it was the practice, his Honour ordered an attendance upon the petition, and it was this day argued (30 Dec. 1778).

His Honour continued of the same opinion, as when the petition was presented. He observed, that a bill [547] of revivor was a distinct record from the original bill, and was as much a new bill as any other bill that was filed; that the Act of 5th of Geo. 2 had remedied the inconvenience, when the defendant absconded to avoid being served, and therefore that the plaintiff must pursue the course prescribed by that act.

That it did not follow, because the defendant employed a clerk in Court in one suit, he was a clerk in Court in every suit; that where a clerk in Court enters an appearance for a defendant, he doth it under a proper authority: were he to do it without, he would act very imprudently.

His Honour however, suspended his directions, and said, if the plaintiff could produce any precedent, and could move it upon any special circumstances, he would hear him.

[But supposing the Court were to grant the order, and the clerk in Court were served: this Court could not compel the clerk in Court to appear, the order not being that he shall appear, but only that service on him might be deemed good service; and if the clerk in Court should not appear, the defendant then comes within that part of the act, which provides for the case of a defendant being served, and refusing to appear.—J. D.]

On this day (10 Dec. 1778) his Honour sent for the Register, and told him, that he had thoroughly considered the petition: that the more he thought of the application, the more he was confirmed in his opinion of the impropriety of it, and directed him to enter a minute, dismissing the petition.

LORD SHIPBROOK v. LORD HINCHINBROOK.

11 Nov. 1778.

Lord Thurlow, C., upon the same grounds, as in the case of *Roach v. Garvan*, reported *supra* [Dick] 88, referred it to the Master, to appoint a guardian in the [548] room of Mrs. Donaldson the infant's mother; and ordered, that she should continue with Mrs. Donaldson until further order, and that Mrs. Donaldson should be restrained from giving her consent to the marriage of the infant, without leave of the Court; and that the infant should not be married without leave of the Court; the order also restricted her from receiving any letters or messages, &c., from one Leoni, a jew singer.*

STANYFORD v. TUDOR.

17 & 18 Dec. 1778.

Exceptions do not lie to a Master's certificate of his having settled interrogatories.

The Master having certified he had settled interrogatories for the examination of the defendant, the defendant took exceptions to the report. The said exceptions came on to be argued on the 17th of December, when it was argued in support of them, that the interrogatories led to matters not in issue, and that should an examination be taken under the interrogatories, as settled by the Master, the same would be of an enormous length. On the other side it was argued, that excepting to a Master's certificate of his having settled interrogatories, was a new practice, and not warranted by precedent; and that the Master was the proper judge of the propriety of the interrogatories to the matters as to which he was to examine.

Lord Thurlow, C., directed the Register to attend Sir Thomas Sewel, the Master of the Rolls, on the subject. His Honour was clear the Master must settle [549] the interrogatories; that the party was to put in such examination as he thought proper. If not sufficient, it would be referred, and the Master would report his opinion, and to this report either side might take exceptions; and the Court, then having the interrogatories and examinations before it, would determine whether the examination was sufficient or not. On making known to his Lordship what his Honour had said, his Lordship was clear this was the proper course of proceeding, and that it was not proper to except in the present stage of the cause; and therefore over ruled the exceptions.

AXE v. CLARKE.

13 April 1779.

Attaching and receiving money levied by the sheriff, though levied before the bill was filed, a breach of the injunction: *aliter* had the sheriff paid it voluntarily.

The defendant had brought his action, and obtained judgment, and had taken out execution, and the sheriff had levied £328, 10s.

The plaintiff filed his bill, amongst other things, for an injunction, and obtained the common order for an injunction, with liberty to proceed to trial, and to obtain judgment, but with a stay of execution.

* Lord Thurlow, C., made a similar order in *Hodgson v. Watson*, 11 April 1789.

The defendant was served with a writ of injunction ; but notwithstanding attached the sheriff, and received the money levied.

The plaintiff moved on the 23d of March last, that the defendant might repay the money, and stand committed for breach of the injunction.

A doubt arose whether, as the money was levied before the bill was filed, it was a breach of the injunction, it being an execution executed.

[550] Upon the matter being moved again this day—

Lord Thurlow, C., was clearly of opinion, that the ruling of the sheriff to pay the money was a breach of the injunction ; and ordered the money to be repaid to the sheriff ; but said it would have been different had the sheriff paid the money voluntarily.

WARING v. HOTHAM.

22 April 1779.

On a bill to settle the boundaries of two parishes, the matter held to be at law.

This bill was to settle the boundaries of two adjoining parishes, namely, St. Luke's Old Street, and St. Leonard's Shoreditch.

Lord Thurlow, C., after hearing Mr. Madocks, said the matter was at law, where it could be easily determined ; that this Court would not entertain such suits, and therefore dismissed the bill with costs.

PEMBY v. MATHEW.

28 April 1779.

There being but one witness against an answer, the Court directed an issue.

The bill was to compel the defendant to execute a bond to indemnify the plaintiff against covenants in a lease ; the defendant by his answer denied the agreement so to do ; the depositions of Luke Hoggart, a witness, examined by the plaintiff, were read ; and *Bate v. Shephard* was cited : but there being only one witness against the oath of the defendant, *Lord Thurlow*, C., said, he would not determine on the credibility of the witness, but directed an issue.

[551] AYLET v. HILL.

29 April 1779.

A mortgagee may sue at law on the bond, after a decree of foreclosure.

A mortgagee forecloses, and, having a bond as a collateral security, brings an action on the bond.

Motion to stay proceedings at law on the bond.

The *Lord Chancellor* held that the mortgagee might proceed at law on his bond, notwithstanding he had obtained a decree of foreclosure, and denied the motion.

[But Qu. having gotten the pledge, if he could do it, till the pledge was *bona fide* sold, and it was seen whether it was deficient to answer the whole of the debt ?—J.D.]

GODWIN v. MUNDAY.

11 May 1779.

A devise of lands in fee to B, after the death or marriage of the testator's widow, provided that B pay £400 to C after the death or marriage of the widow ; C survives the testator, but dies in the lifetime of the widow : the legacy doth not sink.

John Munday, by his will having directed his debts and funeral expences to be paid, proceeds thus : "Also all my lands, leasehold and personal estate whatsoever. "I give to my wife for life, if she so long continues unmarried."

After the death, or the marriage of the wife, the testator gives his lands at Eastow to his son Stephen, and his heirs, and then proceeds :

"I also give to my son James my land called Bushy Common, and the land held by lease of Henry Seymour, to him and his heirs for ever, after the death, or marriage

"of my wife, with this proviso, that my son James shall pay to Mary the wife of the plaintiff Godwin, £100 within one year after my wife's death, or marriage."

[552] Mary the wife of the plaintiff died in the life-time of the testator's widow.

And, on the death of the widow, James the son, came into possession of the estate devised to him upon that event.

The plaintiff, as administrator of Mary his late wife, brought his bill to have the said legacy of £100 given to his said wife, raised, and paid, insisting that it was vested, and transmissible.

The defendant, on the contrary, contended, that as it was to be paid out of land, and as the legatee died before the time it was payable by the will, it was not to be raised.

The same arguments were gone into as in the case of *Pawsey v. Edgar*, *supra* [Dick.] 531; and all the cases that were then cited, with the addition of the cases of *Clarke v. Ross*, *supra* [Dick.] 529; and *Bacon v. Clark*, Prec. in Chan. 244; *Watson v. Marshall*, 26th Feb. 1774; and *Morgan v. Gardiner* in the Exchequer (1 Bro. C. C. 193).

It stood for judgment till this day, when the Lord Chancellor directed the legacy to be raised and paid.

[Mews' Dig. Vested, Contingent and Future Interests, D. 2. S. C. 1 Bro. C. C. 191. See *Henty v. Wrey*, 1882, 19 Ch. D. 504.]

WIGG. v. TILER.

15 May 1779.

The Great Seal hath the care of lunatics under a special appointment, and acts as a commissioner.

The lunatic's real estate had been sold under an act of parliament, and the money arising from it paid into the Bank, and laid out in Bank annuities in the name of the Accountant General, in the matter of the lunacy.

[553] The lunatic died; and, on application to have the money divided, Lord Bathurst, C., ordered the Master to enquire who were the heirs at law, and next of kin [of] the lunatic.

The Master having made his report, the heirs at law and next of kin applied to Lord Thurlow, C., to have the funds transferred; but his Lordship was of opinion, that a bill should be filed for the purpose of taking an account of his debts, and administering his effects.

The plaintiffs accordingly filed their bill to have the funds transferred, and paid to the heirs at law and next of kin.

On the 15th May 1779, the cause came on to be heard, but his Lordship was of opinion, that the report in the lunacy was not a sufficient authority on which to ground a decree; for, observed his Lordship, the Great Seal in respect of lunacy, acts as a commissioner under a signet to take care of lunatics, and it is not of necessity that the Great Seal hath that appointment.

There was an instance, he said, where the Lord High Treasurer had the warrant, consequently the matter could not be considered as a *res judicata*; and therefore he ordered the Master to enquire who were the heirs at law, and next of kin of the lunatic, and to advertise in the Gazette, and other papers, for them to come in and prove their affinity by a time, or to be excluded, and to make his report in the cause.

[554] ROBERTS v. HARTLY.

22 May 1779. 1 Bro. C. C. 56, S. C.

After time to answer, a plea put in, held good.

The defendant after obtaining two orders to answer, put in a plea. An application was made to suppress the plea, and that an attachment might issue.

Lord Chancellor.—I will make no order for suppressing the plea; I conceive a plea to be an answer. It is upon oath.

C. I.—13

LORD IRNHAM *v.* CHILD.

Trin. 1779. 1 Bro. C. C. 92, S. C.

Parol evidence to prove the intention of a party in executing a deed, rejected.

Bill to be relieved against two annuities, and to be let in to redeem them, upon the grounds that although there were no proviso of redemption, yet that it was meant, and so understood.

At the hearing of the cause, parol evidence was offered to prove the intention of the parties.

The cases cited were, Lord Maxwell *v.* Lord Montacute, 1 Eq. Cas. Ab. 20; Harvey *v.* Harvey, 2 Eq. Ca. Ab. 669; Hutchins *v.* Lee, 1 Atkins, 447; Walker *v.* Walker, 2 Atkins, 98; Fitzgerald *v.* Lord Fauconberg, in Fitz Gibbon, fol. 2; Pitcairn *v.* Osbourne (2 Ves. 375); Lock *v.* Colnbrook, 1767; Phillips *v.* Duke of Buckingham, 1 Vern. 227; Baker *v.* Wind, 1 Ves. 160.

Lord Chancellor had no doubt of the question, whether under the Statute of Frauds, or on the clear and acknowledged principles of law, that the evidence was inadmissible; and therefore rejected it.

[Mews' Dig. Annuity, III, 3, a; Mistake, 2; Mortgage, A, 12; Trust and Trustee, A, 1, a. *Explained*, Townshend *v.* Stangroom, 1801, 6 Ves. junr. 328. See Jervis *v.* Berridge, 1873, L. R. 8 Ch. 359; *Distinguished*, *In re* Duke of Marlborough, Davis *v.* Whitehead, [1894] 2 Ch. 133.]

[555] MURRAY *v.* FRANK.

1 Seal 1779.

Application that Naphthali Frank may, in seven days, procure a new grant of a committeeship, or that the Master may appoint a guardian.

Lord Thurlow, C.—You must apply to the Great Seal to appoint a committee; there is no instance where a party hath been found a lunatic under a commission of enquiry, in which this Court hath interfered.

CLOUGH *v.* CROSS.

23 June 1779. Lord Thurlow, C.

The sheriff of Chester refusing to make any return to the mandate of the chamberlain of Chester upon an attachment issued out of Chancery against a defendant to be executed, ordered to do it by a given time.

The defendant who resided in the county palatine of Chester, being in contempt for want of his answer to a bill filed against him in Chancery, an attachment issued against him, directed to the Chamberlain of the County Palatine of Chester, or his deputy there, commanding him to issue a writ under the seal of the County Palatine of Chester, to the sheriff of the city of Chester, to attach and bring the said defendant into this Court on or before a given day, to answer his said contempt. The said writ not being returned, another order was made on the 14th of December last, directing the said Chamberlain, or his deputy, forthwith to return the said writ; the order was served, and the Chamberlain having returned the writ with the following answer, "by virtue of the writ to me directed, I have by another writ under the seal of the County Palatine of Chester, [556] directed the sheriff within written, as within it is commanded me, which said sheriff hath made me no answer." Upon this the plaintiff moved on the 23d of January 1779, that this sheriff might make a return on the writ; but this could not be, as the writ was returned in Court; and the matter being novel, his Lordship was in doubt how to act, whether to proceed against the Chamberlain only to oblige him to compel the sheriff to pay obedience to his mandate, or to proceed against the sheriff in the first instance; for if the Court had not jurisdiction to execute its writ in the County Palatine, but only direct it to the Chamberlain in order for him to issue his mandate, that the effect of it might be observed; he did not see how he could make any order upon the sheriff; and to make an order the Court could not enforce would be lessening its dignity.

His Lordship therefore directed me to get what information I could on the subject, and to attend Mr. Baron Perrin who was Vice-Chamberlain of Chester, which I did.

but did not meet with two persons that agreed in opinion ; however, I procured the following notes and case, which I laid before his Lordship.

Seddon et al. v. Curghey, 11 June 1765. The plaintiffs sued out a *testatum scire facias* against the defendant directed to the Chancellor of the County Palatine of Lancaster, or to his lieutenant or deputy, the Chancellor made out his precept directed to the sheriff of the county, who, being called upon, refused, or neglected to return the precept. The question was, how the plaintiffs were to proceed, whether by calling on the sheriff in open court, or to move that the Chancellor might return the writ of *scire facias*. [557] Upon considering the matter, the latter method was taken, and the following order was made :

Lord Chancellor, 11 June 1765, between Samuel Seddon, Charles Deaves, and John Moore, Esq. plaintiffs, and Belby Curghey, defendant.

Upon motion, &c., it was alleged, that a *testatum scire facias* hath been issued under the Great Seal of Great Britain against the defendant, directed to the Chancellor of the County Palatine of Lancaster, or to his lieutenant or deputy there, returnable in fifteen days from the first day of Easter Term now last past ; and that no return hath been yet made thereof. It was therefore prayed, that the Chancellor of the said County Palatine of Lancaster, or his lieutenant or deputy there, may return the said writ : which is ordered accordingly.

This matter was not further prosecuted : but it was agreed, that when the Chancellor had made his return, the next step to be taken must have been against the sheriff, praying that he might return the precept.

Three orders are said to be necessary to compel the sheriff to return the writ :

First, an order that he do return it.

Secondly, that he do return it in _____ days after notice of the order, or stand committed.

Thirdly, that he do stand committed.

Note, these may be orders on the equity side.

And note, no orders on the plea side are to be made out of Term.

Rule in the Court of King's Bench to compel the sheriff to return a writ.

A. v. B. It is ordered, that the Chancellor of the County Palatine of Lancaster shall, within six days [558] next after notice of this rule to be given to him, or his deputy there, peremptorily return the writ of _____ issued between the parties.

Upon which the chancellor returned that he hath sent his mandate to the sheriff who hath not returned the same ; and thereupon another rule goes directed to the sheriff in the following form.

" It is ordered, that the Sheriff of the County Palatine of Lancaster shall, within six days after notice of this rule to be given to his under-sheriff, peremptorily return the mandate directed to him by the Chancellor of the said County Palatine upon the writ of _____ issued between the said parties."

The Lord Chancellor having considered the above papers, furnished by Mr. Deaves and Mr. Cooper, and having talked with Lord Mansfield, directed me to draw an order agreeable to the rule made by the Court of King's Bench.

An order was accordingly drawn, following the words of it ; and the sheriff, having been served with it, he returned the Chamberlain's mandate with a *cepi corpus*.

And on the 9th of July 1779, an order was made for the messenger to go, and bring up the prisoner.

BULLEN v. BUTCHER.

30 June 1779.

Application to discharge an order for the plaintiff to make his election upon the ground that the matters for which he was proceeding against the defendant in this Court and at law were distinct and unconnected.

The common order was made for the plaintiff to make an election upon the usual allegation that he was prosecuting the defendant both in this Court, and at law, for one and the same matter.

[559] Application on the above day to discharge the order, for that it was obtained upon a false suggestion, the matters for which the plaintiff was proceeding against the defendant at law, being distinct and unconnected with the matter in this suit, and

prayed that it might be referred to a Master to see if the proceedings of the plaintiff against the defendant at law and in this Court, were for the same matter.

The Lord Chancellor's idea was, that if the matter for which the plaintiff proceeded at law was distinct from the matter in this Court, the order did not restrain him, and he had only to prove it, when complaint was made of his breach of the order; and therefore, at first, his Lordship denied the motion; but, being told there were many instances of similar applications being granted, he directed the time for the plaintiff's making his election to be enlarged till further order, and referred it to a Master to see if the proceedings of the plaintiff against the defendant in this Court, and at law were for the same matter, and the Master to state the same with his opinion; and after the report, further order to be made; but his Lordship, at the same time, directed me to see the instances that had been mentioned.

Not an instance having been produced, though I desired the parties to bring me one, and not having been able to find one, I acquainted the Lord Chancellor of it; and he thereupon ordered me not to draw up the order he had before made; but by consent, the plaintiff was to proceed to trial of the action brought by him with stay of execution.

[560] MARTHA HULME, widow, Plaintiff; RICHARD TENANT and FRANCES his wife, and THOMAS WATSON, a trustee in the marriage settlement of the defendants, Defendants.

30 June & 1 July 1779. 1 Bro. C. C. 16, S. C.

Bill against husband and wife and the trustee under their marriage settlement to be paid a bond in which the wife joined for the husband's debt, she having separate property.

Bill against the defendants, the husband and wife, to be paid a bond debt due from the wife, for money lent to the husband, the wife having separate property.

Grigby v. Cox, 1 Ves. 517, 21st November 1748; Peacock v. Monk, 2 Ves. 190, 24th October 1748; lib. B. fol. 126, were cited.

The bill was dismissed.

The cause was afterwards reheard before Lord Thurlow, C., when the following additional cases were cited:

Norton v. Turville, 2 P. Wms. 144; Powlet v. Delaval, 2 Ves. 663, 28th July 1755, lib. B. 480; Hearl v. Greenback, 1 Ves. 298, and in 3 Atk. 695.

Mr. Attorney General for the defendants. —The husband the original debtor is in distress for money; his wife hath a separate property subject to her appointment; he prevails on her to join with him in a bond. The objection is, that the bond, as a bond of the wife, is void at law; but in order to give it effect the plaintiff would have it considered as an appointment, and under the *dictum* in the case of Peacock v. Monk, that the bond is to be taken as an agreement. The *dictum* is, however, questionable.

It was said on the part of the plaintiff, that in Bell v. Commissary Hyde in Gilbert's Rep. 83, and in Chan. Prec. 328, it is held that process will issue against a wife.

[561] In North v. Turville, 2 P. Wms. 144, it was held that a feme covert coming before Master and consenting that her separate estate shall be applied, shall be bound by it.

So in Briscoe v. Kennedy by Sir Thomas Clarke, M. R., 21st July 1762, Reg. Lib. B. fol. 517.

But in Machellan v. Stonehouse, annuities were settled to the use of a wife, and trustees appointed for her separate use. The plaintiff bought the wife's interest, and filed a bill to have annuities transferred by the trustees to the Accountant General, and to have the interest paid to him. The wife insisted that it was not done with her consent. There was evidence that both the husband and wife were satisfied. Nothing appeared fraudulent, yet the Court would not confirm it.

Lord Chancellor. —According to the idea I entertain of the case, doubts arise on the form of the relief to be given.

The bill is brought by an obligee in a bond against the husband, and wife joint obligors, and their trustees, to recover £180 out of the separate estate of the wife.

The question is, what sort of execution the Court will award against the separate property of the wife. The separate property is a real estate vested in trustees to convey

to the appointment of the wife by deed, or will; and in default of such appointment as to one part, to the use of Francis Wright; as to the other part of the real estate, to be sold, and out of the money to arise by the sale, £1000 to be retained, and to be laid out at interest, the interest to be for the use of the wife, and the principal subject to her appointment.

[562] In the argument in this case, what is laid down in the case of *Peacock v. Monk* (1 Ves. 127) is clear, that a feme covert acting with respect to her separate property, is to all intents to be considered as acting as a feme sole.

See *Allen v. Papworth*, 1 Ves. 163, 23d November 1748, Reg. Lib. A. fol. 714; *Grigby v. Cox*, 1 Ves. 517, 21st July 1750, Reg. Lib. A. fol. 647.

In such cases it is impossible to say a feme sole is not bound.

The question arising here is a little beyond it, namely, how far her general personal engagement shall be executed out of her general personal property?

If she had contracted how far her separate property should be applied to this or that purpose, I can have no doubt but the Court would have enforced it.

A general engagement by the wife, I am clear, will not bind, and I know no case where it hath been carried so far, as to direct a real estate of the wife to be sold, or conveyed, or that a decree hath been enforced against a wife by a sequestration, though against her trustee it may.

But the personal estate of the wife and the rents and profits of her real estate will, when they arise, be personal estate.

Therefore refer it to the Master to take an account of the rents and profits of the leasehold estates which were in mortgage to _____ received by the defendant Watson, or by any other person by his order, or for his use; and let the Master state the nature of the interest the said defendant Watson hath in the said mortgaged estates; and for the better taking the account and discovery [563] of the matters aforesaid (the usual directions); and reserve costs and further directions until after report, and liberty to apply.

[Mews' Dig. Husband and Wife, IV. 4, b. i. See *Johnson v. Gallagher*, 1861, 30 L. J. Ch. 298; *Shattock v. Shattock*, 1866, L. R. 2 Eq. 182; *Worsnop v. Benassi*, 1873, 21 W. R. 684; *London Chartered Bank of Australia v. Lempriere*, 1873, L. R. 4 P. C. 595; 9 Moo. P. C. (N. S.) 426; *Pike v. Fitzgibbon*, 1880, 14 Ch. D. 841; *Ex parte Gilchrist*, 1886, 17 Q. B. D. 534; *In re Hastings*, *Hallett v. Hastings*, 1887, 35 Ch. D. 97. See also Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), and S. C. with notes Wh. & T. L. C. 7th ed. vol. i. p. 654.]

G. M. SELWYN.

1 July 1779.

Depositions suppressed, because plaintiff's solicitor was one of the commissioners.

Application to suppress depositions for irregularity, because the solicitor was one of the commissioners.

A solicitor cannot act as a commissioner.

1 Vern. 369,—2 Ch. Cas. 69,—Practical Reg. 91.

Lord Chancellor.—Let the depositions be suppressed, and enlarge publication, and let there be a new commissioner.

MAYER v. GOWLAND; GOWLAND v. MAYER.

13 Nov. 1779. Lord Thurlow, C.

Question, whether a contract by testator after his will for sale of an estate, thereby devised, is a revocation of will as to that devise, and descends to heirs, or whether the contract is to be performed and the purchase money considered as personal estate? held to be part of personal estate.

Bill in the original cause was for an account of the estate of John Gowland, to have the residue paid to the plaintiff John and the defendant Thomas Mayer according to an agreement between them; to have a contract the testator had entered into with the defendant Dinely for the sale of an estate to him completed; and to have the purchase money considered as personal estate.

Lord Chancellor.—The testator was seised in fee of a manor and farm in Sussex called Mayes.

On the 8th of March 1775 he made his will, and thereby devised Mayes farm to Ralph Gowland for [564] life; remainder to Thomas Gowland the elder for life; remainder to Thomas Gowland the younger in fee; and devises his leasehold estate, and also his jewels used or worn by his wife, to a trustee to permit his wife to use and enjoy the above particulars during her widowhood; and, on her death, or second marriage, to go as part of his personal estate.

He also gives two long annuities he was then possessed of to John Shirly and Ann Shirly; these annuities the testator sold, and a faint claim was attempted to be made to have them reinstated, but it was soon dropt.

The testator also gave £500 a-year to his wife for her life, and a power of disposing of £2000; and, after other legacies, gave the residue to the plaintiff John Mayer: he and Thomas Mayer, as it is said, have entered into an agreement to divide the residue.

The testator, after making his will, entered into a contract with the defendant Dinely to sell to him Mayes farm for £1500, in which agreement he averred it was not subject to any lease; and if Banister the tenant should make out a title to any lease, the agreement was to be void.

The bill in the cross cause is, by the devisee of Mayes farm, to establish the will as to that devise; and by Banister the tenant, to have a lease according to an agreement he sets up, but he cannot make out.

The defendant the widow insists that the jewels, of which the use is given to her by the will for her life, are her paraphernalia, and therefore do not pass by the will; if she persists in the claim, which it doth [565] seem to be her interest to do, she must be put to her election.

The principal question in this cause arises on the estate called Mayes farm, devised by the will, and which the testator afterwards contracted to sell; by the heirs at law it is insisted, that the agreement with Dinely, though not carried into execution, is a revocation of the will as to that devise, and therefore the estate descended: By the devisee of that estate it is insisted, that if Banister's title to a lease is established, the agreement with Dinely is void, therefore no revocation; that a void agreement is not a declaration of trust, and therefore will not prevent the devise taking effect: And by the residuary legatees it is insisted, that the testator having contracted, it is evident, he meant to turn it into personalty, and as such they are entitled to it.

And I am of opinion that the agreement is good, that it ought to be carried into execution; and of consequence, the money arising from the sale is to be considered as personal estate.

Cases cited: *Cotter v. Laver*, 2 P. Wms. 623; *Roper v. Radcliffe* (2 Eq. Ca. Abr. 771); *Howard v. Howard*; *Glazier v. Glazier*, in the King's Bench, in which it was held that a covenant to convey in future is not a revocation of a will. *Beard v. Beard*, 3 Atk. 72.

[566] BREEDON v. VAUGHAN.

21 Dec. 1779. Lord Chancellor.

Bill by husband and wife, the husband dies, the wife is not bound to prosecute.

Motion to discharge an order of the 20th June 1778.

Bill by husband and wife, the husband dies, and the wife not proceeding, the bill is dismissed with costs; which order for dismissal she now prays to have discharged. *Parry v. Juxon*, Chan. Rep. 40, in 1669; and in the Practical Register under the head of Revivor.

The question is, whether the wife is bound to prosecute a suit in which she is named a plaintiff by her husband; the wife probably might not know any thing of the suit; during coverture she was under the controul, and influence of her husband: Her husband being dead, she may judge for herself; if a man and wife put in a joint answer, and she, being an heir, admits the will, that admission will not bind her: why? because it is supposed to be her husband's answer; the will must be proved *per testes*. It is analogous to proceedings at law in the action by husband and wife, and the husband dies.

AKEROID v. SMITHSON.

4 March 1780.

Real estate given an executor in trust to sell and to make one mass with the personal estate, and the residue to be divided amongst particular legatees in proportion to

their legacies ; two of the legatees died in the testator's life-time, such proportion as they would thereby have been entitled to had they lived, which arose from the real estate, held, on appeal, to result for the benefit of the heir at law.

Christopher Holworth, by will dated 4th April 1874, gave several legacies to persons therein named, and gave and devised all his real estates therein mentioned, and all his personal estate to the defendants Joshua Smithson and Henry Ibetson, and their heirs, execu-[567]-tors, administrators, and assigns, in trust to sell, and convert into money, and by and out of the money to arise from the sale, to pay all his debts, funeral expences, and legacies ; and after payment thereof, and retaining £50 each for their trouble, if there should be any surplus, after the same was ascertained, to pay the same unto Thomas Whitaker, James Roberts, William Roberts, Grace Ogle, George Ogle, Ann and Phebe Ogle, Joseph Siarr, Hancote Close, William Hawksworth, Mary Bracklebarr, Mary Ross, and Joshua Marshall, defendants in the cause, and Benjamin White and Mary Molineux, who died in the testator's life-time, to each of whom he had given legacies, in proportion to their several legacies.

The testator died 20th March 1775 : his executors proved the will, possessed his personal estate, and entered on his real estate, and sold it.

Benjamin White and Mary Molineux, two of the legatees, died in the testator's life-time, whereby their legacies, and all other their shares in the residue, became lapsed. The plaintiffs the next of kin filed their bill to have the said two legacies and proportional shares of the surplus considered as part of the testator's personal estate undisposed, and to belong to them as the next of kin of the testator.

The defendants, the residuary legatees, claimed the lapsed legacies, and shares, as sinking into and making part of the general residue.

The heir at law claimed such part of the said legacies, and proportion of the surplus as arose from the real estate, insisting, the same was to be considered as real estate.

Upon hearing the cause the 10th of July 1778, before Sir Thomas Sewel, M. R., his Honour declared [568] the plaintiff's the next of kin were not entitled to any part of the testator's estate as undisposed ; but that the same belonged to the several legatees, and dismissed the plaintiff's bill as to that claim.

From this decree the plaintiffs appealed ; and upon hearing the appeal the 4th of March 1780, by Lord Thurlow, C., the same cases were cited as in *Digby v. Legard* (*supra* [Dick.] 500), with the addition of that case. His Lordship declared, that so much of the shares of the surplus given to the said Benjamin White and Mary Molineux, as arose from the real estate, was to be considered as real estate, and descended and belonged to the defendant, the heir at law of the testator ; and proper directions were given for distinguishing it.

[*Robinson v. Taylor*, 6 May 1789, before Lord Thurlow, C., a similar case, where it was held to result for the benefit of the heir at law.—J. D.]

FERRAND v. PRENTICE.

(Reg. Lib. A. fol. 362.) 10 June 1750. Lord Hardwicke, C. Ambl. 273, S. C. and 1 Bro. C. C. 105, S. C. cited.

A legacy to be paid at the end of ten years. The executor to give security to pay it at the end of ten years, or to pay it into the Bank, to be placed out, and he to have the interest till the end of the ten years, and the plaintiff to apply for it.

The following statement is extracted from the entry.

Elizabeth Wallis, by will dated the 27th of June, *inter alia*, gave to the plaintiff Hannah Maria £200, to be paid within ten years after her, the testatrix's death, and appointed the defendant executor : He proved the will ; and, as alleged, promised to give the plaintiff security for the legacy ; but, declining so to do, the plaintiff filed her bill, that the defendant might admit assets, or account for the testatrix's personal estate. And might give the plaintiff [569] security for the said legacy, or pay it into the Bank, that it might be placed out.

The defendant, by his answer, admitted the will and probate, and also admitted assets. And said, the reason why he had not given to the plaintiff security for the legacy, was because he apprehended, they had not given a sufficient reason why they insisted on a security.

The cause was heard on bill, and answer.

His Lordship orders the defendant in a month to give a security to pay the legacy at the end of ten years from the death of the testatrix; and, in default, to pay the legacy into the Bank, to be placed out in Bank annuities, and the interest to be paid to the defendant till the end of the ten years, and then the plaintiff to apply.

(See 5 Dec. 1765. Reg. Lib. A. fol. 115, for another case and similar decree.)

Ex parte FENNILITEAU.

17 Nov. 1781. Lord Thurlow, C.

Infant mortgagee of lands in St. Christophers ordered to convey, after a doubt whether the statute of Queen Anne extended to estates out of the kingdom.

The Master having under a reference found an infant to be a mortgagee of lands in the Island of St. Christophers in the West Indies, within the statute of the 7th of Queen Anne; upon the petition to confirm the report, and that the infant might convey, his Lordship doubted whether the act extended to lands out of the kingdom; but, upon calling for the act, and finding the words to be, "having estates in lands, tenements, or hereditaments, in trust only for others, or by way of mortgage," his Lordship was satisfied, and directed the infant to convey pursuant to the act.

[570] *WORGE v. BRADLEY.*

26 July 1780.

Error discovered after report confirmed, ground for bill of review.

Lord Chancellor.—This cause came on for further directions after a report confirmed, the report being erroneous.

In *Gould v. Tancred*, 2 Atkins, 533, application was made to rectify error in a report after confirmation, but the petition was dismissed. Error being discovered after report confirmed, would be ground for a bill of review, if the evidence came up to it, but in this case it doth not; therefore dismiss the petition.

ROGERS v. MILLICENT.

Trin. 1780. Lord Thurlow, C. See *Gibbons v. Hill*, *supra* [Dick. 324].

Legacies, and an annuity being likewise given out of the personal estate, and the personal estate not being sufficient, the legacies as well as the annuities were to abate in proportion; and in order to settle it, the Master to set a value on the annuities, and apportion such value.

GILES v. ROE.

5 July 1780.

Voluntary bounty of £60 by deed, and legacy of 600, by will entitled to by will; but lands covenanted to be seised in fee, not being so, administrator considered as a creditor by covenant, and satisfaction out of personal estate.

Sir William Thomas, by deed dated 18th December 1776, charged his estates therein mentioned with the payment of an annuity of £60 to the plaintiff for life, with power of entry and distress in case of non-payment, with a covenant that he was seised in fee of the premises charged with it.

[571] By will dated the 26th January 1777, he confirms the deed, and gives the plaintiff a legacy of £600.

The estates charged with the annuity, and of which he covenanted to be seised in fee, were copyhold, and he had not surrendered them, so that the estates descended to his heir.

The bill was, for the plaintiff to be paid her legacy and to have the annuity secured.

Lord Chancellor.—A question hath been attempted to be made, whether the plaintiff is entitled both to the annuity, and to the legacy; but there can be no doubt.

The only question is under the annuity deed; the lands charged with it, and of which he covenanted to be seised in fee, and had power to dispose, prove to be not so, except three acres of land, which are very insufficient.

The plaintiff therefore must have satisfaction under that covenant, and will be a creditor by specialty *quoad hoc*.

And the heir at law, being residuary legatee, and executor, and having admitted assets, the Lord Chancellor ordered the legacy to be paid; and a fund set apart out of the personal estate to answer the annuity.

Cases cited: *Hill v. Spencer* before Lord Camden, in 1767, Ambl. 641; *Whaley v. Norton*, 1 Vern. 483; *Matthew v. Hanbury*, 2 Vern. 187; *Marquis Annandale v. Harris*, 1 Eq. Cas. Abr. 31; *Priest v. Parrot*, 2 Vez. 160.

[572] *BROOKS v. DAY.*

7 July 1780. Lord Thurlow, C.

Bill to make attorney responsible for recommending bad security.

This bill was to make the defendant, an attorney, answerable for a gross breach of trust (as alleged) by recommending a bad security to the plaintiff.

Cases cited: *Arnot v. Biscoe*, 1 Ves. 95; and a similar case, before Lord Bathurst, C.

Lord Chancellor.—If any thing is to be imputed to the defendant through negligence, he will be subject to damages for it at law; if through fraud, this Court is proper to relieve; but fraud doth not appear, therefore dismiss the bill, but without costs.

STEVENS v. VAUGHAN.

12 July 1780.

Bill to be paid two legacies of £200 each: *Qu.* whether the last was in satisfaction of the first? Held not to be so.

James Perry, by will, gives to the plaintiff a legacy of £200, and appointed Elizabeth Perry executrix, who proved and possessed assets. She, by her will, gives the plaintiff a legacy. The bill is for an account of the personal estate of each, and to be paid.

The question was, whether the legacy by Mrs. Perry was or was not a satisfaction of the legacy of £200 given by James Perry, to which, as executrix she was liable.

Cases cited: *Chauncey's case*, 1 P. Wms. 409; *Mathews v. Mathews*, 2 Ves. 237; *Lechmere v. Lord Carlisle*, 2 P. Wms. 326; *Barkham v. Dorwine*, 2 Eq. Ca. Abr. 352.

[573] In *Pilson v. Price*, 1776, the testator being indebted to the plaintiff in £1000, gives him a legacy of £5000, and directs debts and legacies to be paid. Both ordered to be paid, as in *Chancey's case*, 1 P. Wms. 408. *Nichols v. Judson*, 2 Atk. 300.

The Lord Chancellor declared the plaintiff entitled to both legacies, and directed the necessary accounts.

ROBERTS v. ROBERTS.

17 July 1780. Lord Thurlow, C.

Admission of assets by defendant's answer: he was held to it.

This cause came on upon an appeal from a decree at the Rolls, in which his Honour held the defendant executor bound by an inadvertent admission of assets.

The question was, whether the Court can relieve after a full admission of assets?

It was argued, suppose a defendant, an executor, admits assets by his first answer; and upon exceptions he puts in a further answer, and in that corrects the first as to the admission of assets, the Court will hold him to the admission.

In *Morgan v. Gower*, 17 March 1776, before Lord Bathurst, C., some legacies were paid, others were not paid. It was said an executor cannot make a legatee refund, though a creditor may. *Davis v. Davis* (2 Eq. Ca. Abr. 554), and in *Burn's Ecclesiastical Law* (4 vol. 336, and *supra*. 32; see also *Dagly v. Crump*, 35); bill by an executor against a legatee, to refund a legacy voluntarily paid. The legatee was decreed to refund to the plaintiff the executor; for an executor paying out of his [574] own pocket, stands in the place of the creditor, and hath a right to call on the legatee. *Chamberlain v. Chamberlain*, Ch. Ca. 256; in this case a creditor made a legatee refund. *Williams v. Lee*, 3 Atkins, 223; *Brand v. Hughes*, in House of Lords. *Hodges v. Waddington*, 1 Eq. Ca. Abr. 236; *Grove v. Banson*, 1 Ch. Ca. 148, where legatees made a legatee refund. *Katchmead v. Lincoln*.

Lord Chancellor.—The only point for consideration is, whether his Honour was right in directing an account, the defendant having in a former answer admitted assets,

and, in fact, admitted assets by payment ; and all the other debts, and legacies being paid.

The defendant the executor afterwards sells out of the funds at loss. The estates which he at first admitted to be sufficient turn out not to be so, and afterwards the plaintiff files his bill. It was argued, that the executor having admitted assets by his answer to a former bill, he is bound by it, and I am clear he is ; besides, having paid interest, it is to be considered as a payment, or an assent to the payment of the legacy.

Therefore affirm the decree ; but the deposit was ordered to be paid back.

[575] LEITH v. POPE.

17 July 1780. Vid. 2 Bl. Rep. 1327.

Demurrer to a bill for discovery of assets to satisfy an execution taken out against defendant, after a judgment at law, over-ruled.

The plaintiff having recovered £10,000 damages at law against the defendant, the plaintiff filed his bill against the defendant for a discovery of assets, upon an idea that he had made voluntary assignment of his effects.

The defendant demurs to the discovery.

Smithier v. Lewis, 1 Vern. 398 ; Angel v. Draper, 1 Vern. 389, were cited.

Lord Thurlow, C.—The question is, whether, upon a judgment sued out, the Court will retain a bill for discovery of further assets. There are cases where the plaintiff, having obtained judgment at law, and taken out execution, hath a right to come here for relief ; Shirley v. Watts, 3 Atk. 200 ; and in this case the demurrer is too large ; therefore, over-rule the demurrer.

[See Neate v. Marlborough (Duke of), 1838, 3 My. & C. 421.]

LLOYD v. SCOTT.

24 July 1780. Lord Thurlow, C.

Application to quash writ of error in Exchequer in *qui tam* actions in King's Bench.

Motion by Mr. Kenyon to quash a writ of error in Exchequer in *qui tam* causes in the King's Bench.

Stat. 27 Eliz. chap. 8, sect. 2, Sid. 170, in debate upon the Statute of Usury in King's Bench ; Ventris 49, writ of error doth not lie in Exchequer Chamber in *qui tam* actions ; Ashby v. White, Lord Raym. Rep. 954.

Scott v. Knapton, Raym. 275 ; Ryal v. Farrington, Cro. Car. 10 ; Baker v. Duncliffe, Skinner, 549 ; Lord [576] Say and Seal, Cro. Car. 142 ; 3 Salk. 7, the King hath no privilege in action popular.

Lord Chancellor. This is in the Petty Bag. By *officina brevium*, the Master of the Rolls takes notice of matters on the equity side, but on the common law side he hath no jurisdiction.

WOOD v. ADAMS.

2 Nov. 1780. Sir Thomas Sewel, M. R.

Tenants ordered to attorn to sequestrators, under a sequestration for a duty.

Application that the tenants of an estate sequestered for a duty might attorn to the sequestrators.

His Honour entertained a doubt as to the propriety of the application ; but after taking time to turn it in his mind, ordered the tenants to attorn.

[But *qu.* being the first instance of the kind.—J. D.]

FOWKES v. CHADD.

6 Nov. 1780. Lord Thurlow, C.

When a bill is retained, with liberty for the plaintiff to bring an action to establish his right, and there is a verdict against him, it not being to satisfy the conscience of the Court, the party must apply to the Court where it was tried, for a new trial.

Mr. Graham moved for a new trial of an action of trespass, which the Court, upon a motion for an injunction, directed, in order to try the right.

The Lord Chancellor said, the application was improper ; that it should be to the Court in which the action was tried ; and took this distinction : Where an action is to be brought, and tried, the title is a legal one, and till the plaintiff's right or title is established, he hath no business here ; but where an issue is directed, it is in order to ascertain a fact, that the [577] conscience of the Court may be satisfied before it decides ; which being the case, it is proper, if any objections are taken to the verdict, they should be stated to the Court by which the issue is directed, that the Court may consider them, and see whether they have such weight as to make the Court dissatisfied with the verdict. This was the Lord Chancellor's idea : but one case being cited, of the Earl Pomfret v. Smith, before the Lords Commissioners Smith, Aston, and Bathurst (*supra* [Dick.] 427), (which they entered upon merely to get rid of a troublesome man, as I heard them say), it stood over to this day, to see if any further instances were to be met with ; but no other being found, the Lord Chancellor adhered to his former opinion, and would not entertain the motion.

MABANK v. BROOKS.

8 Nov. 1780. Lord Thurlow, C.

Evidence offered to prove that a testator who gave a legacy to A. his executors, administrators, or assigns, knew A. to be dead, and meant it for his representative, rejected.

Robert Maybank, in 1726 clerk to Francis Negus the testator's father, and so continued for many years being in great intimacy with him, in 1732 lent £845 to the said Francis. In 1736 Robert Maybank died. On 8th March 1771 William Negus made a will, knowing of the death of Robert Maybank, and thereby says, " I give to Robert Maybank, formerly my father's clerk, £845. his executors, administrators, or assigns."

In June 1773 the testator died.

The plaintiff, as representative of the said Robert Maybank, filed his bill to be paid the said legacy of £845 given by the will of the said testator, and for an account of the testator's estate.

[578] One Mott was employed by the testator to make the will, and to prepare the draft.

His evidence, at the hearing, was offered to be read, to prove the testator intended the legacy for Maybank's representative, as he knew at the time of giving the instructions, that Maybank was dead.

This was objected to.

The cases cited were, *Southwel v. Lord Limerick*, 2 Eq. Ca. Ab. 418, where a witness was examined *de bene esse*. If the plaintiff, after the defendant's answer, neglects to proceed so as to examine in chief, his evidence shall not be read. *Brown v. Selwyn* in *Forrester's Rep.* 240 ; *Ulrich v. Lichfield*, 2 Atk. 372.

Lord Chancellor.—The only article for which Mott's evidence is now pressed, is to prove that the death of Maybank was in the knowledge of the testator. Allow the objection, and dismiss the bill.

ALCOCK v. EAMES.

20 Dec. 1780. Lord Thurlow, C.

Legacies to infants at twenty-one, if placed out in annuities, and those annuities sink in point of value ; infants not bound to accept those annuities in full satisfaction of their legacies.

In this cause legacies were given to an infant at twenty-one.

Bill for an account of the personal estate, and to have the legacies placed out.

The executors admitting assets, the Court at length directed the legacies to be paid into the Bank, and placed out in annuities, which was done.

By the fall of the funds, at the time the infants came of age, the annuities fell far short, in point of value, of the legacies.

[579] The Lord Chancellor thought they were not bound to accept the annuities in satisfaction of the legacies ; but that they were to take the value in part, and the deficiency was to be made good out of the general personal estate.

WELLINS v. LOMANS.

23 Jan. 1781. Lord Thurlow, C.

Application to serve two persons named by a mortgagor for that purpose in an indorsement on the mortgage, with a subpoena to appear to a bill filed by the mortgagee against the mortgagor to foreclose, the mortgagor having been out of the kingdom so long as not to come within the act of 5 Geo. 2 to render process effectual against persons who abscond: the motion denied.

A defendant, a mortgagor, living or being about to go abroad, by an indorsement on the mortgage deed (as it was alleged), agreed, in case he should not redeem by a limited time therein mentioned, that two persons therein named for the purpose, should accept a subpoena for him to appear, and answer any bill that should be filed against him, touching the mortgage: the plaintiff having filed his bill to foreclose, applied this day, by his Counsel Mr. Ambler, to serve the persons named in the said indorsement with a subpoena to appear, and that such service might be deemed good on the defendant. After standing over for consideration, his Lordship denied the motion.

(There were two cases mentioned, *Hyde v. Foster* (*supra* 102), before Lord Hardwicke, the 5th of August 1745, and *Carter v. De Brune* (*supra* 39), the 12th of July 1722; but in those cases it was admitted, or proved, that the persons served acted as attorneys or agents for the defendants, and the commission ordered, which is, of course, to serve an attorney at law, is merely to obtain an injunction; and there is no instance where the Court went farther, in case the bill prayed other relief than an injunction. Besides, in this case it doth not appear that it was with the privity of the persons named in the indorsement that their names were used; neither doth it appear they would accept a subpoena to appear for the defendant; for who would indemnify them? And should they appear without authority, they would be answerable; and unless they did appear, the bill would not be taken [580] *pro confesso*, the defendant not coming within the act of the 5th of Geo. 2 to render process effectual against persons who abscond to avoid being served, or being served, refused to appear, the defendant having been out of the kingdom above two years before the bill was filed.

The motion was, on a future day, renewed before Lord Kenyon, sitting for the Chancellor, in another shape, and again denied.—J. D.)

PITCHER v. HELLIAR.

23 March 1781. Lord Thurlow, C.

A receiver of an infant's estate ordered upon filing the bill, and before a subpoena to appear had been served.

The plaintiff is tenant in tail of the real estate, and of the money to be raised by the sale of other estates (which had been sold), and of which the plaintiff's father was tenant for life.

The father filed his bill against the defendant Helliard, the acting executor (the other executors having declined to prove), who had possessed, for an account, and to have the property secured.

The defendant Helliard absconded, and was in contempt to a commission of rebellion, for want of his answer.

The plaintiff's father died, and the plaintiff's right, as tenant in tail, taking place, the plaintiff filed his bill against the defendant Helliard, for an account, and for a receiver.

Before a subpoena had been served, and indeed it could not, the defendant Helliard not being within the kingdom within two years preceding the bill, the plaintiff applied this day for a receiver; and upon an affidavit stating all the circumstances, and the danger the property was in of being lost for want of being got in:

[581] His Lordship ordered a receiver; and said he would have ordered one, even if there had been no bill.

The Master of the Rolls had refused a like motion.

HARRINGTON *v.* CHASTEL.

15 Nov. 1781. 1 Bro. C. C. 124, S. C.

Injunction to stay proceedings at law on bonds, the consideration being a place procured about the person of the king.

The plaintiff having obtained an injunction, this day shewed cause for continuing it. The case was this : Earl Rochford, being Groom of the Stole, procured the plaintiff to be appointed a page of the bedchamber, upon condition he entered into bonds to pay annuities to certain persons during his life.

It was insisted, that should this not be a sale of an office within the statute of the 5th & 6th of Edw. 6, this Court will set aside the bonds for fraud and imposition.

Cases cited : *Law v. Law*, Forr. Rep. 140 ; *Debenham v. Ox*, 1 Vez. 276 ; *Godolphin v. Tudor*, 2 Salk. 468 ; *King v. Vaughan*, in King's Bench, Hawkins's Pleas of the Crown, fol. 168 ; *Hall v. Potter*, Shower's P. C. 76

Lord Chancellor.—Allow the cause.

This cause was heard by Lord Thurlow on the 5th of February 1783, and the injunction made perpetual.

[582] DICKENSON *v.* MAVIE.

17 May 1771. Lord Bathurst, C.

£500 to be paid to the wife to prosecute a suit in jactitation of marriage, although no agreement before marriage.

The defendant, the wife of the plaintiff, was seised of lands. She married the plaintiff in France. She was ordered to be paid £500 to prosecute a suit in the Spiritual Court, for jactitation of marriage, although there was no agreement before marriage.

See *Perishall v. Squire*, *supra* [Dick.] 31.

TAYLOR *v.* RHIDDEE AND ASTLE.

19 June 1781. Lord Thurlow, C.

Motion to refer it to Master to see whether the answers put in to three former amended bills were not sufficient answers to a fourth amended bill, refused.

On the 1st of June 1781, Mr. Mitford moved, as of course, for the defendant Astle, "that it might be referred to a Master to examine, and certify whether the answers put in to the plaintiffs' three former amended bills were not sufficient answers to the fourth amended bill, on the following detail of facts :

15th April 1777, the original bill against Rhiddee.

21 May 1778, order to amend by adding parties.

The defendant Astle made a party defendant.

5th November 1778, Astle answered.

Hilary 1779, the bill again amended.

29th October 1779, Astle answered the amendments.

Hilary 1780, exceptions taken to the answer.

27th March 1780, the answer reported sufficient.

Easter 1780, the bill again amended.

27th November 1780, Astle answered the amended bill.

7th March 1781, order to amend the bill again, and the bill amended.

[583] It was said there was a precedent in support of the motion : it however struck his Lordship as novel, and therefore he ordered me to look into it.

The name of the case alluded to was, *Johnson v. Rogers*, 17th January 1769, but it was not in point ; besides, that was moved specially on notice.

On this day it was again mentioned, when his Lordship said, it certainly was not a matter of course ; that it must be upon very particular circumstances, such as frivolous and repeated amendments, evidently for delay, on which he would grant the motion, and then it must be upon notice.

That the plaintiff having served a subpœna on the defendant to answer the amendments, the defendant was bound to answer them, but that he might say he could not give any other answer to them than what he had said in his former answers : and therefore his Lordship directed the order not to be drawn up.

HASSEL v. SIMPSON.

21 June 1781. Lord Thurlow, C.

A new trial granted, of an issue to try whether a bankrupt had committed an act of bankruptcy, at a given time, founded on a general assignment of his effects, when not indebted, and in full credit.

Upon the hearing of the cause, an issue was directed to try, whether Jackson the bankrupt had, on or before a given day, committed an act of bankruptcy.

On trial of the issue, the jury found that by the general assignment of his effects he had committed an act of bankruptcy.

The case was this :

At the time of the transaction in 1773, the bankrupt was possessed of property to the value of £1200 or £1300 :

[584]	A house	.	.	.	.	.	.	.	£400
	Furniture	.	.	.	.	.	.	.	200
	Stock	.	.	.	.	.	.	.	700
									<hr/>
									£1300
									<hr/>

and in full credit :

And no evidence that he was at that time indebted.

He had borrowed £200 of one Ellen Barber : the security proposed was the bankrupt's bond, and the defendant Simpson to join with him in it.

Before the execution of the bond, he agreed to indemnify Simpson.

Child, an attorney, was agreed upon to prepare the indemnity.

The instructions were given by Jackson, the defendant Simpson not being present, nor having seen Child previously to the giving of the instructions.

The security proposed by Jackson the bankrupt was a mortgage of the house ; and he said at the same time, he had furniture and stock ; and left it to Child to prepare the security at his own discretion.

Child, without any participation with the defendant Simpson, prepared a general assignment of the bankrupt's estate and effects defeazible. And Simpson permitted Jackson to continue in possession.

By Statute of 1st of James I. chap. 15, a bankrupt remaining in possession of goods assigned, they shall belong to the creditors.

[585] Ryall v. Rolle, 1 Atk. 165 ; Worsley v. De Mattos, 1 Burrows, 467 ; Twyne's case, 3 Co. 80.

But there is a distinction where goods are assigned as a security, and when on an absolute assignment, and the bankrupt continues in possession.

And there is likewise a distinction where an assignment is made on the eve of a bankruptcy, and a bankruptcy in contemplation, and where made in time of full credit.

Wilson v. Day, 2 Burrows, 827 ; Alderson v. Temple, 4 Burrows, 2235 ; Linton v. Bartlet, 3 Wilson, 47 : in this case, the bankrupt, the very evening before he absconded, assigned to his brother, to give preference to the other creditors.

Law v. Skinner, Blackstone's Rep. vol. 3. fol. 936 ; Jacob v. Sheppard, cited in Cock v. Goodfellow, 2 P. Wms. 430.

In March 1783, the Lord Chancellor, upon these cases, granted a new trial.

[For subsequent Proceedings, see S. G. 1 Dougl. 89 n.]

GREEN v. PIGOT.

23 June 1781. 1 Bro. C. C. 103,—S. C., *Vid. also* 2 Bro. C. C. 58.

The plaintiff at twenty-one entitled to a legacy, with interest in the mean time, brings his bill against the executor and residuary legatee to have the legacy raised, and paid into the Bank, and laid out : And it was so decreed by the Master of the Rolls.

This cause was heard upon an appeal to the Lord Chancellor of the defendant, as to so much of the order on hearing as directs the legacies to be raised and secured.

[586] For the appellant.—The legacy is given to the plaintiff at twenty-one : if he die before, the legacy drops. There is not the least surmise that there is any danger

of losing it from the circumstances of the defendant : besides, as the real estate is charged by the will, the estate cannot be parted with, but must remain subject to the legacy, be it in whose hands it may, when the legacy becomes payable.

The cases cited upon this head were, *Walker v. Cook*, February 1781 (1 Bro. C. C. 105) ; *Johnson v. De la Cruze* (1 Bro. C. C. 105), 17th July 1749 ; *Pearce v. Taylor*, 7th May 1778.

If a legacy be given to an infant to be paid at twenty-one, and the infant die before he attains that age, his executor or administrator cannot demand it until the time arrives, at which, had the defendant lived, it would have been paid.

Lord Chancellor.—I do not incline to vary the decree, and without going into the cases, let the decree be affirmed.

CASSON *v.* DADE.

Trin. Term 1781. Lord Thurlow, C. 1 Bro. C. C. 99, S. G.

The testatrix sat in her coach, and executed her will at the door of her attorney's house. The witnesses attested it in the office of the attorney, through the window of which, it appeared by the evidence of a person in the carriage, the testatrix might see what passed. The witnesses, as soon as they had subscribed the will, took it to her, when she folded it up, and put it into her pocket. The Lord Chancellor held this to be a good execution of the will.

[587] *BOURKE v. LORD MACDONALD*.

Trin. 1781. Lord Thurlow, C.

Service of a subpoena to appear on the defendant in Scotland, being out of the jurisdiction of the Court, the propriety of issuing an attachment under doubted, though thought by the Master of the Rolls, and most of the practitioners, to be regular.

The defendant was served in Scotland with a subpoena to appear. On his coming into England some time afterwards, the plaintiff sued out an attachment against him for not appearing, and he was taken under it.

The defendant applied to discharge the attachment for irregularity. A doubt arose with the Lord Chancellor whether the attachment issued regularly, the defendant being served with the subpoena out of the jurisdiction of the Court. It stood over several times for consideration, his Lordship not being satisfied, although Sir Thomas Sewel, M. R., and most of the practitioners were clear as to the regularity. It afterwards dropped.

MACNAMARA *v.* JONES.

19 May 1784. Lord Thurlow, C.

If an executor employs a solicitor to do business for him in the management of his testator's affairs, he shall be allowed what he pays the solicitor for such business.

The defendant Barber, who had formerly acted as, and was a solicitor of the Court of Chancery, was the acting executor of the will of Arthur Jones Esquire, the testator in the pleadings named. The defendant Barber employed a Mr. Davies, who had been his clerk, to do business for him in the management of the testator's affairs. In taking the account under the decree, the Master refused to allow him sums paid to the said Davies, saying it was the executor's business, and he ought not to be allowed it. Upon arguing exceptions taken by the defendant Barber to the report :

[588] The Lord Chancellor said, he was clear, that if an executor pays an attorney for his trouble and attendance in the transacting and conduct of the testator's affairs, he ought to be allowed, and repaid what he so pays : and referred it to the Master to tax Davies's bill.

GRIERSON v. GRIERSON.

18 Aug. 1781. Lord Chancellor.

Marriage in Scotland : validity doubted.

Complaint against a person for marrying a ward of the Court in Scotland.

The Lord Chancellor doubted the validity of the marriage : therefore referred it to the Master to see if any marriage had been rightly celebrated, and to state the circumstances.

DOMINICETTI v. LATI.

1 Aug. 1781. Lord Thurlow, C.

Though a plaintiff by his bill states an account by which a balance appears to be due to him, and the bill is decreed to be taken *pro confesso*, and an account directed, and the charge is what is stated by the bill, he must prove it.

Bill for an account of dealings and transactions, and for a discovery. It stated dealings and transactions between the plaintiff and defendant, and that the plaintiff had paid to, and received sums of money from the defendant, and the plaintiff annexed a schedule to the bill. The defendant having absconded, the bill was decreed to be taken *pro confesso* against him ; and the Master was directed to take an account of all dealings and transactions between the plaintiff, and the defendant, and the parties were to be examined upon interrogatories, and produce books, &c., as the Master should direct. The plaintiff carried in his charge of what he stated by the schedule to the bill to be due to him. The Master [589] required the plaintiff to prove his charge : which the plaintiff not doing, the Master made his report that nothing was due. The plaintiff took exceptions : the exceptions were argued in Trinity Vacation 1781, and stood over for the purpose of enquiring into the practice. They came on again this day, when the Lord Chancellor over-ruled the exceptions, and put this case : Suppose the defendant had answered, and the plaintiff had not replied to the answer, must not the plaintiff have proved his charge ?

STEDMORE v. PADMORE.

31 Nov. 1781. Lord Chancellor.

If witness to a will is not to be found, no impediment to establishing the will.

Bill to establish a will.

One of the witnesses was not examined ; but it being proved he had been gone abroad five years, and could not be found, nor any intelligence had of him.

The Court, notwithstanding, declared the will well proved, &c.

BENNET v. HAMMOND.

6 Dec. 1781.

Question upon spoliation.

Bill to be let into possession of one moiety of the estates in question, and for an account of rents, and profits.

The case was this : Peter Bennet, the grandfather of the plaintiff, had two sons, William and Barnaby, and several daughters, and was possessed of a real estate of about £120 a-year.

[590] He devised his estate at Shaftesbury to his two sons and their heirs, in joint tenancy, subject to charges thereon.

Upon the death of the testator, William the heir took possession of all his father's estate.

William was prudent : Barnaby was a spendthrift.

In 1755 the two brothers entered into an agreement, stating that all accounts between them were settled, and all William's demands on Barnaby were discharged. And William agreed to discharge all demands on the estate, and to pay Barnaby 10s. 6d. a-week, and Barnaby to make over all his interest in the estate to his brother William.

An agreement was accordingly drawn up and signed by them, that Barnaby should convey.

This was in July. Soon after Barnaby fell into a bad state of health, therefore William did not press Barnaby to convey; as in case he, William, survived, he would take as heir at law to Barnaby.

William was taken ill, and made a will before the agreement was carried into execution; and thereby disposed of his estate as if he and his brother Barnaby had been tenants in common, to his son by his first wife, if he attained twenty-one, if not, he gave it over to his son William, by his second wife; and gave the residue of his estate to his son William by his second wife, and appointed his wife executrix.

William the brother died. After his death, Mr. Kay, the attorney who prepared the agreement, delivered in a bill of his fees and disbursements, in which was contained a charge for attending the execution of the agreement.

[591] After the death of William, Barnaby his brother contrived to get the agreement in his custody, and burnt it; and then got into possession of the estate, and enjoyed it till his death; and by will devised it to the child of his niece Frances Durnford.

The deed not existing, the first question was, what would be the result in point of law? The plaintiff insisted that Barnaby, from the time of the execution of the agreement, was to be considered as a trustee of the estate for William: that there was no room for enquiry into the consideration of the deed: that the destruction of the deed by Barnaby established it: that it was unnecessary to state how far Courts have gone in *odium spoliatoris*.

Cases cited.: *Teurisa v. Delany*, appeal from Ireland, the first case of spoliation: Attorney General and Lord Hunsdon v. Countess of Arundel, in Hobart's Rep. 109: *Hampden v. Hampden*, in 1703, 1 P. Wms. 733, 1 Bro. P. C. 250; *Dawson v. Cotesworth*, in 1721.

The Master of the Rolls.—When a person comes into this Court for equity, he must come with clean hands. The transaction, with respect to the agreement, by the plaintiff's own statement, is suspicious. No consideration is pretended, except 10s. 6d. a-week, £27, 10s. a-year, for the fee of his moiety of an estate of £102 a-year: The very transaction speaks an imposition. And if there had been spoliation, it is a little extraordinary that it should be suffered to pass in silence during the life of Barnaby, and fifteen years after the fact, if such were the fact, to take it up. But the spoliation is not clear; and I will not strain a point to suppose a spoliation of what might never exist; and therefore dismiss the bill.

[592] SCHREIBER v. LATEWARD.

18 Dec. 1781. Lord Chancellor.

Contempt on marrying a ward by commitment not sufficient, held to be a conspiracy, and an information recommended.

The matter before the Court arose on the marrying of a ward of the Court, in which there was a combination. The Lord Chancellor called it a conspiracy. A commitment his Lordship thought not a sufficient punishment: and recommended an information in the Court of King's Bench.

Cases cited: *The King v. Molloy*, Trinity, 14 & 15 Geo. 1: the *King v. Comforth*, Hilary, 15 Geo. 2; the *King v. Atkins*: the *King v. Sweet*, Hilary, 1767; the *King v. Lord Ossulston*, 10 December 1747, 2 Strange, 1107,—3 Keble, 101; the *King v. Hervey*, 13 & 14 Geo. 2; the *King v. Storey*; and the *King v. Turflet*.

JOHNSON v. SMITH.

7 Feb. 1782. Lord Thurlow, C.

Affidavit sworn in Ireland before a Master, to ground a writ of *ne exeat regno* admitted, after doubt and conference with the Judges.

Affidavit of the plaintiff sworn in Ireland, before a Master, to ground a writ of *ne exeat regno*, offered to be read. His Lordship, notwithstanding the orders in the cases of *Annesly v. Earl of Anglesey* (*supra* [Dick.] 90), 13th February 1743, and *Alcock v. Carter*, 1 Strange, 545, and *Chicot v. Le Quesne*, 4th June 1751 (*supra* [Dick.] 150), which were produced to his Lordship, doubted the admissibility of it. But having afterwards, as he said, conferred with the Judges, he admitted the affidavit to be read, but denied the motion.

[593] WILSON v. FOREMAN.

11 April 1782. Lord Thurlow, C.

Trustees in the plaintiff's marriage settlement, lent part of the trust monies in their hands to the husband, when in full trade and in credit, upon his bond. He purchased an estate, and took the conveyance to himself in fee simple. He afterwards became bankrupt, and the estate so purchased, with other estates and effects, were conveyed and assigned to his assignees. The estate so purchased was held to be purchased with the trust money, and ordered to be conveyed to new trustees upon the trusts in the settlement, in part of the bond debt, and the trustees to prove the remainder of the debt under the commission.

The plaintiff Mrs. Wilson, before her marriage with the defendant Wilson the bankrupt, was seised and possessed of real and personal property. Part of it was, on her marriage, conveyed and assigned to trustees named in her settlement, upon the trusts in the settlement. The husband carrying on the trade of a brewer, and in high credit, the trustees lent him part of his wife's fortune upon his bond. He purchased, amongst other estates, an estate called Falling Foss, and took the conveyance of it to himself and his heirs. He afterwards was found and declared a bankrupt, and his estate and effects, and, *inter alia*, Falling Foss, were assigned and conveyed to the defendants his assignees. The question in the cause was, whether the estate the bankrupt so purchased in his name, was to be considered as part of the trust money, the money being lent to the bankrupt upon his bond, without any stipulation or reservation; or whether the trustees were to be considered as creditors of the bankrupt for the money lent, and merely to receive a dividend for it with the other creditors. On the part of the assignees it was contended, that the plaintiff and her trustees ought not, neither could they be considered in any other light than as creditors for the money so lent, any more than if it had been lent to a stranger, and they had taken his bond: that money had no ear-mark: that if the trustees had acted wrong in lending the money, they were to blame, and should make it good, and not throw the loss upon the creditors. The Lord Chancellor was of opinion, the [594] money on the bankrupt's bond, and laid out, was to be considered as part of the trust money, and directed new trustees to be appointed, and Falling Foss estate to be conveyed to such new trustees upon the trusts in the settlement, and the trustees to go in under the commission of bankrupt, to prove as a debt the remainder of the money lent, beyond what he paid for the estate.

[The accuracy of this report questioned, *Lench v. Lench*, 1805, 10 Ves. Junr. 519.]

LUCAS v. CALCRAFT.

2 Aug. 1775. 1 Bro. C. C. 134, S. C.

As in commission and partition, so in dower, each party bears his own costs.

Commission decreed to set out dower. On hearing the cause for further directions, it stood over to consider whether the Court ever gave costs; and on 20th April 1782, Lord Thurlow, C., was decidedly of opinion, that as in partition, so in dower, each party bears his own costs.

WIRDMAN v. KENT.

(Reg. Lib. fol. 295.) 20 April 1782. Lord Thurlow, C. 1 Bro. C. C. 140, S. C.

An appeal will not lie for costs only.

This cause came before the Court on an appeal, evidently to be relieved merely against costs, though other matters were introduced into the petition to give colour to it. It was admitted by the Bar, a party could not re-hear for costs only, but it was questioned whether a party could not appeal for costs only: but the Lord Chancellor said, he had ever understood a party could not appeal for costs only, and for the general reasons laid down in *Owen* [595] v. *Griffith*, before Lord Hardwicke, C., 2 *Vezey*, 250. The other grievances complained of were disregarded as frivolous.

The above case being laid before the Barons of the Exchequer upon a like doubt, the Court determined in the same manner, in *Williams v. Begnon*, 27th January 1792.

WINTER v. KENT.

(Mr. Wright's Minute Book.)

17 July 1782. The fourth Seal. Lord Thurlow, C.

After having replied to a defendant's answer he is not to be examined, for it cannot be said he is not interested.

The defendant Kent was the executor of the testator, for an account of whose assets and other matters the bill was brought. The testator had purchased a real estate in the name of others, of which the said defendant was the only evidence. The defendant having answered, the plaintiff replied. It being necessary to prove the fact of the estate's being purchased for the testator, though taken in the name of others, it was moved the third Seal as of course, and granted, for leave to examine the said defendant, upon the common suggestion that he was not interested, without withdrawing the replication.

Mr. Lloyd, on the above 17th of July 1782, mentioned it again, and stated the facts, and circumstances specially, when it was granted. Being apprised of the motion and order by Mr. Wright, I took the liberty of submitting to his Lordship, that the motion was irregular. It could not be said the defendant was not interested, for that, by replying to his answer, it was evident the plaintiff thought him inte-[596]-rested: that if the plaintiff was at liberty to examine the said defendant generally, and the order was not restrictive, the plaintiff might examine to falsify his answer, as the replication was general, not special; and that, having examined a defendant, the plaintiff could not pray a decree against him. His Lordship said, the reasons were very strong, and directed the order not to be delivered.

LANDER v. WHITMORE.

30 April 1782. Lord Thurlow, C.

Delivering the body of a subpoena to the defendant's wife, at his dwelling-house, which she threw down, and the solicitor afterwards thrust under the door, held to be good service of a subpoena to shew cause against a decree.

The defendant not appearing at the hearing, although duly served with a subpoena for the purpose, a decree was pronounced against him which was to be binding, unless he being served with a subpoena to shew cause against the same, should shew cause to the contrary. The body of a subpoena was delivered to the defendant's wife at his dwelling-house, which she threw down, and the plaintiff's solicitor thrust under the door. The Counsel for the plaintiff, on applying to make the decree absolute, made a doubt whether serving the subpoena in that manner was good service. It stood over two days; but upon referring to Tothil, and the Practical Register, and mentioning to his Lordship *Kinsey v. Kinsey*, before Lord Hardwicke, in which case the plaintiff's solicitor gave the body of a subpoena to the maid-servant of the defendant, at the dwelling-house, as she was sweeping the passage, and which she swept into the street; and a case in Cary's Rep. fol. 54; *Barlow v. Barker*, Cary, 76, 18th and 19th [597] Eliz., in which case an attachment issued against a defendant, whose wife had been served with a subpoena for him to appear; his Lordship allowed the service to be good.

SAMWELL v. WAKE.

1 May 1782. Lord Thurlow, C. 1 Bro. C. C. 144, S. C.

Personal assets are the primary fund, to pay debts, and if not exempted by express words, or striking circumstances, will remain liable.

Sir Thomas Samwell by will, dated the 1st of November 1778, willed as follows:—
 "I direct that all and singular the debts which I shall owe at the time of my death, and
 "the several legacies hereafter given or bequeathed, be fully paid and satisfied; and
 "for that purpose, I hereby charge and subject all and every my manors, &c., and real
 "estates in the county of Northampton, with the payment of all my debts and legacies
 "accordingly; and the better to discharge and satisfy the same, I will and ordain, that
 "Sir William Wake, and John Peach Hungerford, shall with all convenient speed by
 "sale or mortgage of the premises, or a competent part thereof, and by receipt of the
 "rents and profits of the premises, levy and raise sufficient for that purpose; and when
 "and as soon as they shall have such sums as aforesaid, do and shall forthwith pay and

apply the same in payment of my debts and legacies ; and for the better and more effectual performing my will, I do expressly give and grant to the said Sir William Wake, and John Peach Hungerford (whom he appointed executors of his will), full authority to receive the rents, and to sell and convey so much and such part of the premises, as shall be sufficient for the purposes aforesaid ; and subject to, and charged, and charge [598]able with the payment of my debts and legacies, I give and devise the said manors and estates, to Thomas Samwell (the plaintiff in this cause) for life, with remainder over in strict settlement, first, to Sir Wenman Samwell, &c. And "gave and bequeathed to the plaintiff, all his personal estate."

The plaintiff brought his bill to establish the will, and to have the personal estate paid to him, exempt from debts and legacies ; and the question on the will was, whether the plaintiff took the testator's personal estate, exempt from his debts and legacies ? It was urged, that the testator certainly meant a benefit to the plaintiff ; but that if the personal estate was to be applied in payment of the debts and legacies, as the plaintiff was a mere tenant for life of the devised estates ; and by the will, the rents and profits of those estates were charged, and made chargeable, with the debts and legacies, it might happen, that the plaintiff might receive little, if any benefit by the will.

The following cases were cited, *Halliday v. Bowman* ; *Rimbleton v. Cook*, 1775 ; *Adams v. Meyrick*, 1 Eq. Ca. Abr. 271 ; *Wainwright v. Bendlows*, 1 Eq. Abr. 271.

Lord Chancellor. A man's personal estate is the primary fund for payment of his debts, and if not exempted by express words, or striking circumstances, will remain liable : In the will before me, there are no such words ; and from the language of the will, as to his real estate, it is evident to me, he meant to subject, and charge it only in aid of his personal estate.

And therefore his Lordship after establishing the will, declared the personal estate was not exempted from the payment of the testator's debts and legacies ; and directed accounts of them, and of the personal estate, and the application of it.

[599] BANISTER v. WAY.

6 Feb. 1782. Lord Thurlow, C.

In this cause the heir at law could not be found, but the will having been proved *per testes* ; the Court upon consideration declared it well proved.

Bill by creditors, to have the trusts of a will executed, and the estates thereby devised for payment of debts, sold ; the heir at law in this case could not be found. Lord Thurlow, C. having declared the will well proved, it having been proved *per testes*, I took the liberty of mentioning to him in his room, the next day, the preceding cases of *French v. Baron*, and *Cator v. Butler* ; his Lordship said, he did not see the impropriety of it ; for directing the devised estate to be sold, was in effect establishing the will, and executing the trusts ; and the heir at law, when he should appear, must get rid of it as he could.

FIELD v. JACKSON.

15 May 1782. Lord Chancellor.

Injunction for waste denied, because plaintiff's right doubtful.

Motion for an injunction to stay making a cut through grounds, in the nature of waste, on notice : by the defendant it was insisted, that the plaintiff had not shewn his right.

A case was cited by Mr. Cox, in Easter Term, 1744, where a motion, on affidavit of certificate for an injunction was denied, because the plaintiff did not shew his right. *Note.* That is always expected ; many have been since refused for the like reason. *Fanshaw v. Rotherham*, 25 March 1748.

Lord Chancellor. The power the Court exercises to grant injunctions is great, and therefore it is cautious how it exercises so large a power ; and I will follow [600] my predecessors : I will not say this Court will not grant an injunction upon particular circumstances, but I am far from thinking, that when a right is doubtful, the Court will grant an injunction.

This case arises upon the construction of an act of parliament, which is doubtful, whether the defendants have a right to make a cut or not ; yet as it is not clear, the defendants have not exercised the power given by the act, I will not interfere. Therefore take nothing by the motion.

CHAMBERLAIN v. DUMMER.

9 July 1782. Lord Thurlow, C. 1 Bro. C. C. 166, S. C.

The defendant had power by her husband's will, to cut down timber from her own use, without any restriction at seasonable times ; she having cut down trees planted in avenues, &c., on the 28th of March 1782. Reg. Lib. A. fol. 410. Sir Thomas Sewel granted an order for an injunction to stay waste generally ; the defendant having answered, applied to discharge the order ; it came on several times, and stood over for judgment.

The following cases were cited, *Packington v. Packington*, *supra* [Dick. 101], 3 August 1745 ; *Obrien v. Obrien* (1 Bro. C. C. 167), 20 May 1751. Lib. B. 264 ; *Lord Castlemain v. Lord Craven* (2 Eq. Abr. 758), 7 Dec. 1773 ; and *Ashton v. Ashton* (1 Eq. Ca. Abr. 41), by Lord Hardwicke.

On the 19th July, upon its being spoken to again, his Lordship made an order for an injunction, to stay cutting down trees, planted, or growing for ornament, &c., shelter, &c. ; and the injunction was also to extend to prevent the cutting down any timber, or other tree, [601] except at seasonable times and in an husbandlike manner ; and likewise from cutting down saplings, and young trees, not fit to be cut for the purposes of timber.

WILKINSON v. LOVELL.

23 July 1783. Lord Thurlow, C.

Plea to a bill of revivor, filed in 1781, to prosecute a decree in 1752, and which had slept from that time, over-ruled, as not being proper, but said by Lord Chancellor to be such a case as the Court would not on hearing the cause order to be carried on.

In 1749, a bill was filed against the managers of the Royal Family privateers, for an account of the prizes, &c., and for the plaintiffs to be paid their shares of the prize money.

In 1752, the cause was heard, and the account was ordered ; and payment of what the shares amounted to, was directed.

The cause slept till 1781, when the plaintiff filed his bill, to carry on, and prosecute the said decree.

The following cases were cited : *Hollingshead's case*, 1 P. Wms. 742 ; *Comber's case*, 1 P. Wms. 766.

Lord Chancellor.—The question is, whether length of time is a bar ? That will depend upon circumstances, which this Court will expect to be amply proved : That cannot be done by a plea, and therefore this is not a proper case for a plea ; but this is such a case, as the Court would not, on hearing the cause, order the decree to be carried on. His Lordship cited, *Cooper v. Crowele*, 25th July 1773, in which twenty-seven years had elapsed after a decree ; *Burgess v. Mitchell*, in *Gilbert's Reports*.

[602] SIDNEY v. PERRY.

29 Oct. 1782. Lord Thurlow, C.

If a defendant pleads to relief, and answer as to the discovery sought by the bill, it is regular to except to the answer, before the plea is argued.

Bill for relief and discovery : the defendant pleaded to the relief, and answers as to the discovery ; the plaintiff took exceptions to the answer, and obtained an order, dated 10th July 1782, to refer the exceptions : The defendant applied this day, 29th October 1782, to discharge the order for irregularity ; for that the plaintiff could not except, until the plea was argued ; but his Lordship held it to be perfectly regular, and coincided with the reasons of the Master of the Rolls (*Vid. Pigott v. Mace, supra* [Dick. 496]).

BURNET v. BURNET.

4 Nov. 1782. Lord Thurlow, C. 1 Bro. C. C. 179, S. C.

Application for an increase of maintenance, regard being had to two children unprovided denied, and reference to see whether it was proper to make any, and what increase to the allowance, for the maintenance of the infants.

Application by Mr. Scott, to refer it to the Master, to make an increase to the allowance for the infants' maintenance ; and that he might have regard to two children

unprovided ; and for that purpose he cited, *Lanoy v. Duke of Athol*, 2 Atk. 444 ; and *Petre v. Petre*, 3 Atk. 511, by Lord Hardwicke.

Lord Thurlow, C., said, Lord Hardwicke's opinion was better than his order, and changed the application in the extent prayed ; but referred it to the Master, to consider whether it was proper to make any, and what increase, to the allowance for the maintenance of the infants.

[603] *BROOKS v. REYNOLDS.*

28 May 1782. Lord Thurlow, C. 1 Bro. C. C. 183, S. C.

Where there hath been a decree for payment of creditors, and the Master to advertise for them, the Court will not permit a creditor although he hath not gone in under the decree, to proceed at law for his debt.

Bill for an injunction, to stay a creditor from proceeding at law to recover his debt : A bill had been brought by a creditor, on behalf of himself and other creditors ; and a decree for an account and payment, and the Master to advertise for the creditors to come before him ; but the defendant in the present cause had not come in under that advertisement ; and therefore he insisted, he had a right to proceed for his debt as he thought proper.

But his Lordship said, as a bill had been brought for payment of debts, and a decree had been made, for taking an account of them and payment, and the creditors might have satisfaction under it ; he would not permit the defendant to proceed at law, which would be rendering the decree nugatory ; and therefore on the plaintiff's shewing cause for continuing the injunction on the merits, his Lordship continued the injunction.

Mr. Solicitor General was counsel for the plaintiff ; Mr. Mitford for the defendant.

Moore v. Paske, 26th June 1783, the like ; *Douglas v. Clay* ; and *Kenyon v. Worthington*, *supra*, were cited ; but see the cases of *Dennet v. Coke* (*supra* [Dick.] 144), and *Farnham v. Burroughs* (*supra* [Dick.] 63).

[604] *HALL v. MULLINER.*

28 Nov. 1782. Lord Thurlow, C.

The bare filing of exceptions to a report, and not setting them down to be argued, is not cause against confirming the report.

The Master having made his report, the plaintiff obtained the common order, to confirm the report, unless cause was shewn to the contrary, and served the defendant with the order ; the defendant filed exceptions to the report, and when the plaintiff moved to have the order to confirm the report made absolute, the defendant would have shewn the exceptions for cause ; but not having obtained an order to set down the exceptions to be argued, his Lordship considered them as merely dilatory, and made the order absolute ; and on application by the Solicitor General, to discharge the order, his Lordship refused the motion.

ROWE v. JACKSON.

21 Jan. 1783. Lord Thurlow, C.

Where there is an order for a husband to lay proposals for a settlement on his wife and the issue of the marriage, and the wife dies leaving issue, the Court will keep the husband to the order.

Upon application for payment of a wife's legacy, the usual order was made, for the husband to go before the Master, and submit proposals to him, for a settlement on his wife : before proposals were laid before the Master, the wife died, and the husband applied this day for his wife's legacy.

Lord Chancellor. If there be an order, directing a husband to go before the Master, and to lay proposals for a settlement on his wife, and the issue of the marriage, and the wife dies, leaving children, this Court will not part with the property, but keep the husband to the order ; in this case there are issue ; therefore let the husband go before the Master, and prosecute the order.

[Accuracy of this report doubted, *Groves v. Clarke*, 1836, 1 Keen, 132.]

[605] FRETWELL v. KAY.

23 Jan. 1783. Lord Thurlow, C.

Motion on the part of the plaintiff, to transfer exceptions set down before the Lord Chancellor, to the Master of the Rolls, on a suggestion, that the cause was set down to be reheard before him, and therefore it would be convenient : It was said by Mr. Madocks, and admitted, that exceptions ought to be set down before the Lord Chancellor, but that upon special reasons, the Lord Chancellor might order them to be transferred. In this case however, the Lord Chancellor denied the motion.

BOWKER v. HUNTER.

28 Jan. 1783. Lord Thurlow, C. 1 Bro. C. C. 328, S. C.

Unequal legacies to executors, the residue of the testator's personal estate being undisposed, held they were intitled to such residue ; the giving to them unequal legacies, manifesting that it was the intention of the testator, that one should have more than the other. . .

The testator by his will, gave many legacies, among which, were some to his next of kin, and two legacies to his executors, £200 to one executor, and £50 to the other ; and did not dispose of the residue of his personal estate ; the bill was to have an account taken of the testator's personal estate, and of his debts and legacies, to have them paid ; and to have the residue declared to be undisposed, and to belong to the next of kin, upon the ground, that as the testator had given his executors legacies, they were to be considered as trustees of the residue for the next of kin.

The cases cited were, *Blinkhorn v. Feast*, 2 Ves. 27 ; *Buffar v. Bradlay*, 2 Atkins. 220 ; *Brasbridge v. Woodroffe*, 2 Atk. 68 ; *Andrew v. Clarke*, 2 Ves. 162 ; *Newsted v. Johnson*, 2 Atk. 45.

[606] The Lord Chancellor said, that a testator's giving to executors his personal estate, was unnecessary ; the law threw it upon them, to dispose as he by his will should direct ; and if not disposed, they took it in equal shares ; that knowing this, and meaning that one of his executors should enjoy more of his property than the other, was the reason he gave to them unequal legacies. His Lordship therefore said he was clear, that the executors notwithstanding they had legacies, were entitled beneficially, to the clear residue of their testator's personal estate ; and ordered the bill to be dismissed.

The above cause was reheard before the then Lords Commissioners for the custody of the Great Seal, on the 8th day of November 1783, and on the 22d of the same month : when judgment was given, and the dismissal was affirmed.

In addition to the cases cited on the original hearing, there were cited, *Foster v. Munt*, 1 Vern. 473 ; *Pring v. Pring* ; *Cordel v. Noden*, 1690, 2 Vern. 148 ; *Bailey v. Powel*, Prec. in Chan. 92, 6 December 1798, Reg. Lib. A. 87 ; *Darwel v. Bennet*, 2 Vern. 667, Reg. Lib. A. fol. 466, Reg. Lib. A. 516, 1 P. Wms. 544, 10 Mod. 442 ; *Batchelor v. Searle*, 2 Vern. 736 ; *Lawson v. Lawson*, 25 April, in House of Lords (7 Bro. P. C. 511) ; *Ball v. Seville* ; *Ibbotson v. Bothwick* ; *Smith v. Hungerford*.

A pecuniary legacy to a legatee affords a presumption, that such legacy was all the testator meant he should have of his property.

The first distinction attempted on the quantity of a legacy, was in *Griffith v. Rogers*, 1704 (1 Eq. Ca. Abr. 245) ; *Duchess of Beaufort v. Lady Granville*, 1709 (1 Bro. P. C. 305).

[607] If there be a specific instead of a pecuniary legacy, there is a distinction on that head.

Another on the nature and quantity of the legacy ; as in *Bull v. Smith*.

Another distinction was taken, upon the condition of the executors, and other legatees, as a wife, and a near relation, and next of kin remote.

Another distinction was taken, where a legacy was given to an executor, and legacies to the next of kin, in which it was argued, that the testator had pointed out what the next of kin were to have, and no more. *Vachel v. Jefferys*.

Upon the whole, their Lordships concurred in idea with the Lord Chancellor, that the testator, by giving the executors unequal legacies, meant that one should enjoy more of his property than the other : And therefore affirmed the decree.

BELL v. MAIDMAN.

1783. Lord Thurlow, C.

Q. Under a term, whether debts to be paid by annual or general profits held to be by general profits.

On the marriage of Mrs. Webb, with the defendant Webb, by settlement, the estate being the wife's, two terms were created: one for the raising of portions, which the trustees were to raise by rents and profits, or by mortgage or sale; the other a term for ninety nine years, for payment of debts. It was insisted that it was confined to rents and profits, and that there is a distinction between general profits, and rents and profits. The question therefore was, whether the debts were to be paid by rents and profits, or money to be raised by mortgage, for that purpose.

[608] Cases cited: *Ivye v. Gilbert*, 2 P. Wms. 13; *Evelyn v. Evelyn*, 2 P. Wms. 659; *Ravenhull v. Dansey*, 2 P. Wms. 179; *Hellier v. Jones*, Eq. Ca. Abr. 337; *Mills v. Banks*, 3 P. Wms. 1; *Green v. Atkins*, 505; Anonymous case before Lord Nottingham, in 1682, 1 Vern. 104; *Warburton v. Warburton*, 1701, 2 Vern. 420; *Brown's Parliamentary Cases*, 34, 1 P. Wms. 418.—2 P. Wms. 19; *Raines v. Dixon*, 1 Ves. 41; *Combe v. Acland*, by Lord Hardwicke, 1740; *Collier v. Leeds*, 6th July 1769, returned 10th Nov. 1770, and affirmed.

In Hilary 1783, the Lord Chancellor gave judgment, and was clearly of opinion, the debts were to be paid by general profits, and reversed so much of the decree of M. R. as directed an account of rents and profits, and the application of them to pay debts; and directed the principal to be raised by mortgage.

PHIPPS v. BISHOP OF BATH AND WELLS.

6 Feb. 1783. Lord Thurlow, C.

A second mortgagee cannot have a receiver, the mortgagor living, without the consent of the first mortgagee, because the Court cannot prevent the first mortgagee from bringing an ejectment against the receiver, as soon as he is appointed.

Application by the Attorney General, on behalf of a second mortgagee, the first mortgagee declining any steps to get into possession, to have a receiver appointed; and that he might apply the rents in keeping down the interest of a mortgage, and of £10,000 charged on the estate; and to pay the surplus rents into the Bank.

Lord Chancellor.—A second mortgagee, the mortgagor living, cannot have a receiver, without the consent of the first mortgagee; because the Court cannot prevent the first mortgagee from bringing an ejectment against the receiver, as soon as he is appointed.

[609] SYDOLPH v. MONKSTON.

6 March 1783.

It was held by Lord Thurlow, C., that if defendants answer separately, exceptions must be taken to each answer.

CROSLEY v. MARRIOT.

28 April 1783. Lords Commissioners Lord Loughborough and Sir William Ashhurst.

The plaintiff had obtained a judgment against two of the defendants, on a penal statute, not bailable, which could not be entered up until some time in the following term; one of the defendants was in prison for debt; the other, who was solvent, was selling his goods, and threatened to go abroad: The plaintiff applied this day, for a *revent regno*; but the demand being entirely legal, and though one of the defendants threatened to go abroad, yet as the judgment might be executed upon the other, their Lordships refused the motion.

Ex parte CARTER.

15 March 1783. Lord Thurlow, C.

The mortgagee of a mortgage in fee dying intestate, and his heir being an infant, and one of his next of kin, consequently entitled to a share of the mortgage money; the Master would not find him to be an infant mortgagee, within the

statute of 7th Queen Ann. for that he was not, as he conceived, a mere naked mortgagee, but the Lord Chancellor upon its standing over to consider it, was clear he was a mortgagee within the act, and directed him to convey.

A. mortgages to B. in fee : B. died intestate : left C. his widow, (who obtained letters of administration, &c.), and D. his son and heir at law an infant, (whether he had any more children did not appear) ; the mortgagor wanting to redeem, applied under the act of the 7th of Queen Ann. and obtained the usual [610] order to refer it to the Master, to see if the infant heir was a trustee, or mortgagee within the said act : The Master found the said infant not to be a trustee, or mortgagee, within the act : for that he was not a mere naked mortgagee, but had an interest in the mortgage money, as it might make part of the general residue of the intestate's, the mortgagee's, personal estate, to a share of which, the infant, as being one of the next of kin was entitled, and being so entitled, and having the security vested in him, this Court could not make him part with it, without such his right being preserved. A. the mortgagor preferred his petition to his Lordship, praying, that he would, contrary to the opinion of the Master, declare the infant to be a mortgagee within the act, and direct him to convey. The petition came on the 20th of January 1783, and stood for judgment, till the 15th of March 1783.

Per Curiam.—Till the passing of the above act, if the real estate chanced to descend, or came to an infant, the mortgagor could not have his estate again, until such infant attained twenty-one : To remedy that inconvenience, the Legislature passed the Act, and all that is intended by it is, upon the result of a reference, to enable the Court to put such infant into the state of an adult : What an infant's interest in the mortgage money may be, the Court cannot enter into under this proceeding, and *primi facie*, it is part of the intestate's general assets to be administered, in the hands of the administratrix ; to say that it is part of a residue, is absurd, till an account of his personal estate, and of his debts hath been taken, and that cannot be, but under a decree, in a suit instituted [611] for that purpose : And therefore as I cannot take notice of any beneficial interest the infant may have, I am clear he is an infant mortgagee within the act ; and let him convey pursuant to it.

BOWKER v. HUNTER.

1 July 1783. Lords Commissioners. 1 Bro. C. C. 328, S. C.

The cause reheard notwithstanding the parties had entered into an agreement, which was made an order of Court, not to rehear the cause.

The parties had entered into an agreement, to abide by such decree as should be made upon the merits, and that there should be no appeal ; which was made an order of Court : The cause was heard, and a decree pronounced. Notwithstanding the above agreement, an order was obtained to rehear the cause : On application to discharge the order, their Lordships refused it, upon the same grounds as in the case of Buck v. Fawcett, 3 P. Wms. 242, that the Court is concerned to set right any error.

DEVIE v. LORD BROWNLOW.

23 July 1783. Lords Commissioners.

In pleading a former suit, it is necessary to aver that the present and the former suit, are for the same matter.

Plea of a former suit depending, which was said to be for the same matter.

Lords Commissioners.—The pleading a former suit for the same matter, and stating the pleadings and proceedings, and that the matter is still depending, is not sufficient, except there be an *averment*, that the present and former suit are for the same matter : Therefore over-rule the plea.

[612] *Ex parte* BARKER.

29 Oct. 1783. Lords Commissioners.

A similar application, and a similar order, as in Blake v. Blake, *supra* 459, with this difference, that the infant had testamentary guardians, and her mother was in the East Indies.

GARTSIDE v. ISHERWOOD.

8 Nov. 1783.

The distinction between a bill of review, and a supplemental bill in nature of a bill.

This cause came on the above day, upon an application by the defendant, for a new trial of an issue directed in the cause, which being denied, he applied by petition, to file a supplemental bill in nature of a bill of review, in order to introduce newly discovered matter; but it was objected, the decree was not inrolled: Upon which two doubts arose, First, whether a defendant could inrol a decree; Secondly, whether a defendant could file a bill of review, or a supplemental bill in nature of a bill of review: And the Court doing me the honour, to require my thoughts, I submitted to Lord Commissioner Loughborough in writing what occurred to me, of which the following is a copy:

"As to the first question, whether a defendant can inrol a decree: it was held by Lord Hardwicke, that a defendant may, in *Carrington v. Holly*, 12th July 1755: The bill was to establish the plaintiff's claim to an estate: upon hearing the cause an issue was directed: before it was tried, the plaintiff upon motion, without notice, obtained an order to dismiss his own bill with costs: The defendant applied the above day to discharge the order for irregularity, upon the ground, that the cause having been brought on to hearing, the bill could not be dismissed, but by a solemn judgment.

Lord Chancellor. "There hath not been any determination. The directing an issue, is merely to inform the conscience of the Court; the issue hath not been tried, and until there hath been a determination, I hold the plaintiff, be the cause in what stage it may, may dismiss his bill upon payment of costs: Therefore take nothing by the motion. But his Lordship added, had there been a decree, it would have been otherwise, for that all parties had an interest in a decree; and any party might take such steps as were advised to have the effect of it; so likewise his Lordship said it would have been, had the issue been tried, and determined in favour of the defendant; he might have set it down on the equity reserved, in order to obtain a formal dismissal of the bill, and to inrol it as a final judgment, and thereby make it pleadable."

His Lordship said, the language of orders directing issues shewed it: for after directing the issue, the order goes on: "And reserve the consideration of costs, and of all further directions, until after the said trial: and any of the parties (not confining it to the plaintiff), are to be at liberty to apply to the Court, as they shall be advised." As to the doubt, whether a defendant could file a bill of review, or a supplemental bill in nature of a bill of review, the order on hearing not being inrolled: it is submitted, as the order only directs an issue, and is no determination, it is not necessary to inrol it, the application of the defendant not being to review for error, but to introduce by way of supplement, matter come to his knowledge, since the order on hearing: and were it inrolled, it would make no difference in point of expence, as he must make a deposit of £50 on either bill.

The distinction between a bill of review for error apparent, and a supplemental bill in nature of a bill of review, with the greatest deference, I take to be, where there is error apparent, in the judgment of the Court, upon the facts and circumstances the Court was possessed of at the time of pronouncing it, and when the decree is inrolled, the only way a party hath to correct and set it right, is by bill of review, 1 Chan. Cases, 54; *Taylor v. Sharpe*, 3 P. Wms. 371; and such bills may be filed, without leave of the Court, upon making the usual deposit of £50 *ordae curiae* 1700, in the same manner as a party files exceptions to a report: but no matter other than what was before the Court, at the original hearing, can be introduced under such a bill, because a party cannot enter into a new examination of evidence, 1 Roll's Abridg. 382; but where a discovery hath been since a decree of matter, or a fact *in esse* at the time of pronouncing it; the party must apply for leave, to file a bill, to bring it before the Court, *ordae curiae* by Lord Hardwicke, 17th October 1741, the Court requires to be satisfied, that the matter alleged to be newly discovered, was not at the time of the hearing in the knowledge, either of the party, or his solicitor or agent. If the order or decree hath been inrolled, the language of the order, "Let the party applying be at liberty to file a bill of review for the purpose of, &c." [615] If it is not inrolled, the Court if satisfied, permits the party to file a bill, by way of supplement, merely for the purpose of introducing, and bringing before the Court, the newly discovered matter; which cannot be done by a petition for a rehearing: the orders that are made on such

applications speak it : " Let the party on depositing £50 with the Register, be at liberty " to file a supplemental bill in nature of a bill of review, in order to state, that, &c." and to pray relief ; and let the be at liberty to apply to rehear the original cause, and to bring it on at the same time.

Lockart v. Raper, 19 Dec. 1766, Reg. Lib. B. 42 ; liberty given to file a supplemental bill, in order to state the right of the plaintiff, upon the fact of his having such other child by Sarah Lockart, and to pray relief.

Dalzell v. Blisset, before Lord Bathurst, C., 21st Dec. 1770, Reg. Lib. B. 47. *Curia*. Upon the defendant the petitioner, depositing £50 with the Register, let him be at liberty to file a supplemental bill in nature of a bill of review, in order to state the right of the party, upon the foot of, &c. and for relief ; and the parties are to be at liberty to apply to set down the original cause to be reheard, and to come in at the same time.

Stephens v. Hanbury, before Lord Thurlow, C., 20th December 1782 ; application by the defendant, to file a supplemental bill in nature of a bill of revivor against John Stephens, the plaintiff in the original cause, administrator of Richard Stephens deceased, and also administrator *de bonis non* of Willihelmina Ann Stephens, [616] the late wife of the said Richard Stephens, stating those facts, &c. and praying relief ; which was ordered upon the usual terms, and liberty given to apply to rehear the original cause.

Lord Commissioner Lord Loughborough handed what I had delivered to him, to the Bar ; it met the ideas of his Lordship, and the whole Court : the consequence was, that the Court received a petition of the defendant, to file a supplemental bill in nature of a bill of review ; but not being able to satisfy the Court, he was not apprised of what he now wanted to introduce, at the time of the decree, the petition was dismissed.

(I laid this before Lord Thurlow upon a similar question put to me by his Lordship, and he acceded to it.—J. D.)

WHITTINGTON v. ATTORNEY GENERAL.

10 Nov. 1783. Lords Commissioners Lord Loughborough, Judge Ashhurst, and Mr. Baron Hotham

It being agreed by both parties, that the hearing and determining the demurrer in this cause, would take the whole term ; and each side being determined to carry it afterwards to the House of Lords, the Lords Commissioners allowed the demurrer without giving the least *scintilla* of opinion.

A bill of review, impeaching the judgment of Lord Camden, C., respecting the estates given for the purpose of founding a College at Cambridge, by the will of Sir George Downing ; the defendant demurred to the bill of review ; the demurrer was set down to be argued : The gentlemen of eminence in all the Courts at Westminster were engaged ; and it seemed to be agreed on both sides, that it would take the whole Term to hear and determine it, Mr. Serjeant Hill saying he should take at least three days, in stating and arguing from his cases. On the 7th of Nov. 1783, Mr. opened the demurrer of Barter ; on the 10th of November, Mr. Graham opened the demurrer of the University of Cambridge ; when Lord Loughborough addressed the Bar : saying, the Court had heard the [617] matter before them was to employ the whole Term, and likewise, that whichever way it was decided, it was the determination of one or other of the parties, to carry the case before the House of Lords ; and it being so admitted, his Lordship said it would be wasting a great deal of time to no end ; and that a great inconvenience would arise from it : the suitors whose causes were to be heard, would be greatly delayed ; and therefore with the concurrence of his Brother Commissioners, he should make a mere naked order, allowing the demurrer, without the least *scintilla* of opinion ; which he accordingly did.

DOVE v. DOVE.

20 Nov. 1783. Before the Lords Commissioners. 1 Bro. C. C. 375, S. C.

Course of proceeding to be observed, previous to an application for a writ of assistance.

By the decree, the estate of the testator was to be sold, and all parties were to join : the defendant the widow, who had got into possession, under some claim of jointure or dower, and the receipt of the rents and profits, was directed to account : the estate

was sold, and the purchaser served the defendant the widow, (in whom there was no legal estate from her husband), with a writ of execution of the decree, and applied to her to join in the conveyance, and to deliver possession; which she refusing or neglecting to do, he issued an attachment against her, and she was arrested upon it; and on the 15th of November he moved of course, and obtained an order for a writ of assistance; but there not having been the previous order to enjoin her to deliver possession, I objected to draw it up; upon which the plaintiff acquainted the Court with my objection; the Court allowed my objection, [618] and on the 20th of November, the plaintiff changed his motion, and moved for, and obtained an order for an injunction, to enjoin the defendant to deliver possession; but there not having been any previous and direct order for the defendant to deliver possession, only the words of the decree, for all parties to join, which the plaintiff said implied it; but which, as it appeared to me, was only to give the purchaser a title, I again objected, and they again acquainted the Court with my refusal to draw up the order; and the Court requiring my reasons, I submitted to Lord Loughborough the following observations:

There are certain writs or processes of contempt, that issue out of Chancery, to obtain which, particular and established rules are to be observed: there are some that are made out of course, by the Clerk in Court, and pass the Great Seal, without an order, to wit, attachments, attachments with proclamation, commission of rebellion; others there are, amongst which, is a writ of assistance, that do not issue without an order.

To ground an attachment against a party, service and disobedience of something under the Great Seal, (subpœna or order) must be proved; which being proved by affidavit, an attachment issues. Lord Bacon's 77th order.

There are instances in which attachments are not to be executed: One against an infant for not appearing to a bill filed against him, which is issued merely to ground an order, for a messenger to bring an infant into Court, to have a guardian assigned him. *Perkins v. Hammond*, 5 June 1746, by Lord Hardwicke: [619] the other is, the attachment that is issued, for not obeying a writ of execution of an order, to deliver possession of land, which is issued merely for the purpose of obtaining an order, for an injunction to enjoin the party to deliver possession; see *May v. Hook*, June 1773, by Lord Bathurst, C., the plaintiff had unadvisedly executed the attachment, and had the defendant in prison: His Lordship ordered the defendant to be discharged with costs, after hearing counsel on both sides, and upon consideration: The defendant afterwards would have brought an action for false imprisonment; but this his Lordship restrained him from doing, upon the ground that this Court will punish its own officers, agreeably to a case, in 1 Vern. 269; where it is said, "the irregularity of serving the process of the Court is only punishable here; and therefore an injunction lies, to stay proceedings at law, for irregularity."

A writ of assistance must be applied for, because the Court is to be satisfied that the steps requisite to be pursued have been followed: they are these, first, the service of a writ or execution, of an order to deliver a demand, and the issuing an attachment for disobeying it.

The next is an injunction to enjoin the defendant to deliver possession, (which affects the tenant), and which the order for the defendant to deliver possession, doth not, as is said in *Venables v. Foyles*, 12 Car. 2, Lib. fol. 260.

The order for the injunction is of course, upon affidavit of service of a writ of execution of the order for the defendant to deliver possession, demanding possession, refusal, and the issuing the attachment.

[620] Upon proof of service of the injunction, and its not having been complied with, upon motion without notice, and reading an affidavit of the facts, a writ of assistance will be ordered.

The first I have hitherto been able to meet with, is *Russel v. Boderille*, 12 Car. 2, Lib. B. fol. 38, an order for a writ of assistance grounded on an injunction to deliver possession: not obeyed.

Underhill v. Whichcote, the same year, and book, fol. 460.

Venables v. Foyles, the same year, and book, fol. 670, a similar order upon the same grounds. Note: In this a question arose, respecting the regularity of the proceedings, which was referred to the two senior Six Clerks, not towards the cause, (at that time the custom), who certified the same to be regular.

Darlow v. Bradgate, 18th July, 11 William 3d. the like.

Milward v. Milward, 14th July, 8th of Queen Ann ; motion for an injunction : 20th of same month, order for a writ of assistance.

Noble v. Wilson, 12th February, 9 Geo. 1, order for an injunction : 20th of same month, order for a writ of assistance.

Done v. Holt, 10th December, 2d Geo. 2, a writ of assistance denied, because an injunction had not issued, to deliver possession, which was then ordered : and on the 14th of January following, a writ of assistance was ordered.

Stribley v. Hawkins, by Lord Hardwicke, 28th November 1744, and in 3 Atkins. 275. His Lordship said, "a writ of injunction must first issue, and be served, before you can have a writ of assistance."

[621] The following is the form of an order for an injunction to deliver possession :
 "Upon motion, &c. it was alleged, that by the decree or order, dated it was ordered, that the defendant should deliver possession of the land, &c. to the plaintiff : that the defendant who is in possession of the said land, was served with a writ of execution of the said order, and the plaintiff required him to deliver possession, which he refused ; and thereupon an attachment hath issued against him, (doth not say it was executed) and therefore it was prayed, that an injunction may be awarded against the defendant, to deliver possession of the said land, &c. which upon hearing an affidavit (of the facts) read, his Lordship held to be reasonable, and doth order the same accordingly."

It was before observed, that the attachments that issue for disobedience of a writ of execution, of an order to deliver possession, are not executed : in the case before the Court, it hath been executed, (which is wrong according to the custom of the Court), and the order of Lord Bathurst in May v. Hook ; and the more so, as it is for disobeying a writ of execution of a decree in not delivering possession, which the decree doth not direct, and they have no order."

On the 22d of November 1783, Lord Loughborough told the Bar, that he and his Brother Commissioners had considered the observations laid before them : that they were convinced by them, and directed me not to draw up the order for an injunction, that was made on the 20th of the same month ; and added, that previously to the plaintiff's pursuing the regular course, [622] they expected the plaintiff should release the defendant from her confinement, under the attachment.

The plaintiff afterwards pursued the regular steps, and obtained a writ of assistance : but query as to the propriety : the decree was for a sale, and all parties to join, not for the defendant or any one to deliver up : the defendant was in possession, not under the will, but on a supposed right in herself : the purchaser was in the situation of every other purchaser ; he either could have a title or not ; if a title could be made when he had a conveyance, he might take the proper steps to obtain possession, and the Court would assist him, as far as was consistent with its rules : It might happen, that a purchaser, sensible a good title could not be made, might purchase at an under value, and run the risque, and by this mode of proceeding, obtain that in this Court, which he could not by an ejectment, and having got the possession, lay the onus upon those, who were so turned out of possession, to shew a better title.

ROWLEY v. RIDLEY

24 Jan. 1784.

Tenants ordered to attorn to sequestrators in mesne process ; but which his Lordship afterwards would not enforce.

The defendant in contempt to a sequestration, to mesne process, for want of an answer, and the tenants of the estate sequestered ; refusing to attorn, Mr. Mitford moved, at the rising of the Court, (when it was scarcely possible to hear, much less to understand), as of course, that the tenants might be ordered to attorn to the sequestrator, which passed, as other motions of course do. Seeing what the order was, [623] when the instructions for it were left with me, I declined delivering it, and mentioned my doubt as to it's propriety, to Lord Loughborough, who was then one of the Lords Commissioners for the custody of the Great Seal, and his Lordship having desired me to lay before him my reasons, and the distinction between sequestration in mesne process, and for a duty ; I submitted to him the following, which his Lordship handed down to Mr. Mitford, and as I understand, he and many others, have copied them : how far I was right, rests with them.

"There are in the different Courts in Westminster Hall, certain rules and forms, to be observed in the course of proceeding in the respective Courts: length of time and experience evince them to be wise and expedient; to deviate from them is hazardous; as it is impossible to see where it will end, and it may be the means of occasioning that confusion, which those rules were well calculated to prevent."

"In the Court of Chancery, there is a process of contempt, called a sequestration; of which there are two species."

"One being in mesne process, merely to ground a further proceeding."

"The other for a duty, which, as is said in *Attorney General v. Mayor of Coventry*, 1 P. Wms. 306, is the execution, and life of a Court of equity, and the fruit of a long suit, and is *ad satisfaciendum*, and not bailable, as was said by Lord Hardwicke, *Ch. in Kinsey v. Yardley*, the 24th of November 1753, and by Lord Bathurst, C., in *Meadows v. Lady Falmouth*, 10th July 1781."

[624] "Sequestrations were at first, laid on the thing in question, and afterwards extended to the effects in general of the contemnour."

"Sequestrations for duty decreed, are antient, as will appear from Tothil, p. 273, where there is a long list of sequestrations for duty, but none in mesne process; which are more modern."

"To ground a sequestration, there is a certain line of process to be pursued."

"An attachment."

"An attachment with proclamation."

"A commission of rebellion."

"An order for the Serjeant at Arms to go: If on either of these, the contemnour is taken, he is brought into Court, and turned over to the Fleet; if in contempt for a duty, a sequestration will then issue; if in mesne process, the defendant is brought into Court: first on an *habeas corpus*, &c. an *alias habeas corpus*, and a *pluries habeas corpus*, and an *alias pluries habeas corpus*, and the plaintiff's clerk is ordered then to attend with the record of the plaintiff's bill; and if he persists in his contempt, the Court will decree the bill to be taken *pro confesso* against him; and thereupon he is discharged as to that contempt, paying the costs of it."

"Should a defendant so in contempt on mesne process, not be taken on any of the above processes, and the Serjeant at Arms return *non est inventus*, which must be, a sequestration issues, which being personal, and being only to ground a further proceeding, is not to be executed, as was said by Sir Thomas Clarke, M. R. (who was allowed to be an excellent law historian, and well knew the forms, and practice), in [625] *Heather v. Waterman*, 16th February 1762, the bill was for an account of tythes, and that the defendant might pay what should be found due from him; the defendant being in contempt to a sequestration in mesne process for want of his answer, which the sequestrators had executed: the plaintiff preferred a petition, praying, that the sequestrators might account, which was heard at the same time with the cause; and although his Honour decreed the bill to be taken *pro confesso*, and would of course have decreed costs: yet as the plaintiff had executed the commission of sequestration, and now prayed the sequestrators might account; he reserved costs. After reprobating the measure as improper, and what should not have been done, he reprehended the solicitor in very severe terms; his Honour said, that if he, the solicitor, through ignorance of his duty, ordered the sequestrator to execute the sequestration, it was shameful; if knowing his duty, he acted contrary to it, it was worse: As it must be then done with design, knowing, that if the sequestrators executed the sequestration as they had, they would have to account; that he as solicitor would have to see the account taken; and that whoever suffered, he would be sure to gain, for he would not fail to charge for his time and attendance: This decree was not prosecuted.

Vaughan v. Williams, 1st December 1762. Bill decreed to be taken *pro confesso* on a sequestration, for want of an answer, which had been executed, held to be unnecessary and improper: Decree was for the defendant to pay to the plaintiff £770 received for his use.

A sequestration in mesne process is, as hath been said, not to be executed, but drops as soon as the [626] purpose for which it issued, is attained; and the effect of which, he may have in the course of a term; for having obtained the sequestration, he may set down and hear the cause, as a short cause, for the last day of causes in Term, in Court, or at the Rolls the second day after; which plainly shews, how unnecessary it is to execute a sequestration, and if it be executed, what is the object of executing it.

That a sequestration in mesne process, is merely personal, is likewise evident : for if the party dies, it drops and is gone ; whereas if a party dies who is in contempt to a sequestration for a duty, it only abates : and is revived with the suit ; and so it was determined in *Burdet v. Rokeby*, 2 Vern. 58 ; *Hawkins v. Crook*, 3 Atkins. 594.—2 P. Wms. 556 ; and by Lord Hardwicke in *Hyde v. Greenhill* (*supra* [Dick.] 106), 4th August 1748 ; *Hyde v. Forster* (*supra* [Dick.] 102), 9th February 1748 ; *Wharam v. Broughton* (*supra* [Dick.] 137), 17th December 1748.

The question now resting for your Lordship's opinion, arises upon the Register's hesitating to draw up an order upon an application moved, as if of course, that tenants might attorn to the sequestrators, named in a commission of sequestration in mesne process. The application appearing to him novel, not having in the course of forty-seven years practice or experience, seen or heard of such an order, and recollecting what was said by Sir Thomas Clarke as before stated, upon a party's executing a sequestration in mesne process ; and also what was laid down by Lord Hardwicke in *Wharam v. Broughton*, 17th December 1748, founded on the cases of *Burdet v. Rokeby*, 1 Vern. 58, 118 ; *Hawkins v. Crook*, 21st December 1747 ; and also recollecting what is laid down in *Gibson v. Seevengton*, [627] 1 Vern. 247 ; that sequestrators in mesne process, are to retain only to answer the contempt : and not comprehending, if the contemnor will pay the costs, why it should be executed, he thought it his duty to submit the propriety of the application to the Court. It is true, a single precedent in a cause, *Wood v. Adams*, dated the 2d of November 1780, hath been produced to the Register, but that being where the sequestration was for a duty, it rather strengthened his doubt ; and it being mentioned to him, that the Master of the Rolls, Sir Thomas Sewel, granted the motion after a fortnight's consideration, was a confirmation that it was novel, and that it was not of course.

In support of the motion, five or six cases in the course of a century, some only dietas, have been mentioned ; with submission, they only shew, that sequestrators having executed the commission, were (as it was necessary they should be), directed to account : but such orders do not prove that it was right to execute the commissions.

That there should be so very small a number of cases in such a length of time, for sequestrators under a sequestration in mesne process to account, is rather evidence to the contrary, for at least there are twenty or thirty sequestrations in mesne process every year ; and if it were necessary, such sequestrations should be executed, and if they did not drop of course, paying the costs of the contempt, when the purpose for which they issue is answered, the sequestrators, as they are officers of the Court, would be to account, and to act under the orders of it ; and there would be an order or two every term for that purpose ; and yet, if the Gentlemen of the Bar should be applied to, it is apprehended, there would not be one in twenty, [628] that could say, he moved two motions, for sequestrators in mesne process to account, in the whole course of his practice.

As to the case of *Maynard v. Pomfret*, 3 Atk. 468, the reporter must certainly have mistaken Lord Hardwicke's ideas ; the language of an order for a sequestration shews it ; the order after stating the defendant's contempt, " directs a commission of sequestration to issue, directed to certain commissioners to be therein named, to sequester the defendant's personal estate, and the rents, issues, and profits of his real estate, " until he shall fully answer the plaintiff's bill, and this Court make other order to the " contrary." By the defendant's not answering the bill, he tacitly assents to it, or confesses it, and the plaintiff is decreed the whole relief he prays. As to continuing the sequestration, as was argued, till it was seen, whether the defendant would be guilty of any future contempt, it is extraordinary ; should he afterwards be in contempt for breach of the decree, it is a new offence ; a new sequestration must be applied for, and the order for it would be, until he doth what the decree directs him, or until further order.

But were it as Mr. Atkins states, it would be oppressive, it would be cruel ; for instance, suppose a bill to open a general account between merchants, and the bill had been taken *pro confesso* under a sequestration against the defendant for want of his answer, and he was decreed to account, and to pay what should be found due from him : it might be five or six years or more, before that account was taken, and it might then turn out, that the balance was due to, instead of being due from the defendant : and to keep [629] the defendant's property in general, in the hands of the sequestrator, till the account was taken, or the event known, the man might, in the mean time, be reduced

to beggary; and therefore it is submitted, that if a sequestration issues against a defendant, and the plaintiff hath had the effect of it, it drops, and if the defendant is afterwards in contempt for another matter, fresh process must issue against him.

The case of *Dupont v. Ward* (reported *supra* [Dick.] 133), though not exactly similar, it is submitted is so in principle, and shews Lord Hardwicke's ideas to be different.

Should the Court be of opinion, the application for the tenants to attorn is improper, the plaintiff is not without his remedy, he may apply for, and obtain an order to revive the Serjeant at Arms, and so take the defendant into custody.

And should the Court think the application proper, with submission, should it not be made appear, as it is to bring the tenants into contempt, that the sequestrators have served them with a copy of the order, under which the sequestration issued, and of the commission in which they are named, as a receiver doth the order and report under which he is appointed?

Had this application for the tenants to attorn been under a sequestration for a duty, and it had been ordered, and the tenants were served with the order, and they refused to obey it, the Court perhaps might commit them, and there it would stop: for no process of contempt passes the Great Seal, but *inter parties* to a suit, and the tenants are not such parties.

If the contemnor hath not withheld the estate from the sequestrators, and they are in possession, why do they not distrain, or apply for an order, for leave so [630] to do, as a receiver doth; but if they are not in possession so as to sustain a distress, by reason of the contemnor's withholding the estate from them: it is the fault of the sequestrators, that they do not apply for a writ of injunction to deliver possession, and follow it with a writ of assistance.

Were the application, as it is alleged to be, of course, it would be in all the orders for a sequestration, (which it is not), as it is in every order, for the Master to appoint a receiver, "that the tenants of the estate do attorn, and pay their rents to such receiver;" the reason seems obvious, a receiver is *ad rem*, which the suit hath brought under the immediate care and protection of the Court; he is appointed by the Court, that is, by the Master, under the direction of the Court (and exceptions lie to the appointment), and so careful is the Court of the property, that the person appointed receiver, is first to give security to be approved by the Master, to account for what he receives; but as to sequestrations, they are not *ad rem*, but to the property of the contemnor in general; the sequestrators are named by the plaintiff, or the party who applies for the sequestrations; the Court hath no concern in the propriety of the nomination; and they do not give security for what they may receive: for the above reasons it is submitted, that should the application be thought proper, upon good grounds, yet it is not of course.

The Lords Commissioners having delivered up the Seals, and Lord Thurlow being again appointed Chancellor, the motion was revived, and by his desire, I submitted to him the above reasons: but being told by Mr. Mitford, that Lord Commissioner Ashurst [631] in conversation, had told him, he would grant the order, the Lord Chancellor on the 14th January 1784, said, that though he should in this instance grant the motion, it was not of course, and could be granted only upon notice: but afterwards upon the plaintiff's moving, that the tenants might stand committed for not obeying the order, his Lordship said the sequestration was in mesne process, and that the plaintiff must remedy himself as he could, and refused the motion.

SMITH v. BATE.

11 Feb. 1784. Lord Thurlow, C.

A testamentary guardian, being a bankrupt, a person appointed to have the care of the ward.

A testamentary guardian having been declared a bankrupt; it was referred to a Master to approve of a proper person, to have the care of the person of the infant.

WILCOX v. DRAKE.

5 April 1784. Lord Thurlow, C.

The father being insolvent, a person appointed to have the care of his infant son.

The father being insolvent, it was referred to the Master to approve of a person, to have the care of his infant son.

[632] SPEIDALL v. JERVIS.

24 Feb. 1784. Lord Thurlow, C.

Bill dismissed against defendant, though he made default at the hearing.

The defendant Jervis made default at the hearing, but it appeared from the opening of the bill, that the plaintiff had no equity against him, the Court notwithstanding he made default, dismissed the bill, as to the said defendant, but by reason of his making default, which is assigned as a reason in the order, his Lordship did not give him costs.

BAILY v. EKINS.

20 March 1784. Lord Thurlow, C.

It was laid down by his Lordship, that if a man covenant to settle his estate, and afterwards sell it, he is only to be considered as a trustee, and a debtor by simple contract ; but if an action of covenant be brought, and judgment obtained, he is a debtor by specialty.

[Mews' Dig. Executor and Administrator, X, a, 1. Report declared inaccurate.
Holland v. Holland, 1869, L. R. 4 Ch. 453 n.]

BAKER v. HAILY.

28 April 1784. Lord Thurlow, C.

It is not necessary in an affidavit on which to ground a writ of *ne exeat regno*, to swear the plaintiff is in danger of losing his demand, by the defendant's leaving the kingdom, it being a strong implication, he doth it with a view to avoid the demand on which a suit has been commenced.

Mr. Scott, moved this day to discharge an order for a *ne exeat regno*, for that the affidavit on which it was grounded did not go so far as to swear the plaintiff would be in danger of losing his claim, by the defendant's leaving the kingdom : he cited the Practical Register : *Cursus Cancellarie* ; Sir John Smithson's case, 2 Ventris, 345 ; Read v. Read, 1 Chan. Cases, 115 ; but [633] the Lord Chancellor said, though it might have been stronger, if the plaintiff had sworn he should be in danger of losing his claim ; yet as the bill was brought for the demand, the defendant's quitting the kingdom, whereby the Court lost its jurisdiction, was a strong implication that it was with a view to avoid it, and therefore denied the motion.

BRADSHAW v. TOULMIN.

11 May 1784.

If two persons perish by one blow, the estate will remain as it was.

Lord Thurlow, C., said, if two persons being joint tenants, perish by one blow, the estate will remain in joint tenancy, in their respective heirs.

SPEIDALL v. FULLER.

18 May 1784.

A bankrupt's certificate must have passed the Great Seal before he can be examined as a witness.

A bankrupt having had his Certificate signed by the Commissioners, was, before such certificate had passed the Great Seal, examined as a witness ; his evidence was offered to be read at the hearing ; objection taken to it, for that his certificate had not passed the Great Seal : the objection was allowed.

[634] *Ex parte* PROCTORS.

9 June 1784. Lord Thurlow, C.

Estate vested in trustees by will, to raise portions and maintenance for younger children, but no guardian appointed. Application to the Court to appoint guardians and to settle maintenance, and to have the costs of the application. No cause being in Court, Lord Chancellor refused it, after its standing over for consideration.

Sir William Proctors, by his will, vested an estate in trustees to raise portions and maintenance for younger children, but appointed no guardian: On application, it was referred to me, to approve of a guardian and to settle maintenance; and upon application the above day to confirm the report, they prayed the costs of the application might be paid.

The Lord Chancellor doubted the propriety of giving costs, there being no cause in Court; and supposing he was to direct them, how the payment could be enforced; that it was evident the application was meant to justify the trustees, with whom he had nothing to do; but the application being said to be very common, the Lord Chancellor left it to the Register, to see if there were any similar orders: one order, and no more, was produced in the same matter, which appearing to have passed *sub silentio*, I referred them again to the Court, after having talked with Mr. Madocks, who agreed as to the impropriety of it; and Mr. Spranger having again introduced it, the Lord Chancellor was clear as to the impropriety of the application, and refused it.

MACHIN *v.* SALKELD.

9 June 1784. Lord Thurlow, C.

Reference to a Master, to see what was proper to be allowed for the maintenance of a person of insane mind: no commission of lunacy having issued: ordered after consideration.

An application was made to have an allowance for the maintenance of a person of insane mind. His Lordship objected, for that a commission of lunacy had not issued, and, without it, he did not see how the executors or trustees could be justified; but [635] being told the expence of a commission, and the orders, &c., would cost £120, and the life-income was no more than £79 a-year, and having been told there had been similar instances, it stood over; and *Wilkinson v. Leach*, 23d July 1760, Reg. Lib. B. fol. 385; *Eldridge v. Crouch*, 15th May 1782; *Price v. Bedford*, 26th April 1784; having been laid before his Lordship, he, on the above day, referred it to the Master, to see what was proper to be done, and to enquire into the insanity of the party.

COREYN *v.* BIRCH.

7 July 1784. Lord Thurlow, C.

The reasons for suing out sequestration against a defendant, who is one of the sworn Clerks of the Court, for not putting in his answer, instead of applying first, as was formerly the practice, for an order to suspend him.

The defendant Birch, one of the sworn clerks of the Court of Chancery, being in contempt for not putting in his answer, it was moved to suspend him; and upon my mentioning to his Lordship, that of late years the course had been to order a sequestration instead of a suspension, his Lordship desired me to acquaint him with the grounds for such change in the mode of proceeding: Upon which, I submitted to him what follows:

There are three modes to be pursued in order to have a bill taken *pro confesso*.

First, Under the act of the 5th Geo. 2, to render process effectual, where a defendant being served, will not appear, or absconds to avoid being served.

Second, Where a defendant is taken on an attachment for not answering, to bring him into Court on different writs of *habeas corpus*, &c., and if on being brought up on an *alias pluries habeas corpus*, he per [636]-sists in his contempt, the bill is ordered to be taken *pro confesso*.

Third, Where a defendant hath appeared, and is in contempt for want of his answer, and cannot be taken, and a sequestration hath issued against him, and which must issue, as the ground for taking the bill *pro confesso*.

To obtain a sequestration an attachment, an attachment with proclamation, a commission of rebellion, and the serjeant at arms must have issued (and a space of fifteen days between), unless where the party is privileged; in which case, a sequestration issues in the first instance (see Lord Wenman's case, 701; and Anon. 1 P. Wms. 535).

It was said by Mr. Mitford, when the motion in the principal case was made, that no writ of attachment, or process of contempt could issue against a party an officer belonging to the Court out of which that writ is to issue. A clerk in Court consequently coming within the predicament of a privileged person, it is humbly submitted, whether the first proceeding should not be a sequestration.

True it is, that the suspending of a clerk in Court used to be the mode for a contempt in a clerk in Court; but in *Langstaffe v. Hilton*, 16th April 1774, a sequestration *nisi* was ordered against the defendant in the first instance for want of his answer, for that no attachment lay against him, being a privileged person.

Should a suspension be the only remedy, the relief, it is humbly submitted, will not be compleat; for there are several clerks in Court who have seats without any business; who hold their seats merely to [637] prevent their serving parish, and other offices. To suspend such a clerk in Court, may be disgraceful to him, but no satisfaction to a plaintiff; and though he may have a seat without business, he may have property to sequester.

Suppose on a decree *ad computandum* against a defendant, a clerk in Court, a balance should be found due from him, and he should not pay it, will it be said that a sequestration (which in equity is in the nature of an execution, and is, as Lord Hardwicke said in *Kinsey v. Yardley*, 24th May 1754 (*supr.* [Dick.] 623); *ad satisfaciendum*) cannot issue? If it will not, how is the plaintiff to be satisfied? The defendant cannot be attached; and his suspension may be from bare boards; and even should there be business pertaining to the seat, it would be punishing an innocent client, or might be the means of diverting the business to the seat of another clerk in Court, between whom and the contemnor there might be an understanding. But if a sequestration may issue for a duty, why not in mesne process, to obtain a decree for such duty? A sequestration being the only mode (when a privileged person hath appeared and will not answer) that can, and by the course of the Court must be pursued, to procure a bill to be taken *pro confesso*.

Suppose an order should be made to suspend a clerk in Court for a contempt in not answering, and he should persist in his contempt, it is submitted whether such an order would have the effect of a sequestration, to ground the taking a bill *pro confesso*? I do not know, nor ever heard of, nor do I believe such an instance can be produced.

[638] Upon speaking to several clerks in Court upon this matter, they say, if a clerk in Court is prejudged, by the order for suspending him being made absolute, he may then be attached, and the line of process pursued to a sequestration, unless he be taken up and brought into Court upon any of the preceding processes: but it being a town cause, the defendant, according to the indulgence that is usually granted, may by praying time, have one month, three weeks, and a fortnight, to answer, before the plaintiff can have an order *nisi* to suspend him; and it will be some time before it is made absolute. After which, being, as before said, prejudged, it will require the same time to go through the line of process against him as against another party not an officer of the Court; so that by belonging to the Court, and by not doing what he knows he should do, instead of less, he hath more indulgence than a party not an officer. His Lordship told the Bar, what was submitted to him was convincing, and therefore ordered a sequestration *nisi*.

(I think there is a distinction to be taken where an officer of the Court is a plaintiff, and where he is a defendant; because, by suing he waves his privilege, and the defendant may pursue such course, as is usual where a plaintiff is not privileged, as it used to be before the privilege of Parliament was taken away by an act of the legislature; for if a member of Parliament filed his bill, he put himself upon the footing of every common suitor (barring the attaching of his person); but where he is brought into Court, by being a defendant, he hath a right and may with propriety insist on his privilege.—J. D.)

BRAY v. HOOKER.

7 July 1784. Lord Thurlow, C.

Application to empower sequestrators in mesne process, to grant leases, refused.

On the 30th of June 1784, the defendant being in contempt to a sequestration, in mesne process, the plaintiff moved that the sequestrators might be at liberty to grant leases, and that the defendant's clerk [639] in Court might attend with the record of the bill, in order to have it taken *pro confesso*: the novelty having struck his Lordship, he desired Mr. Selwyn to mention it on a future day; and, accordingly, on the above 7th July Mr. Selwyn again brought it on; and the Attorney General *v.* the Mayor of Coventry was cited. His Lordship said, how could it be! It was in mesne process; the defendant was not before the Court; there had been no decree; consequently it was not *ad satisfaciendum*; and therefore denied so much of the motion as prayed the sequestrators might have liberty to grant leases; but suppose it had not been in mesne process, it would be giving sequestrators more power than is given to a receiver who gives security.

SAWYER v. BOWYER.

30 July 1784. Lord Thurlow, C. 1 Bro. C. C. 338, S. C.

On the first Seal after Trinity Term 1784, Mr. Price, on behalf of the plaintiff, moved to suppress depositions of a witness taken before a Master, after a decree (who had been examined in chief before the hearing), without an order for the purpose. Mr. Mitford, of counsel for the defendant, said it was of course, and cited some cases from the Practical Register.

But mentioning the case of *Browning v. Barton*, reported *supra*, 508; it stood over for consideration; and on my laying the said case before his Lordship, he said it was decisive, and that he was satisfied; but the defendant consenting to pay £5 for the plaintiff's costs of the application, it was on this [640] day (30 July 1784) by consent ordered, that the depositions should stand upon the defendant's paying unto the plaintiff £5 for costs.

WOODBRIDGE v. HILTON.

2 August 1784. Lord Thurlow, C. 1 Bro. C. C. 398, S. C.

Exception will lie to an award of a referee under a decree, if only *ad computandum*; but not if to all matters in difference.

Upon hearing this cause, it was by consent referred to persons therein named, to arbitrate and put a final end to all matters in difference; and the consideration of costs and of all further directions, was reserved until after the award: the award was made, and the defendant took an exception to it. Upon the exception coming on to be argued the above day, by Mr. Selwyn and Mr. Hollist for the defendant, and Mr. Mansfield for the plaintiff, a question arose respecting the propriety of an exception to an award, by arbitration, under a decree. The following cases were cited: *Hyde v. Coath*, 2 Vern. 109; *Cressy v. Carrington*, *ibid.* 79; *Lingood v. Eade*, 3 Atk. 501.

Lord Chancellor.—If a matter is referred to arbitrators by a decree or order, merely *ad computandum*, I am clear an exception will lie to the award, as to a Master's report; the referee being substituted in the place of a Master: but if the reference, as in this case, is of all matters in difference, I am clear an exception will not lie: therefore let the exception be over-ruled.

[641] MOORE v. AYLET.

4 August 1784. Lord Thurlow, C.

The competency of this Court in examining *viva voce*, allowed at law to ground a prosecution for perjury.

This cause came on to be heard this day for further directions and costs. The defendant Aylet (who was a solicitor) attended in person. At the rising of the Court, Mr. Griffith Price, on behalf of the said Aylet, complained to the Lord Chancellor, that the said Aylet, on his way from Court, after the cause was heard, to his own house, had been arrested; and the officer who arrested Aylet averring that Aylet had been at his own house, that he afterwards went from his own house to a neighbour's, and

that, on his way back to his own house he had arrested the said Aylet ; The Lord Chancellor directed the parties to go before one of the Masters of the Court, and make affidavit of the facts ; but his Lordship being told the Masters had left the office, his Lordship directed me to administer an oath to the said Aylet, which I did, " to answer truly to such questions as should be put to him, and to speak the truth and nothing but the truth." Aylet having taken the above oath, the Lord Chancellor asked Aylet if he had been arrested before he had entered his house, after his return from attending the above cause ; or whether it was after he had been at home, and upon his going out again, that he was arrested.

Aylet answered, that he had not been at home after attending the above cause, but that he was arrested upon the steps at his own door, on his way home from attending the Court in the above cause, and before he had been within the door of his house. Upon Aylet's swearing as above, the Lord Chancellor or-[642]-dered him to be discharged from his said arrest ; and he was discharged in Court.

A bill having been found against Aylet for wilful and corrupt perjury on his above examination, upon trial, the 19th of July 1785, before Judge Buller, sitting for Lord Mansfield, in Westminster Hall, Aylet having removed the bill of indictment by *certiorari* into his Majesty's Court of King's Bench, Mr. Erskine, of counsel for the prisoner, doubted the competency of the Lord Chancellor as to examining *viva voce*, so as to ground a criminal prosecution for perjury. It struck me as very strange, that an affidavit sworn before one of the Masters of the Court, (whom the Chancellor appoints), should be (as was allowed) competent, and an examination before the Chancellor, who delegates the power to a Master to administer an oath, should not be competent ; however, so it was questioned. Mr. Erskine asked me, if it were usual for the Court to examine a witness *viva voce* ? My answer was, that it was done every day, and, to my knowledge, had been the practice almost every day for fifty years ; that the complaint of Aylet was in a cause in the Court of Chancery ; that Aylet took the oath voluntarily ; that he had the benefit he sought by his swearing ; and that his now disputing the competency of the Court to administer an oath was with a very ill grace. That objection was over-ruled, and he was found guilty. In Michaelmas Term following he moved in arrest of judgment ; and, as one reason, again questioned the competency of the Lord Chancellor to examine *viva voce*, to ground a criminal prosecution.

On this day (26 November 1785) the matter was argued. Mr. Jus [643] tice Ashhurst wrote to me to desire I would inform him what I took to be the practice. My answer was, that I ever understood it to be the practice of the Court to examine *viva voce*, upon a complaint of the kind alluded to, and for this reason : if the party was wrongfully arrested, he might be released immediately, and not remain in custody till a formal complaint could be made, founded on affidavit ; and mentioned an instance of Mr. Galliard, a barrister, being arrested in going from Lincoln's Inn to his Chambers, from attending a cause in which he was concerned, and was brought back into Court and discharged. The Court over-ruled the objection, and allowed the competency.

The defendant afterwards brought a writ of error in Parliament, which was argued in the House of Lords, in July 1786, and the judgment was affirmed.

MORGAN v. MORGAN AND JONES.

4 August 1784. Lord Thurlow, C.

Interest directed to be computed on the arrears of an annuity, from the time of filing the bill ; till which time the non payment was attributed to the neglect of the annuitant in not using means to enforce payment, the fund being effective.

On the marriage of Sir William Morgan with the late defendant Lady Rachael, in 1725, a settlement was made, and a term thereby created on certain lands, for the purpose of paying Lady Rachael in case she survived her husband (which she did), a yearly sum or rent charge of £2000, with power of entry and distress, in case of non-payment within forty days after it became due. In 1776, ejectments having been brought to recover a very large sum alleged to be due for arrears of very long standing, the plaintiff, in 1776, filed his bill for an injunction to [644] stay proceeding on the said ejectment, praying that an account might be taken of what, if anything, was due ; offering to pay what should be found due on the account : and by decree, dated 12th February

1776, an injunction was granted till further order, and an account directed of what was due for arrears of the said annuity or rent charge, and interest, costs, and further directions were reserved. The Master reported £16,000 to be due for arrears.

And the cause came on to be heard this day (4 Aug. 1784) for further directions as to interest and costs; and it was argued for the defendant, that the annuity was granted for the support of the wife; that the not paying of it was putting the annuitant under the necessity of borrowing money at interest for her support.

On the part of the plaintiff it was argued, that the debt was such as in its nature did not carry interest: that there being a sum in arrear must be attributed entirely to the neglect of the defendant; for that the fund was a producing fund, and the defendant had a power of entry and distress under the settlement, if the rent charge were not paid as it became due.

The cases of *Bedford v. Coke* (*supra*, [Dick.] 178), 7th December 1752; *Signal v. Brereton* (*supra*, [Dick.] 278), 2d July 1751.

The Lord Chancellor took this distinction: that the fund was effective; that the defendant had a power to compel payment of the annuity, but had not exercised it; that when the defendant would have used that power, she was prevented by the bill and the injunction, and therefore he thought, that from the time of filing the bill, the defendant was entitled to interest for the arrears of the rent charge, [645] and ordered the Master to compute interest on the arrears from the time of filing the bill, at 4 per cent., and the plaintiff to pay what should be found for such arrears, and interest, and thereupon, the injunction to be perpetual.

[*Distinguished*, *Brown v. Newall*, 1837, 2 My. & Cr. 572; *Small v. Attwood*, 1838, 3 Y. & C. 130.]

NICHOLS v. KEARSLY.

16 August 1784. Lord Thurlow, C.

Order, in nature of an injunction to stay waste, granted on petition at the Lord Chancellor's house.

Order in the nature of an injunction to stay the defendant from printing Capt. Cook's Voyages; granted on petition, between the Seals, at the Lord Chancellor's house. See the like, *Chamberlain v. Dummer* (1 Bro. C. C. 166); and *Smith v. Clark*; the like, on petition.

ARNOLD v. ARNOLD.

9 Nov. 1784. Lord Thurlow, C. 1 Bro. C. C. 401, S. C.

Real estate devised to trustees to sell, and to pay the purchase money to particular persons, naming them. The testatrix afterwards sold the estate, held to be an ademption of the specific devises.

Catherine Arnold was seised of a real estate which she devised by her will to particular persons, to sell and pay legacies out of the money, and further gave legacies, and the residue to the plaintiff and others. After making the will, the testatrix sold the real estate she had so devised by her will. The question in the cause was between the devises of the real estate, and the residuary legatees of the personal estate, each claiming the money that had been produced by the sale of the real estate, the residuary legatees insisting that the sale of the estate by the testatrix was a revocation of the will *quod*: and [646] that the money produced by the sale fell into the residue of the personal estate.

The following cases were cited: *Vernon v. Jones*, 2 Vern. 241,—Prec. in Chan. 32; *Saville v. Blacket*, 1 P. Wms. 777; *Ogle v. Cook*, 3 Atk. 746; *Sparrow v. Hardcastle*, 3 Atk. 798.

The Lord Chancellor delivered his opinion, that the ademption of a specific devise was the same both in law and equity; and was clear that the money arising from the real estate devised by the testatrix, and afterwards sold by her, made part of her general personal estate.

MANSEL *v.* BOWLES.

17 Nov. 1784. Lord Thurlow, C. 1 Bro. C. C. 403, S. C.

Bill dismissed with full costs, though the plaintiff had not replied, under an order of Court, by Lord Hardwicke, for that purpose.

The cause was heard on bill and answer, and dismissed, as to Bowles, with 40s. costs, as being the course of the Court; but upon mentioning that Lord Hardwicke had altered that course by an order of Court for that special purpose, and left it to the discretion of the Court (and which was founded in common justice; for a defendant being served with a subpoena, was under the necessity of taking a copy of a bill, the expence of which alone might, as the pleadings are so much lengthened, to what they were when that rule first took place, cost him seven or eight pounds): the next day I produced the order, and the Lord Chancellor dismissed the bill, as to Bowles, with costs to be taxed.

[647] WORSAL *v.* MARLAR.

16 Dec. 1784. Lord Thurlow, C.

A feme covert, entitled to a contingent legacy: the husband becomes bankrupt: the Court will not order payment, before the assignees and the bankrupt have each laid proposals for a settlement before the Master.

The wife was entitled to a contingent legacy; the husband became bankrupt; his assignees claimed the legacy, insisting that every contingent interest in the bankrupt at the time of the bankruptcy, vested in his assignees. The following cases and act of parliament were cited: *Jewson v. Moulson*, 2 Atk. 417; Stat. 18 Geo. 3, chap. 52; *Jacobson v. Williams*, Mich. 1713, 1 P. Wms. 382; *Bates v. Dandy*, 2 Atk. 207; *Miles v. Williams*, 1 P. Wms. 249; *Tudor v. Samyne*, 2 Vern. 270. And a distinction was taken, where the husband assigned a chose in action for a valuable consideration; and where the assignment was voluntary, or by the operation of law: that in the present case the assignees were to be considered as standing in the place of the husband; that as the legacy could not be paid without the aid of the Court, the Court would take care of the interest of the wife, in the same manner as if the husband had not been bankrupt.

His Lordship ordered both the assignees, and the husband to pay proposals before the Master, for a settlement on the wife, and the issue of the marriage.

HICKS *v.* RAINCOCK.

23 July 1783. Lord Thurlow, C.

Bill for an injunction to stay the infringement of a patent right. Demurrer, that the plaintiff had not established his right at law,—overruled.

Demurrer to a bill for an injunction to stay the infringement of a patent for making loops in stockings; for that the plaintiff had not established his right at law. Cases cited: *Chetwynd v. Lyndon*, 2 [648] Vez. 450; *Salkeld v. Science*, 2 Vez. 107; *Lord Teynham v. Herbert*, 2 Atk. 483; *Whitchurch v. Hyde*, 2 Atk. 391.

Lord Chancellor.—Overrule the demurrer.

DUNCANNON *v.* CAMPBELL.

26 Jan. 1785. Lord Thurlow, C.

Giving notice of the execution of a commission to examine witnesses, to the plaintiff, in an interpleading bill, and not to the defendant: held to be good.

On an interpleading bill, the defendant having answered, the plaintiff replied, and served a subpoena to rejoin. One of the defendants sued out a commission to examine his witnesses, and executed it; he gave notice of the execution of the commission to the plaintiff, but gave no notice of it to the other defendant.

Mr. Scott, on behalf of the other defendant, moved to discharge the order and the commission for irregularity; for that his client ought to have had notice of the execution of it; but his Lordship was of opinion the giving of notice to the plaintiff was sufficient.

(But it is submitted, that as the plaintiff in an interpleading bill, hath nothing more

to do than to bring the cause into a state to be heard : and having replied, and served a subpoena to rejoin, so that the defendants were enabled to proceed to examine witnesses, if they thought fit, with which he had nothing to do : the defendant ought to have had notice.—J. D.)

PEARSON v. WARD.

28 Feb. 1785. Lord Thurlow, C.

Matters of importance on the cause, lying within the knowledge of one person only, application was made to examine him *de bene esse*, though he were neither old nor infirm : and, to support it, [649] *Shirly v. Earl Ferrers*, 3 P. Wms. 77, was cited. His Lordship granted the motion, saying he would have made a precedent, had there not been one.

[*Mews' Dig. Evidence*, VII. 4, a, ii. S. C. 1 Cox. 177. See *Hope v. Hope*, 1840, 3 Beav. 322 ; *Blackwood v. Burrowes*, 1842, Fl. & K. 632.]

HALL v. SMITH.

15 March 1785. Lord Thurlow, C. 1 Bro. C. C. 438, S. C.

Plea to a bill of revivor, merely for costs : the costs having been taxed,—overruled.

By decree the party was to pay costs : the costs were taxed : and the party to pay afterwards died : a bill of revivor was filed against the representative of the deceased party : the defendant put in a plea to it. Upon argument, after citing the cases of *White v. Hayward*, 2 Vez. 461 ; *Kemp v. Mackrel*, 2 Vez. 579 ; *Blower v. Morret* (3 Atk. 772) ; his Lordship overruled the plea.

CURRIER v. WALKLEY.

5 March 1785. Lord Thurlow, C.

The contractor for an estate devised to trustees to sell, subject to particular charges, must see the money applied in payment of such charges ; but if only to sell, he hath nothing to do with the application of the money.

The testator had devised estates, subject to particular charges : he afterwards entered into a contract for part of the estate : and the purchaser paid the sum of £600 as a deposit.

The bill was for an account of what was due to the plaintiff in respect of his charge, and that the purchaser might pay out of the remainder of his purchase what remained due to the plaintiff.

* *Lord Chancellor*.—If an estate is devised to trustees to sell, and the testator afterwards contracts for the sale of the estate, it is enough for the purchaser to pay the purchase money into the hands of the trustees to apply it, as it doth not lie with him to [650] see it applied ; but if the estate be devised, subject to particular charges, it is incumbent on him to see it applied in payment of those particular charges.

WHATELY v. SMITH.

2 May 1785. On petition to the Master of the Rolls.

A co-plaintiff examined to prove a deed, to which he was the only surviving witness, allowed by consent.

The petition stated, that it was necessary to prove the execution of a certain indenture dated the 14th March 1775 : that the plaintiff was the only surviving witness to the deed, &c., and an affidavit verifying the facts was annexed. His Honour, without ordering an attendance, gave liberty to the defendant Bailly to examine the plaintiff, to prove the execution of the said indenture, saving just exceptions : But *query* ; there had been motions in the same cause, for the same purpose, before the Lord Chancellor, which he refused : and on the 8th of April 1785, Reg. Lib. B. fol. 278, the defendant again moved for liberty to examine the plaintiff, when, by consent of the plaintiff, the motions were granted.

HICKS v. HICKS.

In Trinity 1785.

On a similar application to Sir Lloyd Kenyon, M. R., to that in the case of *Webb v. Webb*, *supra*, 298, to Lord Thurlow, C., that case was cited; little attention, however, was paid to it, and the application was refused; and this distinction was taken, that when deeds are in the hands of a tenant for life, the [651] Court will not take them out of his hands; but when they are not in his hands, the Court will not order them to be delivered to him.

HINDMAN v. TAYLOR.

8 June 1785. Lord Thurlow, C.

Plea of fact in bar to a bill of discovery, doth not lie, as it would be trying the bar in equity; which is more proper to be tried at law; the case re argued, and the decision confirmed.

The plea in this cause was to a bill merely for discovery in order to proceed at law, but did not state that any action was brought: the defendant pleaded a fact, as he alleged in bar, which was, that he had paid the money demanded by the plaintiff, and for which the plaintiff had brought his action.

Brownsword v. Edwards was cited, 2 Vezey, 243. The Lord Chancellor doubted from the first if he could try the bar, and at last determined the plea was improper. His Lordship said, he could not deny but that a plea would lie merely to a bill of discovery, but then it must be when it leads to a penalty; and in this case, allowing the plea would be trying the bar, which is more proper to be tried at law, and if a good bar, the defendant would have the benefit of it at law; and therefore overruled the plea.

Upon re arguing this plea before the Lord Chancellor, Mr. Madocks for the defendant said, it had been questioned whether any thing could be pleaded but an equitable plea; but that there are many instances where a legal bar may be pleaded: settled account pleaded, 1 Vern. 180; 2 Atk. 1. Plea of an award, 3 Atk. 539, 644. Fine and nonclaim, 1 Ch. Cas. 2; a good plea, both to relief and discovery.

The Lord Chancellor said, that since this plea had first come before him, he had conversed with the [652] Master of the Rolls and several of the Judges respecting it, and that he was confirmed in his judgment, that allowing the plea would be trying the bar, which was most proper to be tried at law, and therefore affirmed his former order.

MATTHEWS v. THE BISHOP OF BATH AND WELLS.

27 June 1785. Lord Thurlow, C.

Coparceners seised of an advowson. Bill for a partition: the mode by presenting alternately.

The bill was for the partition of an advowson: it is necessary, because if the party jointly interested will not concur in presenting, and the time lapses, the Bishop will present; the stat. of 31st of Henry the 8th, which compels parties to a partition of a joint tenancy, it was urged, extended to an advowson, and was to be done by presenting alternately: see a similar case before Lord Hardwicke (*supra*).

The Lord Chancellor laid it down as a settled principle, where one coparcener hath presented, the other coparcener may compel the Bishop the next turn to induct the clerk whom such other coparcener presents.

MOODALY v. MORETON AND EAST INDIA COMPANY.

8 July 1785. Sir Lloyd Kenyon, M. R., sitting for the Lord Chancellor.

1 Bro. C. C. 469, S. C.

Objection that a demurrer would not lie to a bill merely for a discovery, to enable the plaintiff to go to law; where the plaintiff had not brought his action at law; but held it would.

The East India Company had granted to the plaintiff a lease for supplying Madras with tobacco, of which, as the bill stated the Company had dispossessed him, and granted a lease for the same purpose to another person before the expiration of the

plaintiff's lease : The plaintiff, in order to enable him to sue for his right, filed his bill for a discovery, and a commission to examine witnesses : but prayed no relief.

[653] The defendant demurred, upon several grounds, that the defendants, the East India Company, were Sovereigns of the territory ; that they could not be sued ; that it might be attended with bad consequences, in a political view, to discover their secrets ; and that the defendant (Moody) being their secretary, had sworn to keep the secrets of the Company, could not be compelled to disclose them ; besides, the plaintiff had not brought an action, and no good cause of action was proved.

The cases cited by the defendant were : *Meal v. East India Company*, 3 P. Wms. 310 ; *Heathcote v. Fleet*, 2 Vern. 422 ; *Morse v. Buckworth*, 2 Vern. 443 ; and *Colonel Dethick v. Lord Howe*, before Lord Thurlow. The bill was for a discovery ; a demurrer allowed, because a good cause of action was not stated in the bill.

Mr. Madocks, for the plaintiff, cited the preceding [case] of *Hindman v. Taylor* (*supra* [Dick.] 651).

There may be three persons against whom the action may be brought : the Company, the secretary, and the lessee ; and how is it to be known against whom the action may be brought, till the discovery is made.

The Master of the Rolls. I shall put the East India Company and the defendant Moody upon the same footing. In ordinary cases, it is usual for this Court to grant discovery, auxiliary to a Court of law, and to grant commissions to examine witnesses.

It hath been said, that the East India Company have a sovereign power : Be it so ; but they may contract in a civil capacity : It cannot be denied but in a civil capacity they may be sued : in the case now before the Court, they entered into a private contract ; if they break their contract, they are liable [654] to answer for it. In the present case there is a *prima facie* ground of action : it hath been said, that no action having been brought, the bill is improper : at first I had my doubts, but I have had some instances handed up to me.

I mean the cases of *Mendes v. Barnard* (*supra* [Dick.] 65), 23d May 1735 ; and *Emmot v. Aylet*, 12th February 1755 ; which have brought others to my mind ; therefore over-rule the demurrer.

[*Mews' Dig. Discovery*, C. 3. See *Prioleau v. United States*, 1866. L. R. 2 Eq. 667.]

CATER v. DEWAR.

21 July 1785. Lord Thurlow, C.

The bill retained for 12 months, with liberty for the plaintiff to bring an action, and to proceed to trial ; and, in default, the bill to be dismissed with costs. The plaintiff did not proceed according to the liberty given to him ; and thereupon, the defendant moved to dismiss the bill ; held to be improper, not being such a judgment as could be pleaded ; and the cause ordered to be set down for further directions.

Upon the hearing of this cause, the bill was retained for twelve months, with liberty for the plaintiff to bring his action, and proceed to trial in the mean time ; if not, the bill was to be dismissed. The plaintiff having neglected to bring his action within the time, the defendant moved on the Court-day, July 1785, that the plaintiff's bill might be dismissed, which was ordered. I thought it not right. I desired Mr. Leake to suspend the order, which he did, and it was mentioned after the fourth Seal ; when two doubts arose. First, whether such an application was necessary ? Secondly, if necessary, whether that was the proper mode ? But Mr. Bitson, one of the sworn clerks, as an *amicus curiæ*, telling his Lordship it was the constant practice, upon the plaintiff's neglecting to bring an action within the time, to go before the Master without a further order, and to get the costs taxed, his Lordship granted the motion ; but bid him tell me, it was his pleasure I should inform him [655] what I took to be the practice, and to suspend the order in the mean time.

In obedience to his Lordship's order, I submitted to him the following observations :

First, I begged leave to call his attention to the language of the order, made on hearing the cause : " Let the plaintiff's bill be retained for twelve months ; and in the mean time let the plaintiff be at liberty to bring an action at law, and proceed to trial ; and in case he shall bring such action and proceed to trial within the time aforesaid, reserve further directions ; if he doth not, the plaintiff's bill is to be dismissed (not

an absolute order that it do stand dismissed) : and in either case (that is, of the plaintiff's bringing or not bringing an action within the time), any of the parties are to be at liberty to apply to the Court ; so that from the words of the order it is plain a further application is necessary, and was intended by the Court. And indeed I have always understood it to be an established rule, if terms or conditions are annexed to an order : unless the words " without further motion," such orders are not conclusive : but the party applying must swear to the Court that the order hath not been observed, and obtain another order to make it absolute. There are repeated instances on the Seals and motion days, when upon an application to dismiss a bill for want of prosecution, terms are imposed on the plaintiff, and if he doth not comply with them, the bill is ordered to be dismissed. If through any mistake or inadvertence the words " without farther motion " are omitted, the defendant applies and obtains an absolute order of dismissal.

[656] Should your Lordship think a further order necessary for dismissing a plaintiff's bill, in case he doth not bring his action, and proceed to trial within the time limited, the question recurs as to the mode of applying for it.

Your Lordship will be pleased to observe, that the cause is set down for the decision of the Court, by a solemn judgment upon the case ; and being brought on to hearing, and an order made, it is submitted whether the Court can afterwards dispose of the bill, on the application of a defendant, but in the same solemn way ? A plaintiff, Lord Hardwicke held, in *Carrington v. Holley*, 12th July 1755 (*supra*, [Dick.] 280), might at any time, upon payment of costs, if there had not been a determination, which an issue was not. Suppose the plaintiff had brought his action and proceeded to trial, and there had been a verdict against him ; in that case, the cause must have been set down to be heard on the equity reserved, in order to have the bill dismissed. A judgment may be pleaded, which, it is submitted, a dismissal, by an interlocutory order, cannot. As to the expence of an application for a dismissal, whether by motion, or by a solemn hearing, the only difference would be about thirty or forty shillings, for setting the cause down ; the same briefs that would be wanted for the hearing would be requisite upon the motion ; which difference in expence would be fully compensated by the difference in point of advantage it would be of to the defendant to have a solemn judgment, which he might plead, instead of an interlocutory dismissal ; by which, though he gets rid of the present bill, the [657] plaintiff will not be debarred from harassing him with another, as he cannot plead.

Lord Chancellor, when he came into the Court this day (21 July 1785), addressed the Bar ; stated what I had submitted to him ; and put this question : Can a dismissal by an interlocutory order be pleaded ? And all agreeing it could not, his Lordship said I was perfectly right ; and directed me to tell Mr. Wright the Register, not to draw up the order ; and said the cause must be set down, to get the bill dismissed.

GUNN v. PRIOR.

16 Dec. 1785. Lord Thurlow, C.

Negative plea : the plaintiff stating himself to be heir at law, for a discovery of title deeds, &c., that the plaintiff was not heir at law,—over-ruled.

The bill was for a discovery and production of title deeds ; and the plaintiff, by the bill, stated himself to be heir at law. The defendant pleaded to the bill : the plea was, that the plaintiff was not the heir at law.—It was said, that it was analogous to a plea : that one who sets himself up for an administrator, is not administrator, and the *Practical Register* was cited, page 276 ; *Wynne v. Fletcher*, 1 Vern. 447 ; *Ord v. Huddleston*, in 1773. Plea, that the person whom the plaintiff pretended to represent was living : the plaintiff replied to the plea, and entered into proof in support of his right, not of his limited right, but of his general right ; so in this case, it was said, the plaintiff ought first to prove his right to come into this Court, before he hath the discovery prayed ; for otherwise, any person might, by stating he was heir at law, or representative (without being so), come into this Court, and make a person discover his title, of which another might avail himself.

[658] *Lord Chancellor*.—Heir or not heir, is a point in issue in the cause ; which the Court will not determine upon a plea ; if disproved, having no title, his bill will be dismissed, and he will pay the costs : and therefore over-rule the plea.

JOHNSON v. AYLET.

20 Dec 1785. Lord Thurlow, C.

A party being in Newgate, under a criminal sentence, cannot be brought up under a writ in mesne process, for the purpose of charging him; the leaving of such writ with the Sheriff sufficiently charging him.

The defendant Aylet being in execution in Newgate, under a sentence for perjury, Mr. Richards as counsel for the plaintiff, on the fourth Seal day after last Term, moved for a *habeas corpus* to bring the defendant into Court, merely to charge him in custody with a contempt on mesne process for not answering, which, his Lordship, on the following day, was pleased to grant. Finding by the instructions left to draw the order from, that the return was founded on the return of the messenger, not of the sheriff, a doubt struck me, whether the ground of the application was good? And, if so, whether there was any occasion for such an application? I therefore submitted the following reasons to his Lordship:

An *habeas corpus cum causis* issuing under the order of the Court of Chancery, is ever immediate to, and founded upon the return of the sheriff, or of the person in whose custody the contemnor is, except in special circumstances as after mentioned: I have always understood that where an attachment in mesne process is executed, and the sheriff returns a *cepi corpus*; and the party is then in execution, in custody, and charged so in custody by others, that the next process is an [659] *habeas corpus*, &c., to bring him up with his causes.

Where an attachment in mesne process hath issued, and the sheriff returns a *cepi corpus*, "and that he hath the defendant ready," which he doth when the defendant is not otherwise charged, and he hath taken the defendant's bail-bond for his appearance; then, and then only, the messenger goes.

Should the defendant in the interval between the return of the *cepi* and the going of the messenger, be charged in execution at the suit of others, the Sheriff will not deliver the defendant to the messenger, but return that he hath the defendant safe in his custody (that is, in prison, which is the return the Sheriff makes, when the defendant is not out on bail bond), this the messenger will return specially; and, on that return, an *habeas corpus cum causis* will be granted.

In the case before your Lordship, the application is founded upon the return of the messenger, not of the sheriff.

It is therefore submitted, that the application for the messenger was improper, and that if any order was necessary (it being merely to charge the defendant in custody), it should have been an *habeas corpus cum causis*; but it was moved for and granted as a motion of course, and drawn up and passed by the Register's Clerk as such, without his attending to the return of the messenger, which is special. "The defendant is in his Majesty's Gaol of Newgate, in execution, on a criminal prosecution for perjury:" speaking as of his own knowledge, not as having it from the sheriff; neither doth he suggest that he had applied for, or that the sheriff had refused to [660] deliver the defendant to him: it may be taken to be so by implication; but it is submitted, that when this Court issues its warrant, it is upon something expressed, not merely implied.

Should your Lordship be of opinion the application is well founded, it is submitted, whether there is a necessity for it.

The motive for the application is not to bring the defendant up, and turn him over to the Fleet, in order to take the bill *pro confesso*, which would not answer the purpose of the plaintiff (what the plaintiff seeks being a discovery), but merely to charge him in custody, that when the term of his sentence is expired, he may not be released till he hath made the discovery, upon an idea, that when that sentence is at an end, the sheriff will discharge him, without regard to the attachment directed to him to execute; which, whether he may do, it may not be improper to attend to the form of an attachment:

"We command you to attach A so as to have him before us, in our Court of Chancery, as well touching a contempt, which he, as it is alleged, hath committed against us, as also such other matters as shall then and there be laid to his charge; and further to abide, &c.: and hereof fail not."

The sheriff, in the case before the Court, hath returned, that he hath executed

the attachment; and that he hath the defendant in safe custody (the language of returns when in prison); and having made such return, it is submitted, whether he is not obliged to have the body forthcoming, as to his said contempt, whenever called for.

[661] In *Kendal v. Baron*, before Lord Hardwicke, 9 Feb. 1743, an attachment having issued against the defendant, for want of his answer, directed to the sheriff of the West Riding of Yorkshire; the sheriff returned a *cepi corpus*, and that he had the defendant safe in custody; and the defendant being then charged in execution for sundry debts, an *habeas corpus* issued, directed to the sheriff, to bring the defendant up with his causes, with which he was served; but an insolvent act having passed, the sheriff discharged the defendant out of his custody. On the above day, the sheriff, on motion, was ordered to stand committed, unless he shewed cause to the contrary, and on the 6th of March following, he was ordered to stand committed.

Therefore, as by the attachment, "the sheriff is to attach the defendant, so as to have him before the Court, as well as to answer the contempt (for which the attachment issues), as also such other matter as shall then and there be laid to his charge; and of this he is to fail not": and as the sheriff by his return states he hath executed the attachment, and that he hath the defendant in his custody, it is submitted, the sheriff cannot part with the defendant, as to his said contempt, unless he be discharged, or taken out of his custody, by an order of this Court: If that be so, it is submitted, whether the defendant is not sufficiently charged? And, if it be, is not the present application unnecessary?

Lord Chancellor, upon the above, was pleased to say, that had the application been necessary, the ground for it was wrong; and had it been right, it was unnecessary: and therefore directed me not to deliver the order.

[662] DYER v. LORD CRAVEN.

13 Jan. 1786. Lord Thurlow, C.

When the mortgage merely of an advowson is become absolute in the mortgagee, he may present.

The mere advowson being mortgaged, the incumbent died; the mortgagee presented; the plaintiff who claimed to be entitled to the equity of redemption, also presented: by reason of the double presentment, the Bishop refused to induct either. Thereupon, the defendant, Lord Craven, brought a *quare impedit*, and the plaintiff filed his bill for an injunction; and on the above day, applied for an injunction to stay the defendant's, Lord Craven's, proceeding on the *quare impedit*.

The mortgage was of long standing, and no interest paid. Lord Chancellor seemed to lay it down as a principle, that a mortgagee, when the estate was absolute in him, might present; and, therefore, till it was seen whether the mortgagor would redeem, he would not grant the motion: and in order thereto, directed an account of what was due on the mortgage, and to pay it by a short day; and an injunction to be granted in the mean time, and on report, liberty to apply.

[Mews' Dig. Ecclesiastical Law, IX, 1, f. *Distinguished*. *Welch v. Bishop of Peterborough*, 1885, 15 Q. B. D. 437.]

GODDARD v. PRITCHARD.

27 Jan. 1786. Lord Thurlow, C.

Defendant served with a subpoena to appear; but, not appearing, an attachment issued against him for his contempt, and on his absconding, to avoid being attached, the Court ordered him to appear by a certain day, under the act of the 5th Geo. 2, to render process effectual against persons who abscond, &c.

An attachment had issued against the defendant (who had been served with a subpoena to appear and answer), for his contempt in not appearing; but not being to be found, Mr. Richards on the 25th of January, moved under the Act of Parliament, of the 5th of Geo. 2, to render process effectual against persons who abscond, &c., which provides a remedy, [663] where a defendant absconds to avoid being served, or being served, refuses to appear; that the Court would under the said Act, appoint a day for the defendant to appear. The Lord Chancellor had some doubt, and asked Mr.

Richards if he had read the act, and wished him to consider it, and make his motion on a future day : he did on the 27th of January, and cited a case from 1 Brown's Chan. Rep. fol. 388, when his Lordship granted the order : The affidavit on which the application was grounded, was, that the defendant had been served with a subpoena ; that not appearing, an attachment had issued ; that diligent search had been made to attach him at his last place of abode, and where he formerly lived ; that he could not be found, and that there was great reason to believe he absconded to avoid being served with the process of this Court.

The case cited, was *Mawer v. Mawer*, it is dated the 30th of June 1784, and entered Lib. A. 1783, fol. 545.

WATKINS v. BUSH.

1 Feb. 1786. Lord Chancellor.

Demurrer to a bill praying a discovery and relief : allowed.

Demurrer to a bill praying a discovery and relief, for that as it was alleged, the plaintiff had no equity, and that if he were entitled to any relief, it was at law.

It was objected to by the plaintiff, for that it was a general demurrer, both to discovery and relief ; and that though he could not have relief in this Court, he might at law, and the discovery prayed, would lead to it.

The demurrer was allowed.

[664] LACON v. MERTINS.

9 Nov. 1743. Lib. B. 95. 1 Ves. 312, S. C., and 3 Atk. 1, S. C.

The admission of a parol agreement, takes it out of the Statute of Frauds.

The bill was for the specific performance of a parol agreement, by the purchaser against the heir at law of the vendor ; he by his answer doth not insist on the statute in express words, but he says, " if any parol agreement were made, he was not affected " thereby, in regard the same was not reduced into writing, nor in any sort performed " by Elizabeth Hay in her life time " ; and Lord Hardwicke, C., said, that had the bill been against Elizabeth Hay, and she had admitted the agreement, he would have decreed a specific performance of it, for the admission took the case out of the Statute.

[See case more fully reported, 3 Atk. 1.]

WHITCHURCH v. BEVIS.

8 Feb. 1786. Lord Thurlow, C. 2 Bro. C. C. 559, S. C.

Plea of Statute of Fraud allowed, but it was upon the particular circumstances of the case.

Plea of the Statute of Frauds, to a bill for discovery, as well as for a specific performance of a parol agreement, and the bill stated several acts, in part performance ; but the defendant did not by answer, deny the agreement.

The plea was arguing several days, and his Lordship upon the preceding case of *Child v. Godolphin*, which he read, made a similar order. His Lordship cited, *Earl of Ayleston's case*, 2 Strange, 783, and said, as *Earl Macclesfield* did in *Child v. Godolphin*, that if the defendant admitted the agreement, the Court would decree a performance : for the admission took it out of the Statute.

[665] This case being reargued 2d March 1789, before Lord Thurlow, C., on giving judgment, he proceeded thus :

This is a subject I have much considered, and I have also consulted several of the Judges upon it, but I do not find myself enabled to reconcile the practice of the Court, in two of its rules : the allowance to plead the Statute of Frauds ; and a decree of an agreement, as it stands confessed in the answer.*

The rule seems to carry a necessary conclusion along with it, that whatever in conscience affords the plaintiff a title to relief, it is impossible to exempt the defendant from a discovery of, in order to enable the plaintiff to obtain that relief ; but where the defendant hath pleaded the Statute, and hath not confessed the agreement, the Court hath in no instance compelled him to perform it ; the case of *Wayley v. Bagnal*, hath placed that rule a great deal too strong to be overturned.

* Lord Macclesfield and Lord Hardwicke say he ought to deny it.

I have read over with attention all the cases, and find but two decided cases, in which relief hath been given upon an agreement confessed, against a plea of the Statute of Frauds, the first, *Child v. Comber*, before Lord Macclesfield, the 10th March 1723; the other, *Fox v. Peachy*, before Lord Hardwicke, 2 Atk. 256; but the dicta are very numerous. It appears to me to be necessary to correct that rule; if the plaintiff doth not state his agreement, as not being within the Statute, I think his bill should be demurred to.

In the present decision, I shall go no further than the case before me: The case in Ireland, though not like the present, is analogous, consisting of a variety of transactions, approaching to a performance; there [666] was a plea of the Statute, and a general averment, that there was nothing in writing between the parties: I think that is a right way of pleading.

The case before me, is of a man wanting to dispose of a public house for an annuity of £40, and some money was paid him for his stock, &c.: the parties go to an attorney, and give him instructions, and he takes minutes as the foundation for drawing a deed: and the business went on from the day of February to the 23d of March following: On the 23d March, the vendor chose to be off.

The minutes taken by the attorney were more general than the agreement set forth in the bill amounted to, which was more particular in the parol part, than in the general agreement.

If there ever were a case on which the Statute of Frauds was intended to attach, it must have been this; the plea must therefore be allowed, and the exception overruled.

I determine this case merely on the special grounds of it; because in process of time, it must come to be more maturely considered, what sort of verbal agreement (after a plea of the Statute of Frauds), this Court will carry into execution.

I am at present prepared to say, that where there is an agreement consisting of mutual coincidents (on the various terms stated in this bill), and in order to its being extended at large, it is put into the form of an instrument, and that is not avoided by any fraud: either party taking advantage of the *locus penitentia*, shall not be compelled to carry it into execution, if he insist on the Statute of Frauds.

[667] GOODWYN v. SPRAY.

21 Feb. 1786. Lord Thurlow, C.

Joseph Stanley seised in fee of real estates, died intestate, leaving the plaintiff and the defendant, his co-heirs at law, to whom the estate descended as tenants in common, in undivided moieties: The defendant got into possession by virtue of an ejectment, and having cut down some timber, and threatening to cut down the rest, the plaintiff filed his bill for an injunction to stay waste; and accordingly on the 21st of February 1786, moved by Mr. Brown for an injunction, on the usual affidavit, and his Lordship granted the motion, but before the Court rose, having a doubt whether there could be an injunction to stay a tenant in common, from doing what he pleased with his own property, directed me to suspend the order: Mr. Brown on the 22d again mentioned it, when the Lord Chancellor was clear in opinion, he could not stop the defendant, and the only remedy the plaintiff had, was to get a partition, and directed the order not to be drawn up.

MOLESWORTH v. LORD VERNEY.

23 Feb. 1786. Lord Thurlow, C.

The defendants Lord and Lady Verney being in contempt to a sequestration for want of their answer, the cause was set down, and there was an order for the Clerk in Court to attend with the record of the bill, that it might be taken *pro confesso* against the said defendants: The cause came on to be heard the above day, when his Lordship dismissed the bill against them for want of equity.

[668] KENYON v. WORTHINGTON.

13 March 1786. Lord Thurlow, C.

See *Douglas v. Clay*, *supra*, [Dick.] 393.

Thomas Kenyon, the late husband of the plaintiff, being indebted to sundry persons, made his will, and appointed the plaintiff his executrix, and devised his real estate in aid of it.

John Cash a creditor, filed a bill on behalf of himself and the other creditors, against the plaintiff as such executrix, and against the devisee and the heir at law, to establish the will, and to have the defendants paid out of the real and personal estates, and by the decree in that cause, dated the 31st of January 1786, the will was established, an account of what due to the plaintiff and the other creditors was directed; and advertisements were to be published for the creditors to come in and prove their debts, and the necessary directions were given for payment.

Notwithstanding this decree, John Worthington the defendant in this cause and one of the creditors, brought his action at law against the plaintiff as executrix of the testator, for the recovery of his debt.

The plaintiff in this cause the executrix, filed her bill in this Court against the defendant, stating to the effect aforesaid, and praying an injunction to stay proceedings at law; the defendant having prayed a *dedimus* to take his answer, the plaintiff applied for, and obtained the common order for an injunction, till answer and further order, with liberty for the defendant to proceed to trial, and enter up judgment, with a stay of execution.

[669] On the 11th of March 1783, the plaintiff moved by Mr. Stanley, that the injunction might extend to stay the defendant from proceeding to trial; but it being at that time uncertain whether the application was necessary, as it was not clear whether the plaintiff at law had declared, and if he had not, the injunction would have prevented his taking any step at law; if he had, then it only went to stay execution: It stood over till this morning, when Mr. Stanley again brought it on (the plaintiff at law having declared), and cited *Martin v. Martin* (1 Ves. 211); *Bertie v. Bertie*; *Morris v. Bank of England*; *Forrester's Reports of Cases in Time of Lord Talbot*, 217 (3 P. Wms. 492, in not.); *Douglas v. Clay*, 21st February 1769, *supra*, 393, by Lord Camden; and *Brook v. Reynolds*, 28th November 1782, by Lord Thurlow (1 Bro. P. C. 183); Mr. Scott for the defendant argued, that the decree was only *quod computet*, that the plaintiff might not prosecute it: that it was hard the defendant should be prevented from using his legal diligence to obtain a judgment, and that he ought to have his election.

Lord Chancellor.—Having decreed an account of what is due to all creditors, and having decreed an account of assets, and administration of them in payment, will this Court suffer its decree to be rendered nugatory, by altering the course of administration? Certainly not. It will surely protect the executor or administrator in obeying its decrees; the creditors will have justice here; and therefore let the injunction extend to stay trial.

[See *Lee v. Park*, 1836, 1 Keen, 720.]

[670] MOGG v. MOGG.

13 March 1786. Lord Thurlow, C. Last Seal continued.

A defendant not having or claiming any right, cuts down timber on the estate, being a mere trespasser, and having committed an act, for which an action would lie against him; the Court would not grant an injunction to stay waste.

The plaintiff was a trustee of certain estates, and in whom the legal estate was vested: The defendant hath not any right, but persuaded the tenants to cut down timber.

Bill for an injunction to stay waste; and this day the plaintiff moved for an injunction accordingly, upon filing the bill: It was mentioned on the 11th, but the Lord Chancellor desired Mr. Madocks to see, if he could find an instance, where a stranger comes upon lands as a trespasser, and cuts down timber, or commits waste, in which this Court hath granted an injunction to stay him, saying he was liable to an action by which he might be stayed.

On this day, the 13th, Mr. Madocks said he had recollected a case before Lord Camden, C. in which the plaintiff was lord of a manor in Oxfordshire, upon which the defendants claimed a right to estovers, and under that right, they cut down timber in one day to the value of £400; the plaintiff filed his bill for an injunction to stay waste, and obtained one; upon its being served, their attorney advised the defendants to desist from cutting down any more timber, but advised other tenants of the manor to cut down timber; upon which Lord Camden granted an injunction to stay waste, against persons not parties, and Mr. Madocks argued this as a case in point.

[671] The Lord Chancellor said it did not apply, for in that case there was a right

to something in the defendants, though perhaps they carried it beyond what such right went to ; and that until such right was determined, it was very proper to stay them from doing an act, which if it turned out they had no right to do, would be irreparable : but in the present case the defendant had no interest : he was a mere trespasser, and being such, an action of trespass would lie against him : and therefore his Lordship would not grant the motion.

[Mews' Dig. Trespass, B, 6, a ; Waste and Timber, I. See *Mason v. Mason*, 1841, *Flan. & K.* 431.]

SWEET v. SOUTHCOTE.

17 May 1786. Sir Lloyd Kenyon, M. R., sitting for Lord Thurlow, C.

Derivative mortgagee not affected by a settlement's coming to his hands, if the mortgagee from whom he took his mortgage, had not notice.

Bill against a derivative mortgagee, for a discovery, stating, that he had notice of a settlement : the defendant pleaded : Upon arguing the plea this day, his Honour said, if a derivative mortgagee under mortgagees, without notice, pleads such matter, though he hath notice by a settlement coming to his hands, that the first mortgagor had no right to mortgage, he shall not discover it ; therefore allow the plea.

[672] *BANCROFT v. WARDEN.*

24 May 1786. Sir Lloyd Kenyon, M. R., sitting for the Lord Chancellor.

A demurrer having been overruled for being too extensive, a defendant cannot afterwards demur as to part.

Demurrer to a bill overruled for being too extensive : the defendant afterwards demurred *de novo*, but the second demurrer was more confined : Upon arguing the second demurrer, the question was, whether a defendant having demurred, and the demurrer having been overruled, he could afterwards demur as to part : His Honour was clear a defendant could not ; and overruled the demurrer.

MILNER v. GOLDING.

2 June 1786. Sir Lloyd Kenyon, M. R.

An answer referred for scandal and impertinence, not cause for continuing an injunction.

The defendant having put in his answer, applied and obtained the common order, to dissolve the injunction, unless the plaintiff shewed cause to the contrary.

The plaintiff having obtained an order to refer the answer for scandal and impertinence, Mr. Nedham for the plaintiff, on 29th of May 1786, shewed for cause, the above order for referring the answer for scandal and impertinence : It stood over till this day for consideration, his Honour said, it was against reason : the referring for impertinence, was admitting too much, not complaining of too little : and therefore disallowed the cause.

Lord Thurlow was of the like opinion, in *Henry v.* , 18th June 1788.

[673] *COUNTESS OF STRATHMORE v. BOWES.*

5 July 1786. Sir Lloyd Kenyon, M. R., sitting for the Lord Chancellor.

Affidavit read in support of an injunction to stay waste.

Application by Mr. Attorney General and Mr. Price this day, on behalf of the defendant, upon the coming in of his answer, to dissolve an injunction which had been granted, to stay him, his servants, workmen and agents, from cutting down, &c., until answer and further order ; and upon reading the defendant's answer, which in part denied the facts sworn to, the Master of the Rolls dissolved the injunction.

Having asked the plaintiff's solicitor, how it happened, that he omitted to read the affidavits upon which the injunction was granted, he mentioned it to Mr. Mansfield his counsel, and Mr. Mansfield having intimated it to his Honour, his Honour spoke to me, and upon my telling him I understood it was the rule for the Court to permit

plaintiffs to read affidavits in support of an injunction to stay waste, and that I had a faint recollection of cases upon that head, his Honour directed the order not to be drawn, and the motion to stand over till the First Seal; and in the mean time desired I would lay before him such cases as I should meet with, and what should occur to me upon the subject.

The following is a copy of what I submitted to his Honour :

On application to continue or dissolve an injunction, either of course, or special, I have always understood it to be the rule, that though affidavits are not permitted to be read, to support the plaintiff's equity, that is, his right to come into this Court, when denied by the defendant's answer; yet in injunctions to [674] stay waste, or in the nature of waste, when the waste sworn to, and upon which the injunction is grounded, is denied; the Court will admit proof by affidavit, in support of the facts, and the following are the reasons it is submitted for such permission.

When applications for injunctions to stay waste, or what is in the nature of waste (which are specially moved, and upon affidavit), are made, the Court expects such affidavits to be clear and positive, as to the acts done, &c., and not to speak from hearsay and belief; and it frequently happens, that the affidavits not being satisfactory, the Court refuses the motion, and tells the plaintiff to get a fresh affidavit, and to speak with more precision.

Therefore an order so granted, is founded either on truth or falsehood; and it is not a defendant's denying by his answer the acts sworn to, that make them less true: Suppose five or six persons were to swear positively to acts of waste, &c., and a defendant was by his answer to deny the whole or part; it then would rest with the Court to consider to whom the most credit is to be given: How is that to be known, but by considering the swearing of each? And upon a defendant's application to dissolve an injunction to stay waste; will the Court dissolve it, without knowing what they dissolve? And how is that to be known, without reading the injunction, or the order granting it (which are always read, or supposed to be read), and if read, the Court cannot but see, upon what it is founded, for the injunction recites the order in *hac reple* (which runs thus), "Upon opening of the matter by Mr. of counsel with the plain [675] tiff, it was alleged that it appears by the affidavit of (first as to the plaintiff's title, that the defendant hath done, or caused to be done, &c." And should the Court dissolve the injunction, without knowing upon what it was founded, merely upon the answer of the defendant, it will do that blindfold, which may be the means of irreparable damage; and if a defendant hath committed the least waste, though not to the extent sworn to, the Court will be cautious to prevent his doing further injury. See the cases of *Packington v. Packington* (*supra*, [Dick.] 101); and *Attorney General v. Burrow* (*supra*, [Dick.] 128).

That the answer is attended to, so far only as it goes to the denial of the plaintiff's right, or equity, it may not be improper to refer your Honour to the common and usual language of an order, to dissolve an injunction unless cause; which is the most usual for a defendant to apply for, on putting in his answer, and which if the defendant had done, instead of the mode he hath taken, please to attend to what he would have said: "Whereas the plaintiff hath obtained an injunction to stay the defendant, his servants, workmen, and agents, from committing, &c., until answer, and further order, now upon motion this day made by Mr. A. of counsel with the defendant, it was alleged, that the defendant hath since put in a full and perfect answer to the plaintiff's bill, and thereby denied the whole equity thereof (that is, the plaintiff's right to come into this Court, not the acts sworn to have been committed); and therefore it was prayed, that the said injunction may be dissolved, which is ordered accordingly, unless cause."

[676] That the admitting of affidavits to be read in support of injunctions to stay waste upon application, is not novel, will appear from the following cases, and the dictum of Lord Hardwicke:

Mount v. Fenner, 4th of August 1732. The bill was for an injunction, to stay the printing of the Common Prayer Book; and an injunction was granted upon affidavit of the title, till answer and further order; the defendant put in his answer, and upon his application to dissolve the injunction, which was moved specially, affidavits were going to be read, but it being suggested, that the defendant had put in a plea, which went to the plaintiff's title, the Court saved the notice, until the plea was argued; the plea was argued the above day, and allowed; and in consequence thereof,

there being an end of the plaintiff's equity, the defendant moved immediately to dissolve the injunction, which was granted.

On the 11th of July 1786, Mr. Attorney General again moved to dissolve the injunction, when his Honour said, that as the deciding of the question would establish the practice in future, he would save the motion until the Third Seal, and in the mean time, would consult the Lord Chancellor. The plaintiff inadvertently consenting that the defendant should read affidavits, in support of his answer (never before heard of), if he would consent, the plaintiff should read his, with which the defendant immediately closed, by consent, and so it is noted, affidavits on each side were read, and the defendant's affidavit being the strongest, the injunction was dissolved.

[677] RAYNER v. JULIAN.

21 June 1786. Sir Lloyd Kenyon, M. R., sitting for Lord Chancellor.

Demurrer will not lie to a bill for being multifarious.

Demurrer to a bill, for that it was multifarious, overruled being informal; his Honour at the same time saying, that he would not have it understood, he overruled it upon a ground, that a demurrer would not lie to a bill for being multifarious, and he put this case: Suppose an estate is sold in lots to different persons, a plaintiff could not include them all in one bill for a specific performance; for each party's case would be distinct, and would depend upon its own peculiar circumstances; and there must have been a distinct bill upon each contract.

BOLTON v. LOWTHER.

15 Nov. 1786.

It was said by Lord Thurlow, C., that a lord of a Manor hath no right to a common: he hath a right to the soil, to dig, to plant upon, and to do every thing authorised by the Statute of Merton.

ROWLEY v. RIDLEY.

23 Nov. 1786. Lord Thurlow, C.

Depositions of a witness amended.

Application founded on affidavit, to amend a deposition.

Lord Chancellor.—Let the deposition of William Ridley be amended, by striking out the word November, in the line of the said deposition, and inserting [678] instead thereof, the word October; and to that end, let the said depositions be taken off the file; and let the said depositions when so amended, be resworn by the said William Ridley, before the Master, to whom the matter in question is referred.

SELBY v. SELBY.

22 Feb. 1787. Lord Thurlow, C.

James Selby Esquire, by his will in his own writing, devised estates beneficially in trust for a Mrs. Hone, and devised particular estates to his heirs, and if none should appear in a given time, he devised his estate in fee simple to William Lowndes, he taking upon himself and using the name of Selby; Mrs. Hone filed a bill to establish the will, and to have the trusts thereof carried into execution; and made Samuel Selby, who, the bill stated, pretended to be heir at law of the testator, a defendant.

The said William Lowndes also filed a bill to establish the will, and to have the benefit of the several devises in his favour; and prayed that the defendants, and amongst others the said Samuel Selby, who pretended to be heir at law of the testator, might set forth their respective claims: the said Samuel Selby put in his answer, and thereby set forth his pedigree, and that he was heir at law of the testator; and insisted on his right.

On the 23d of April 1779, both the causes were brought on to hearing, and the said Samuel having stood out all process of contempt to a sequestration in Mrs. Hone's cause, for want of his answer, the plain-[679] tiff's bill in that cause was decreed to be taken *pro confesso* against him, and making default in appearance in the said William Lowndes's cause, although duly served with a subpoena to hear judgment, the bill was retained for twelve months, with liberty for three of the other defendants, excluding Samuel

Selby, to bring actions, or ejectments as they should be advised; and further directions were reserved; and the decree or order was to be binding on the said defendant Samuel Selby, unless he shewed cause to the contrary; which he not doing, the same was made absolute.

The three defendants, to whom liberty was given by the said order to bring ejectments, brought ejectments accordingly, but failed therein; and the causes being set down to be heard on the equity reserved came on to be heard the 28th March 1783, when the will was decreed to be established (having been proved *per testes*), and the trusts executed; and an account of the testator's debts and legacies, and of his personal estates, and the usual application of it, and other necessary directions were given.

The Master having made his report, the cause came on to be heard for further directions, when it appearing that the debts and legacies were paid, and the estates which remained unsold were clear, his Lordship ordered that the accumulated rents which had been paid into the Bank, by the receiver appointed in the cause, to abide the event of the causes, to the amount of £20,000, should be paid to the said plaintiff William Lowndes; and the Court declared he was entitled to the estates devised to him, and ordered that he should be let into possession of the said estates; which he [680] was, and the accumulated rents were paid to him, and he in conformity to the will, took upon himself and used the name of Selby; and the decree was inrolled.

The before-named Samuel Selby, having afterwards brought an ejectment, to recover the possession of the said estates, the said William Lowndes by his then name of Selby, filed his bill against the said Samuel Selby, stating the above facts, and praying a perpetual injunction.

On the 6th of February 1787, the cause came on to be heard before Lord Thurlow, C.: It was argued, that the Court having established the will, and directed the trusts to be performed, and the plaintiff Selby to be put into possession of the estates; the defendant by bringing an ejectment, was preventing the execution of these trusts, and the decree from having the effect intended.

On the part of the defendant it was argued, the defendant did not mean, and that in fact he did not dispute the effect of the will, or the execution of the trusts of it; that one of the trusts was a devise for his heirs; that he the defendant was that heir; and that the ejectment brought by him, was in order to determine that right. His Lordship said he would consider of it, and ordered the cause to stand over until the 9th day of February 1787: It stood in the paper that day, when his Lordship ordered it to stand over until the 22d day of February 1787, and asked me if I knew of any case that would apply, and what my thoughts were of the case before him: In consequence of which, I had before his Lordship the two cases of *Lowe v. Jolliffe*, and *Attorney General v. Montgomery* (*supra*, [Dick.] 74), and submitted, that [681] as the defendant Selby suffered the bill filed by Mrs. Hone, to establish the will of the testator, and to which he was made a defendant, as claiming to be heir at law, to be taken *pro confesso* against him for want of his answer (which was in effect confessing he had no claim); and as he did not appear at the time the causes were heard, to assert the claim made by him as heir at law, in his answer to the bill, filed by the said William Lowndes, though duly served with a subpoena for that purpose, and afterwards permitted the decree or order by which he was excluded (three only of the defendants who claimed to be heirs at law, being thereby permitted to bring ejectments, leaving him out), to be made absolute, although he were served with a subpoena to shew cause against the said order; whether the defendant Samuel Selby, was not considered as having abandoned his claim, if he had any? And if so, whether the Court will permit him to resume it, while the decree by which he is excluded, and which is inrolled, remains in force? In 2 Chan. Reports, p. 127, it is laid down, "that the Court will enforce the decree of a former Chancellor, until it be duly reversed"; And in *Sorrel v. Carpenter*, 2 P. Wms. 482, it is said, "this Court will oblige all persons to take notice of its decrees, as of judgments."

On a bill brought by creditors, on behalf of themselves and the rest of the creditors, a decree for an account of what is due to the creditors, and an advertisement for creditors to come in by a day to be fixed, or to be excluded; and an account of assets, [682] and application of such assets: this Court will not permit a creditor (though he doth not come in under the decree) to take any legal method for the recovery of his debt (*Brooks v. Reynolds*, 28 May 1782 [Dick. 603], and *Kenyon v. Worthington*,

13 March 1786, *supra* [Dick. 668]; *Moore v. Paste*, 26 June 1783). as by that means the decree will be counteracted; and should a creditor apply for leave to go before the Master to prove his debt, after the time is run, the Court will expect him to account for his remissness: And even if he is permitted, it will be upon terms, that it is not to disturb any dividend that may have been made: If a man stands by and sees another build upon his ground, without forbidding or in any wise interrupting him, he will not afterwards be permitted to claim that ground: How far the defendant Selby's abandoning his claim in manner aforesaid, his letting the decree be executed, which directs the accumulated rents to be paid to the plaintiff, and the plaintiff to be let into possession, and the title deeds to be delivered to him, which hath been done, be analogous, is submitted to your Lordship.

The cause standing for this day, 22d of Feb. 1787, in the paper for directions, his Lordship said, from what he had heard, and from what he had read, this Court will not permit any person to impede the execution of a decree, so long as the decree remains unappealed; and therefore his Lordship ordered a perpetual injunction.

[683] POPE *v.* GWYN.

27 Feb. 1787. Lord Thurlow, C.

The testator willed, that his debts should be paid out of his real and personal estate, and then gave several legacies, and willed those legacies should be paid out of his real and personal estate, that was possessed of, or should be possessed of, or might thereafter be possessed of; but did not devise his estate, or make any executor: He left two infants defendants in the cause, his co-heirs at law. The Court held the real estates to be equitable assets, and decreed them to be sold; and the infants the co-heirs to convey at twenty-one; and the purchasers to hold and enjoy in the mean time.

MOUNTAIN *v.* BENNET.

1 March 1787. Lord Thurlow, C.

A new trial of an issue *devisavit vel non*, the heir at law paying the costs of the former trial.

Mr. Mansfield on the First Seal after Hilary Term, applied on behalf of the defendant the heir at law, for a new trial of an issue *devisavit vel non*, which was granted, upon payment of the costs of the former trial. Mr. Mansfield objected to his client's paying the costs, it being unusual, as he insisted, for an heir at law to pay costs. It stood over from the First Seal to this day, for his Lordship's consideration. Having laid before his Lordship the cases of *Birt v. Pitt* (*supra*, [Dick.] 87); and *Blount v. Swinnerton* (*supra*, [Dick.] 500), his Lordship granted a new trial, upon the defendant's the heir at law, paying the cost of the former.

[684] GUEST *v.* HARRIS.

12 March 1787. Lord Thurlow, C.

Bill dismissed on hearing the cause, with costs to be taxed as to the defendant Cook; and the plaintiff to pay £100 costs to the rest of the defendants.

MOLINEUX *v.* LUARD.

9 June 1787. Lord Thurlow, C.

The replying to an answer, the serving a subpoena to rejoin, and giving rules to produce witnesses, will not prevent a defendant from moving upon his answer, to dissolve an injunction unless cause.

The bill was amongst other things for an injunction; and an injunction was granted until answer, and further order: The defendant answered, and having let two Terms pass without applying to dissolve it, the plaintiff imagined, he did not intend such application, and therefore replied, served a subpoena to rejoin, and then gave a rule to produce witnesses, and prepared interrogatories: then and not before, the defendant obtained the usual order, to dissolve the injunction, unless the plaintiff shewed cause to the contrary: the plaintiff upon the grounds of the preceding statement, having served the defendant with the order, applied this day to discharge the order for irregularity.

Lord Chancellor. Why did not the plaintiff take exceptions? He had eight days of course to do it, and upon application, that time would have been enlarged: Are a replication and a subpoena to stop a defendant from applying to dissolve the injunction? If so, a plaintiff may reply immediately on the answer's coming in, and the next day move for, and sue out, and serve a subpoena to rejoin; and thereby preserve his injunction, which is only a temporary judgment, [685] until it is seen whether the plaintiff hath any equity, and though continued to the hearing, will then drop, unless the plaintiff prove his case, and it be made perpetual.

[See *Barnett v. Mole*, 1837, 1 Keen, 646.]

BROWN v. PARRY.

13 June 1787. Lord Thurlow, C.

A devise or bequest by the testator to his widow, unless he say it is to be in bar of dower, doth not bar her dower.

The testator died seised of lands, of which the defendant, his widow, was dowable. By his will, he devised to his wife some particular estates for life; and he also bequeathed to her specific parts of his personal estate, but did not add in bar of dower: the question was, whether by accepting the devise and bequest under her husband's will, she had not barred her claim of dower? The Lord Chancellor was clear she had not; for it was not her husband, but the law, that gave her dower; and what her husband gave her was an addition.

KENRICK v. CLAYTON.

13 June 1787. Lord Thurlow, C.

Defendant cannot demur after having obtained an order to answer only.

The defendant had obtained three orders for time to answer only; and not answering within the time limited, an attachment issued against him. In July 1786, he put in a demurrer only: Upon application to discharge the demurrer for irregularity, it was referred to the Master, to see if it were regular, or not; the Master having reported it to be regular, the plaintiff took exceptions to the report; and, [686] upon arguing the exceptions this day, they were allowed.

Stevenson v. Gardner, 2 P. Wms. 286; *Penn v. Lord Baltimore*, 12 Feb. 1755, were cited.

MORSE v. STEVENS.

25 June 1777. Lord Bathurst, C.

In 1764, the plaintiff filed a bill to perpetuate the testimony of witnesses, and examined them; but proceeded no further; on the death of a witness, which happened in 1777, the plaintiff applied in this cause, to publish the depositions. His Lordship was of opinion, that by his neglect he had precluded himself.

BANISTER v. WAY.

3 July 1787. Lord Thurlow, C.

Bill by the assignee of a share of the residue of the testator's estate, belonging to one of the residuary legatees against the trustees and executors, and also against the residuary legatees who were out of the jurisdiction of the Court (as the bill stated, and was admitted to be the fact), to establish the testator's will, and for an account of the testator's personal and real estate, and to be paid the share of the charges belonging to the residuary legatee, which he had purchased. The cause was heard before Lord Thurlow, on the 5th of February 1782, when a decree was pronounced establishing the will, and directing the necessary accounts. Some of the residuary legatees, though still [687] abroad, applied this day, praying to have the benefit of the decree, submitting to be bound by it: And it was ordered (they submitting to the decree), that they should be at liberty to enter their appearance by their Clerks in Court; and that they should have the like benefit of the decree, as if they had put in an answer, and had appeared at the hearing of the cause.

[*Mews' Dig. Practice*, A. II. b; i: XX. 5. c. See *Dyson v. Morris*, 1842, 1 Hare, 413; *White v. Hall*, 1830, 1 R. & M. 332; *Peed v. Curren*, 1843, 2 Con. & Law. 391.]

CREUZE *v.* BISHOP OF LONDON.

23 July 1787. Lord Thurlow, C.

The proper way to bring a report, appointing a receiver, before the Court, is by exception to it.

An exception was taken to a report, whereby the Master appointed a particular person to be the receiver in the cause : It was objected, that exceptions did not lie to such report. His Lordship said the objection was not founded, for that no act, judgment, or opinion of a Master was conclusive ; what he had done was an act : it was referred to him to appoint, not to approve, as he doth of a guardian or maintenance, and state his opinion for the Court to judge of ; he under the order had appointed ; and there was no way to bring it before the Court but by exception ; and, being open to exception, should be confirmed in the usual way.

There were cited, *Hamilton v. Frankland*, in 1752, by Lord Hardwicke ; and *Sheppard v. Mills*, in 1785.

[688] CURZON *v.* GREEN.

25 July 1787. Lord Thurlow, C.

Bill by four persons, for distinct demands ; two of them died : the question was, whether the suit was abated ? His Lordship held it was.

COLLINRIDGE *v.* MOUNT.

6 Nov. 1787. Lord Thurlow, C.

If the Sheriff takes a bail bond on a writ of *ne exeat regno*, the Court hath nothing to do with prosecuting the bond.

A writ of *ne exeat regno* ordered to issue against the defendant, until answer and further order, and to be marked in £300. A writ was made out and delivered to the Sheriff, by which he was to take the defendant on bail in £300 ; the Sheriff took bail : the defendant appeared (so that he was in Court) ; and after putting in two insufficient answers, left the kingdom (an insufficient answer being no answer, the plaintiff might have taken the bill *pro confesso*, on a sequestration for want of his answer, the Sheriff having given up the bail bond to the plaintiff, with liberty to use his name, being indemnified) : the plaintiff, on the above 6th of November 1787, moved, by Mr. Johnson, for leave to put the bail bond on suit, which was granted. The application being quite novel, after stating the above facts, I submitted to his Lordship, whether this Court had any thing to do with the business, other than to call on the Sheriff to produce the defendant. Lord Chancellor said, he would think of it ; and, on Mr. Johnson's mentioning it again on the 14th of November, Lord [689] Chancellor said he had nothing to do with prosecuting the bond, and rescinded the order he had made.

FOX *v.* MACKRETH.

23 Nov. 1787. 2 Bro. C. C. 400, S. C.

Inadequacy of price alone not sufficient to set aside an agreement.

In the course of hearing this cause, on an appeal, the bill being to set aside a purchase made by the defendant of the plaintiff, just after he had attained twenty-one, for fraud and imposition, and undue advantage : It was said, that all the Barons of the Exchequer, on the 21st of June 1787, were unanimous, that inadequacy of price alone was not sufficient to set aside an agreement.

[See case more fully reported, 2 Bro. C. C. 400 ; 2 Cox, 320 ; Wh. & T. L. C. 7th ed. vol. ii. p. 709.]

PARKINS *v.* MORRIS.

5 Dec. 1787. Lord Thurlow, C.

Reasons for granting a partial, or short writ of execution of a decree.

Mr. Ainge, for the plaintiff, having before moved for an order to warrant a short writ of execution ; his Lordship having doubts as to the propriety of the motion, desired

Mr. Ainge to postpone it to a future day ; and said he would have me state to him what was the practice. In obedience to his commands, I submitted to his Lordship :—

That the mode of proceeding against a party in a cause for a contempt, is by attachment, except such contempt be gross misbehaviour ; in which case it is by application to commit him. The ground for an attachment which issues of course, is disobedience to something under the Great Seal, such as a subpoena to appear, and answer ; or a writ of execution, such [690] writ being necessary when a party is driven to enforce a decree. The expence is borne by the party suing it out, unless the other party suffer an attachment to issue ; in which case, it comes within the costs of his contempt. As it was, and is said to be still the rule, that a judgment cannot be divided, but that a writ of execution must be of the whole, unless by special order ; it was the habit of the Court fifty years back, Mr. D. speaks from his own experience, to grant orders for the purpose, of warranting a partial or short writ of execution of a decree, which with great submission appears to be reasonable, for a plaintiff may be driven to compel a particular defendant to obey a particular direction, quite unconnected with a multiplicity of other directions, which concern the other parties. For instance ; A decree establishing a will, and directing the trusts to be executed, with the consequential accounts ; sale of the real estate in aid of the personal ; guardian, maintenance, and receiver ; and then a direction for a particular defendant, who claimed a beneficial interest in Stocks or security, purchased or taken in his name by the testator to transfer or assign them, and to account for and pay the interest ; the Master makes his report, and states the result of the accounts and inquiries, and particularly finds that the defendant had received the sum of _____ : Should the plaintiff be under the necessity

to enforce the decree against such defendant, if according to the rule, he must in the writ of execution write the whole of the decree and report, the expence will be considerable, and will, should the defendant immediately comply with it, fall on the plaintiff : on the [691] contrary, should it be confined to that part which relates solely to the said defendant, it will come within a very narrow compass. The order to warrant such partial writ will state, that by the decree it was amongst other things ordered that the defendant should, &c. ; that the Master had made his report, and thereby, as to the said defendant, found there was due from him the sum of _____ ; that the plaintiff had applied to him for payment, which he had refused ; and therefore it was prayed, &c. ; which is ordered accordingly ; and the Court may, as it frequently doth, fix a time, which by the decree is indefinite. Mr. Ainge moved again the above day : his Lordship said he was satisfied, and granted the motion.

SIR JAMES WRIGHT *v.* NUTT AND PINEBURY.

23 Jan. 1788. Lord Thurlow, C.

The plaintiff was governor of Georgia in America, in the time of the rebellion ; he was banished, proscribed, and his estate confiscated ; and being indebted, the creditor, who is abroad, appoints an attorney here to sue : The attorney brings an action against both. The debtor files a bill against both principal and attorney. Upon the answer of the attorney, the principal being still abroad, the plaintiff applies for an injunction. It was said it should have been upon an affidavit of facts, the principal being abroad. But the Lord Chancellor held, that equitable grounds differ from all others brought before a Court, and upon paying the sum of £1982, into Court, an injunction was granted until the principal put in his answer, with liberty to proceed to judgment with a stay of execution.

[692] ERRINGTON *v.* AYNLEY.

22 Feb. 1788. Sir Lloyd Kenyon, M. R., sitting for Lord Chancellor.

A bill will not lie to compel the performance of an agreement to build an house ; but it will to compel conveyance of land, because there is a thing certain to be conveyed.

Bill to be relieved against the penalty of a bond, conditioned for maintaining a bridge across the Tyne, from Hexham in Northumberland ; the bridge was destroyed by an extraordinary flood in one night, and the foundation of the river being so bad at that spot as to make it impossible to build one that would stand ; the cause came on to be heard, and after hearing the defendant's defence, his Honour put it off merely for the purpose, and in hopes, that the Justices of the Peace at the Quarter Sessions and the

plaintiff would settle matters, which he recommended : His Honour mentioned a case in the Court of Exchequer, in which he and Mr. Madocks were counsel, the name of the cause *Shakerly v. Lord Kilmarry* : the bill was to compel the defendant to keep up the bed and banks of a river, because the not doing of it was permissive waste, as it let the water out, and overflowed the adjacent grounds : his Honour put the following question : Did you ever know an instance of a bill to compel a defendant to perform an agreement to build an house ? Certainly not ; but to compel a conveyance of land you may, because there is a thing certain to be conveyed.

[693] EDWARDS v. POOL.

25 Feb. 1788. Sir Lloyd Kenyon, M. R.

A defendant against whom the Serjeant at Arms was ordered to go, for not producing deeds pursuant to a decree, being a lodger and keeping himself locked up except on a Sunday, so that the Serjeant at Arms could not execute his warrant, and the plaintiff being, as it was supposed without remedy, applied by motion, that a commission of rebellion might issue to commissioners who can break locks, &c., but it was denied ; it being a writ, which if warranted, issues of course.

An application quite out of course being intended to the Lord Chancellor, but he being confined by illness, was the above day made to the Master of the Rolls ; the Register thought it his duty, to apprise his Honour of it, as he had his Lordship before, what the intended application was, and the case on which it was meant to be grounded ; and premised, that the established practice and course of proceeding against a party for not performing a duty decreed (except for not producing deeds before the Master, or putting in his examination), is by attachment, attachment with proclamation, commission of rebellion. These are issued of course without an order ; must be issued and returned, and if *non est inventus* be returned, the next process is the Serjeant at Arms, which is by order.

For not producing deeds, &c., before the Master, pursuant to a decretal order, the common and usual course is, to apply in the first instance for an order, upon the Master's certificate, that the party do produce, &c., in four days, or that the Serjeant do apprehend the defendant, and bring him into this Court, to answer his contempt : should the party be taken, he is brought into Court, and turned over to the Fleet, and thereupon the Court will of course grant a sequestration.

So if the Serjeant at Arms return *non est inventus*, the Court will upon such return (see printed orders of Court, fol. 203, concerning the Serjeant at Arms) grant a sequestration.

[694] The ground of the application is, that by the decree, accounts are directed, and the estate in question to be sold ; and in order thereto, all deeds, &c., in the custody or power of any of the parties, are to be produced before the Master.

The defendant in whose custody the writings are, refusing to produce them though summoned, the common order, upon the Master's certificate, for the Serjeant at Arms to apprehend, and bring the defendant into Court hath been granted : The defendant is a lodger, and keeping himself shut up in his apartments, except on a Sunday, the Serjeant at Arms cannot execute his warrant.

The plaintiff upon a supposition he is without remedy, intends to apply for an order, that he may be at liberty to sue out a commission of rebellion, (a process, as before observed, that is never used in such a contempt as the present, but if issued, is without order, and is sued out of course), for that such writ as it is said, may be executed on a Sunday, and according to Crompton p. 17, " the Commissioners may break open the " party's house, or the house of another where he is."

Suppose the Court should grant the order, and the plaintiff should sue out a commission of rebellion, the Commissioners can only attach the body, and bring the party into Court ; their authority doth not extend to his property ; but with great submission, the plaintiff hath his remedy in the ordinary way, if he will pursue it : He hath an order for the Serjeant at Arms to apprehend and bring the defendant into Court, he can, or he cannot apprehend him ; if he doth, he will bring the defendant into Court, and he will be turned [695] over to the Fleet, and thereupon the Court will of course grant a sequestration ; if he return a *non est inventus*, upon such return, the Court will likewise order a sequestration, which not only goes as originally *ad rem*, but to all the personal property of the contemnor.

Should he keep the door of his apartments shut, and refuse to deliver possession to the sequestrators, the Court will of course upon their certificate, grant an order, to enjoin him to deliver possession to the sequestrators, and upon service of the order, and disobedience, an attachment issues of course (which is not to be executed), and upon this the Court will order a writ of assistance, to put the sequestrators into possession: So it was ordered by Lord Hardwicke in *Bird v. Littlehales*, 19th March 1742, the defendant was in contempt to a sequestration, for not performing a decree, and kept his doors shut against the sequestrators, and would not let them into possession.

Bingham v. Bingham, the like, the 9th of December 1751.

On the 26th of February 1788, Mr. Scott made his intended motion: But his Honour taking notice of what had been submitted to him, adopted the reasons, and denied the motion.

[696] SWEET v. PARTRIDGE.

28 Feb. 1788. Sir Lloyd Kenyon, M. R., sitting for Lord Chancellor.

Where satisfaction is sought out of real assets descended to an infant heir, so that the parol may demur, the Court will appoint a receiver of the real estate descended.

Bill by creditors, for satisfaction out of the personal assets, and if not sufficient, out of the real assets descended to an infant heir: On hearing the cause, accounts of the intestate's debts and of his personal estate were directed, and directions were also given for payment of the debts; but as to directing satisfaction out of the real assets descended, his Honour said he could not, because the parol might demur: It was then pressed to have a receiver appointed of the said real estates, the propriety of which his Honour doubted, though he said it was his wish to do it; and upon the Counsel saying, it had been done by the Lords Commissioners in July 1783, in a cause *Docker v. Horner*; and since by Lord Thurlow, on a motion before the hearing (which to my knowledge he did, but I cannot at present recollect the title of the cause), his Honour gave the Counsel leave to mention it on a future day.

Mr. Scott mentioned it this day, and produced the decree in *Docker v. Horner*: His Honour said he was pleased to find an instance; that he was certain the parol demurring was to the disadvantage of an infant, and ordered a receiver to be appointed of the real estate descended.

[S. C. 1 Cox, 433.]

[697] SMITH v. MORRIS.

1 March 1788. Sir Lloyd Kenyon, M. R. 2 Bro. C. C. 311, S. C.

On a bill brought for the purpose of getting rid of a lease, offering to surrender it, and to make all possible satisfaction, which the defendant resisted; it was said by Sir Lloyd Kenyon, M. R., that this Court will not decree contracts to be carried into execution, merely for the purpose of harassing parties. *Hales v. Dodd*, cited 2 Atkins, was mentioned.

[See case more fully reported, 2 Bro. C. C. 311.]

PRICE v. JAMES.

5 March 1788.

Demurrer to a bill for want of equity.

Lord Thurlow, C.—The bill prays discovery and relief: the plaintiff makes the discovery ancillary to the relief: I have thought of it often, and know there are opinions for it, but I think a demurrer will lie; therefore allow the demurrer.

BEYNON v. COLLINS.

5 March 1788. 2 Bro. C. C. 323, S. C.

On a devastavit by the husband of an executrix or administratrix, of the estate of her testator or, intestate; this Court will charge the wife, after the death of her husband.

Cases cited: Cro. Car. 564; Vaughan v. Morris, Dyer, 210; Wentworth's Law of Executors; Comyn's Digest, under title of Administrator.

Per curiam.—Decree the wife to pay the money found due, on account of the devastavit.

[Mews' Dig. Executor and Administrator, VIII. See Adair v. Shaw, 1803, 1 Sch. & Lef. 243; Soady v. Turnbull, 1866, L. R. 1 Ch. 494, 35 L. J. Ch. 784, 12 Jur. N. S. 612, 14 W. R. 955.]

[698] JEREMIAH BIXLY, on behalf of himself and the rest of the creditors of FRANCIS ELEY, deceased, Plaintiffs; SARAH ELEY, the widow of the said FRANCIS ELEY; JOHN HUMPHREY and JOHN STEANE, the executors; SARAH ELEY an infant, the daughter of the said FRANCIS ELEY; JOHN ELEY the younger, and JAMES YOUNG and his Wife, Defendants.

2 April 1788. 2 Br. C. C. 324, S. C.

Defect of the surrender of a copyhold estate, supplied for the benefit of creditors.

The bill was for an account and payment of the testator's debts out of his personal estate, and if not sufficient, out of his copyhold estates devised for that purpose (which not having been surrendered), to have that defect supplied; and if the copyhold estate should not be sufficient, to have the deficiency raised out of other real estates of the testator, which he had specifically devised.

The bill stated that the testator was seised of copyhold estates, and likewise of freehold estates; that on the 20th of January 1783, he made his will, and thereby willed, that his executors, their executors, administrators, or assigns, should as soon as conveniently could be after his death, sell his copyhold estate (which he described), in trust, to apply the money to arise thereby, and the rents and profits till sold, for and towards payment of his debts, special and simple; and if there should be any residue, he willed his executors should place the same out at interest, until Sarah his daughter should attain twenty-one, when the same should be paid to her, and the interest to arise [699] during her minority, to be applied towards her maintenance and education; if she died before twenty-one, he gave the principal money to his wife; he devised to his wife Sarah, and to her heirs and assigns, all his messuages, lands, &c., by description, at Thorpe, and devised unto his executors, their heirs, and assigns, until his said daughter Sarah should attain twenty-one, all his messuages, lands, &c., by description, at Bradford, to apply the rents and profits for her maintenance, and when she attained twenty-one, he devised the said last-mentioned lands, &c., to his said daughter in fee simple; if she died before without issue, he devised the same to his said wife for life, and after her death, to his brother John Eley for life; and after his death, to his nephew John, in fee simple; and gave to John Montford and John Stean whom he named jointly with his said wife executors of his will, and gave them £10 each for their trouble; and gave the residue of his personal estate to his said wife. The testator died, and his executors proved his will, possessed his personal estate, and entered on, and received the rents and profits of the real estates devised to them, but neglecting to pay his debts, under pretence that the copyhold estate devised in aid of the personal, was not surrendered to the use of the will, the plaintiff filed his bill for the above purpose, insisting that the copyhold estate being devised for the payment of debts, the defect of its not having been surrendered ought to be supplied.

The cause was heard on the 11th of February 1786, when the will was declared well proved, and decreed to be established, and an account of the personal estate, and an application of it, in payment of his [700] debts, was likewise decreed, and if deficient, the consideration how the deficiency was to be raised, was reserved: The Master made his report, and certified that the personal estate was not sufficient to pay the testator's debts.

On the 2d April 1788, the cause came to be heard before Lord Thurlow for further directions, when Mr. Mansfield and Mr. Ainge saying it was a rule, that where a copyhold estate was not surrendered, and the testator died seised of freehold estates, that those estates should be first resorted to, before recourse was had to the copyhold estate; and such likewise being his Lordship's idea (without attending to the will, which was not read), he ordered subsequent interest to be computed; he ordered the deficiency of the personal estate to be raised out of the testator's freehold estates devised to his wife and daughter, *pari passu*, and if those estates should not be sufficient, the deficiency

to be raised out of the copyhold estate, and the infant heir to convey, or surrender at twenty-one.

The will not having been read, but it appearing upon looking into it, that it was the manifest intention of the testator, that the copyhold estate should be applied in aid of his personal estate, that his wife and child might have the benefit of his specific devises of his freehold estates to them respectively, which otherwise would be frustrated, and the wife thereby be left unprovided, and the wife being likewise beneficially interested in any surplus there might be of the money to arise by sale of the copyhold estate, after payment of his debts, and understanding it to be a rule, that the Court will supply the defect of surrender for a creditor [701] tor, and unprovided widow, and younger children, I took the liberty to lay the will before his Lordship, with what had struck me, with the following cases : and submitting, that instead of assisting, it would be taking from the widow the provision made for her, should the freehold estate devised to her be first sold. The cases were, *Drake v. Robinson*, 1 P. Wms. 443 ; *Tollet v. Tollet*, 2 P. Wms. 489 ; *Harris v. Ingledew*, 3 P. Wms. 91.

His Lordship some time after sent for me, said he had read the will and the cases, and was satisfied that the copyhold estate should be first sold in aid of the personal estate, and the heir to surrender at twenty-one, and the purchaser to hold and enjoy in the mean time ; and the minutes were altered accordingly.

WATKINS v. BUSH.

30 April 1788. Sir Lloyd Kenyon, M. R., sitting for the Lord Chancellor.

A demurrer being allowed, the bill is out of Court, and the plaintiff cannot amend it.

The plaintiff having filed his bill in this Court, the defendant demurred to it, which demurrer, upon argument, was allowed : Afterwards the plaintiff improperly obtained an order to amend his bill, and amended it accordingly : To the bill so amended, the defendant demurred, as being irregular ; and the above day Mr. Scott and Mr. Stainshy argued the demurrer. His Honour overruled the demurrer, saying, that by demurring, the defendant waived the irregularity ; that when a demurrer is allowed, the cause is out of Court, and the bill cannot be amended ; that the step the defendant should have taken (if any were necessary), should have been [702] to apply to discharge the order to amend for irregularity.

[But query : As the cause is out of Court, how could he apply ? And whether it would not be more advisable for the defendant not to pay the least regard to any step the plaintiff might take, and leave it to the plaintiff to justify any unwarrantable measure he might adopt to compel the defendant to pay obedience to it ?—J. D.]

HALFED v. JENNING.

30 April 1788. Sir Lloyd Kenyon, M. R. 2 Bro. C. C. 336, S. C.

Plea to a bill for a discovery, and an account of partnership dealings and transactions.

A clause in the partnership articles, that no bill, &c., should be brought until the matter had been referred to arbitrators, and their arbitration, and their award made, pleaded, and allowed.

Bill by one of the surviving partners against another partner, and the representative of a deceased partner, for an account of the partnership dealings and transactions, and for a production and discovery : The defendant pleaded, and stated in the plea a clause in the partnership articles, by which it was covenanted, that no bill, suit, &c., should be brought respecting the partnership, until the matter should have been referred to arbitration, and the arbitrator should have made his award.

For the plaintiff it was said, that where a plea went to the relief and discovery, it might be good as to the relief, but not to the discovery ; and *Wellington v. Mackintosh*, 2 Atk. 569 ; and *Fletcher v. Raymond*, before Lord Thurlow, were cited.

His Honour took notice of the statute of the 9th of King William the 3d, intituled,

An act for determination of differences by arbitration : and said, that arbitrators under an agreement of the party have not power to call witnesses before them, and to examine [703] mine them : that the partnership articles under which the parties acted and were bound, pointed out the previous steps to be taken ; that these steps had not been taken : that till then, and it was seen what would be the award, the plaintiff had no business here, and therefore allowed the plea.

ROBINSON *v.* LORD BYRON.

9 May 1788. Lord Thurlow, C.

Application to discharge a sequestration issued against the defendant for breach of an injunction to stay waste, upon the ground that the defendant had put in his answer, and that therefore it was irregular ; but as the injunction was in force, the defendant not having applied to dissolve it, the Court denied the motion.

The injunction having issued against the defendant, to stay him from working or using the shuttles, flood-gates, &c., until his answer and further order ; and the defendant having been guilty of a breach of the injunction, the plaintiff gave notice, and moved for the sequestration against the defendant, which, after hearing Counsel on both sides, was granted.

On the second Seal Lord Byron moved to discharge the order for the sequestration for irregularity, for that he had put in an answer.

He had not applied to dissolve the injunction.

It was ordered to stand over ; and Mr. Green, who then attended, was directed to mention it to me ; and agreeably to his Lordship's pleasure, I submitted that although an injunction should be irregularly issued, yet it was to be obeyed, as was laid down by Lord Nottingham, in *Woodward v. King* (2 Ch. C. 203), Mich. Term, 26 Car. 2 [1674].

It therefore was of no consequence whether the injunction was ill-founded or irregular ; the Court thought proper to grant an injunction to prevent the defendant from doing further mischief until answer and further order ; it had not been dissolved, and till then it was [704] to be observed ; and the defendant's having done what he was expressly enjoined from, and his person being privileged, a sequestration was ordered to issue against him : it was to be observed, not in mesne process, but for breach of a duty. And it might not be improper to attend to the order for the sequestration : It states the order for the injunction to stay the defendant, his servants, and that the defendant had been served with the injunction from working, or using the shuttles, &c. : It further states, that the defendant had, in violation of the injunction, done what he was enjoined from ; that the plaintiff had thereby sustained great injury ; and therefore for breach of the injunction, after hearing Counsel on both sides, it was ordered that a sequestration should issue until further order. Had the defendant been a commoner, the language of the order would have been "until he cleared his contempt, and the Court should make further order." And it was submitted, that although the word contempt was not used, the offence was the same as if committed by a common person, and if he had not been privileged, he would have been committed ; the mode of proceeding for a contempt such as the present.

On application of a party to be discharged for a contempt, the Court considers the nature of it and the conduct of the party, and whether he hath done all he ought, or could do, in satisfaction for his breach of the duty, to the party injured.

For instance : where a defendant is in contempt for taking out execution on a judgment at law, the Court will, before they discharge him, make him do away every thing beyond the limit he was permitted to proceed, [705] as your Lordship did in *Williams v. Axe*, 13th April 1779.

The sheriff had levied money under a judgment before the bill was filed ; after an injunction had issued to stay the defendant's proceeding at law, the defendant attached and received the money from the sheriff, your Lordship took this distinction, and said that if the sheriff voluntarily paid the money, it would not have been a breach of the injunction ; but as the defendant compelled the sheriff to pay it, it was such breach ; and ordered the defendant to return the money.

The injunction, as before observed, is until answer and further order, and though the defendant hath put in his answer, yet it is not thereupon dissolved of course ; and as he hath applied to dissolve the injunction, it still subsists, and so long as it doth subsist, the Court will enforce it. And when application for such purpose shall be made, it may happen the Court may take into consideration the matter of the injunction, and the past conduct of the defendant, as Lord Hardwicke did in the case of the Attorney General *v.* Burrows, 6th May 1747 (*supra*, [Dick.] 128) ; and in an anonymous case in 3 Atk. 567 : An injunction to stay waste on filing the bill had been granted : the defendant, on the putting in of his answer (by which he said, that since filing the bill he had not committed waste), applied to dissolve it : His Lordship said, as the defendant

had committed waste, the Court will presume he may do more, and therefore denied the motion. So likewise in *Vane v. Lord Bernard*, 2 Vern. 738, by Lord Cowper: The defendant was tenant for life without impeachment of waste, remainder to his son, the plaintiff, for life; out of some displeasure to the plaintiff he [706] wilfully pulled down and injured part of Raby Castle; on filing a bill by the plaintiff, an injunction to stay waste was granted; and on the defendant's putting in an answer, and applying to dissolve it, his Lordship continued the injunction until the hearing, and at the hearing not only made it perpetual, but ordered the Castle to be repaired and put in the state it was in at a given period, and a commission to issue to see what was to be done, and the Master to see it done at the expence of the defendant.

In the case before your Lordship, the acts of the defendant before filing the bill, and the injunction, might proceed from a misconception of his right; but the injunction having explicitly pointed out to him what he was not to do, what he hath done in violation of it, is wilful: The intention of the Court by issuing the injunction was to prevent him; the injunction hath not been dissolved, and so long as it subsists, it is to be obeyed; it was in force at the time he disobeyed it, and at the time the sequestration was applied for, and ordered to issue; and therefore, it was submitted, the application and the order were well founded. The motion came on again the above 9th day of May 1788, when his Lordship was pleased to adopt what was submitted to him, and ordered that the plaintiff should be at liberty to bring an action as advised, and proceed to trial; and that the injunction and sequestration should continue until after the trial or further order.

[707] WINDSOR v. WINDSOR.

24 Jan. 1788. Sir Lloyd Kenyon, M. R.

Naming a party in a bill, as a defendant, unless process is prayed against him, an objection at the hearing that he is not a party, will be allowed.

The first tenant in tail in remainder was named a party defendant in the bill, but process was not prayed against him, and he was abroad: Objection was taken at the hearing of the cause for want of parties.

Per curiam.—The naming of a party in a bill as a defendant, and not praying process against him, is not to be considered as making him a party; therefore let the cause stand over, with liberty for the plaintiff to amend the bill by adding parties.

BEDFORD v. LEIGH.

27 June 1785. Lord Thurlow, C.

Bill by a single bond creditor, to be satisfied out of personal and real assets: the bill, after consideration, dismissed, so far [as] it prayed satisfaction out of the real estate.

The plaintiff was mortgagee in fee of particular estates, late belonging to John Burrel Leigh, deceased, with the usual covenant to pay, and an additional security or a bond: the mortgagor died intestate, leaving the defendant Leigh his heir at law, and the defendant William Huxly took out administration to him. The mortgaged premises being a deficient security, as the bill stated, the plaintiff prayed by his bill that the defendants might redeem, or that the mortgaged premises might be sold, and the purchase money applied in payment of what should be due on the mortgage, and if deficient, that the plaintiff might be paid what remained due to him out of the personal estate; and if that should also be deficient, that the deficiency might be made good out of other real estates of the intestate descended, and for that pur[708]pose, that the same might be sold. The cause was heard the above day, and the Counsel saying it was quite of course, the case was not attended to; and I was ordered to draw up a decree, according to the prayer of the bill. Upon reading the prayer, not having heard of the Court's going so far as to decree satisfaction to a single creditor, out of legal or equitable assets, I mentioned it to the Lord Chancellor this day (29 June 1785): The Lord Chancellor seemed, at first, to wonder at my difficulty, as the plaintiff, under his covenant, was a creditor by specialty for the remainder of his debt, after applying the money arising by sale of the mortgaged premises, as far as it would go, in discharge of the mortgage, and asked if he could not at law have gone to an elegit, and recovered out of the real estate? And asked me the grounds of my difficulty? My answer was: In the first place, it was novel; that I had never heard of a decree upon a bill by a single creditor, not on behalf

of himself and the rest, go to real assets (and Mr. Ambler, and Mr. Madocks, on being applied to, gave the like answer) ; that his Lordship, in *Machin v. Graves*, which came on before him the 17th of July 1799, had doubted even of relieving a single bond creditor out of personal assets ; but on searching by his order for, and producing precedents, his Lordship had made such decree ; that the language of such decrees was necessary to be attended to, for they did no more than direct an account of what was due to the plaintiff (not a general account of debts), for the executors or administrators to pay out of assets in a course of administration : and in case they did not admit assets to account for the personal estate : that supposing his [709] Lordship should confirm what I understood to be his direction, and the real estate descended should be sold, how was the purchase money to be applied ? Legal assets were subject to all specialty debts ; there might be some of a superior nature to the plaintiff's, for instance, a judgment ; the account of debts was not general, and if it had been so, the language of the decree would have been to apply the money to arise by the sale of the real estate descended (which, if not sufficient, an account of the rents and profits would have been directed), in making good the deficiency of the personal estate, to answer not one, but all the creditors by specialty ; and the assets being legal, the decree would have gone on, " And in case any of the creditors by specialty shall exhaust any part of the personal estate of the intestate, the simple contract creditors are to stand in their place to receive satisfaction *pro tanto*, out of the intestate's real estate." His Lordship, at the rising of the Court, said he had revolved it in his mind, and put this question, Supposing the estate should be sold, must not the money be paid to the heir ? And said that the estate could not be sold under an *elegit* ; that the creditor could only hold till he was satisfied his debt, and must account for what he should receive ; that he was perfectly satisfied my doubt was well founded, and ordered the bill to be dismissed, so far as it prayed satisfaction out of the real estate descended.

[710] HALL v. HALL.

5 July 1788.

Reprisal was said by Lord Thurlow, C., to be a common drawback.

Ex parte SWINNEY.

8 Nov. 1788.

It was said by Mr. Mansfield, in arguing the petition, which was in bankruptcy, and upon an exception, for that the Master had charged the assignee with a bond made to him by a debtor, which he had not received ; that if a debtor assign a chose in action, it lies with the assignor to call upon the assignee to use diligence to recover it ; and unless the assignor so call upon him, the assignee will not be liable, should any loss happen by not calling it in : But if it be part of the agreement that he shall exert himself, or if called upon, he will not, he may be liable : *Earl Ranelagh v. Hays*, 1 Vern. 189. Lord Chancellor said, he was clear that where a man receives a bond for a debt due to him, he makes it his own ; and therefore dismissed the petition, and overruled the exceptions, abating so much as commission at £5 per cent. amounts to.

[711] BOWES v. COUNTESS STRATHMORE, *et e contra*.

29 Nov. 1788. Mr. Justice Buller sitting for Lord Chancellor.

A defendant, a prisoner in the King's Bench Prison, under a criminal prosecution, brought up by *habeas corpus*, and turned over to the prison of the Fleet *pro forma* (to ground an order for a sequestration) ; and from thence carried back to the King's Bench, with his cause ; and immediately then a sequestration moved for and granted.

The defendant Bowes, brought up by *habeas corpus*, by the marshal of the King's Bench Prison, where he was confined under a criminal sentence, for not obeying a decree ; and the Court being informed it was necessary he should be turned over to the prison of the Fleet, to ground a sequestration, rather paused, as he was confined under a criminal prosecution, but after consideration, made the following order : " It appearing the defendant Bowes is a prisoner in the King's Bench Prison, on a criminal prosecution, let him be turned over to the prison of the Fleet *pro forma*, for the purpose of grounding an order for a commission of sequestration ; and from thence let him be carried back to the King's Bench Prison, with his cause."

HALES v. SHAFTO.

29 July 1790.

Sequestrators cannot sell goods sequestered, in mesne process, otherwise than to pay the costs of the contempt to be taxed.

The same day a sequestration issued on mesne process against a member of parliament, for not appearing to a bill filed against him for a discovery ; so that the taking of the bill *pro confesso*, under the stat. of 5th Geo. 2, would not be of any avail. The defendant persisting in his contempt, application was made on a former day, and renewed this, that the sequestrators might sell the goods sequestered, &c. Lord Thurlow, C., after consideration, denied the motion, saying, that sequestrators in mesne process could not sell, &c., any otherwise than to pay the costs of the contempt to be taxed.

[712] TIDD v. CLARE.

17 Dec. 1788.

Demurrer to the whole bill, the defendant having answered part ; the demurrer was overruled.

SCOTT v. TYLER.*

20 Dec. 1788. Lord Thurlow, C. 2 Bro. C. C. 431, S. C.

A condition annexed to a legacy, that the legatee shall marry with the consent of her mother, is a valid condition, and upon marriage without such consent, it shall go to the mother under a gift of a general residue.

This is a bill filed by Samuel Scott and Margaret Christiana his wife, against Elizabeth Tyler, the residuary legatee, and executrix of Richard Kee ; George Shakespeare, Charles Mayhew, and Philip Nind, executors and trustees, named in the will of the same Richard Kee ; and Richard Dryer, his heir at law.

The bill prays that the plaintiff Margaret Christiana's right may be established in a trust fund of £10,000 South Sea annuities, and that proper accounts may be directed accordingly.

That an account may also be taken of the produce of certain tenements, and of certain securities upon the river Lee ; and that the same may be duly paid and assigned to her.

And that the legacy of £100 given by the will of one James Cockburn may be paid to her.

For this purpose the bill states the will of Richard Kee, made on the 16th day of December 1776, whereby he directs his executors to purchase £5000 South Sea annuities, of the year 1751, in their own names, but, in trust, to pay £60 per ann. for the maintenance of Richard Dryer till his age of fifteen, and from thenceforward £120 per ann. with liberty to raise £100 to put him out in some trade or profes-[713]sion, the surplus profits to be invested in the like annuities, and the whole to be transferred to him at twenty one ; but if he dies in the mean time, the whole is to be thereupon divided between the defendant Elizabeth Tyler and the plaintiff Margaret Christiana ; the share of Margaret Christiana not to be transferred to her till her age of twenty-one ; and if she dies sooner, her share is to go over to Elizabeth.

He also directs his executors to purchase the sum of £10,000 in the like annuities, in their own names, in trust, to pay Elizabeth Tyler £100 per ann. for the maintenance of Margaret Christiana, till her age of twenty one ; the surplus to be laid out in the mean time in the like annuities, at her age of twenty one, if then unmarried, one moiety is to be transferred to Margaret Christiana, for her own use and benefit ; and at her age of twenty five, if then unmarried, the remainder to be transferred in like manner.

If she marries with the consent of Elizabeth before twenty one, a moiety of the whole sum is to be settled to her separate use, and for her issue according to the direction of Elizabeth ; the other moiety is to be disposed of, as Margaret Christiana shall think fit ; if she dies unmarried before her age of twenty five, the whole is to go over to Elizabeth.

* This cause stood for judgment. His Lordship having read his judgment, which was written, gave it to me : The following is correctly copied from it.—J. D.

He also gives to the same trustees, certain freeholds in Denmark Court in trust, to lay up the rents till Margaret Christiana shall attain twenty-one, whereupon he gives both the estates and their produce to her absolutely ; or if she dies sooner, to Richard Dryer, or if he be then dead, to Elizabeth Tyler.

He gives to the same trustees, his securities on the river Lee, in trust, to apply the produce thereof, to [714] the separate use of Margaret Christiana, notwithstanding her coverture, till twenty-one, and thereupon to her absolutely, but if she dies sooner to Elizabeth absolutely.

He gives divers other legacies. All the rest of his estate, real and personal, he gives to Elizabeth Tyler absolutely, whom he looks upon as a wife.

He died on the 3d of November 1776, leaving Elizabeth surviving, and Margaret Christiana his natural daughter by her.

On the 17th May 1783, the plaintiff Samuel Scott, clandestinely and against the will of Elizabeth, married Margaret Christiana, then an infant of eighteen years : Elizabeth objected to it as an improvident match, by reason of his inferior circumstances, his advanced age, and the family which he had by one of his former wives ; and warned her daughter of the consequence.

And, as the plaintiff Samuel Scott states, by a deed of 13th May 1783, he has covenanted to settle Margaret Christiana's fortune on her, and her children, after his own death, if she or they should survive him,

The bill further states the will of James Cockburn, who died in October 1774, leaving Elizabeth Tyler his executrix, and Margaret Christiana a legatee of £100.

All the executors proved Richard Kee's will, Elizabeth Tyler alone acted.

Elizabeth Tyler forthwith transferred £5000 South Sea annuities into the names of the trustees, which have been since transferred to Dryer, together with the accumulations, and that legacy has been duly discharged.

[715] In August 1777, she transferred £10,000 South Sea annuities, into the names of herself and co-trustees, together with the further sum of £1000 of like annuities, whereof she has constantly received the produce : she received in like manner, the rents of the freehold houses, and the interest of the securities on the river Lee.

She admits the legacy of £100 to remain due and that she had assets, but claims a debt of £900 against the plaintiff Samuel Scott.

In March 1786, Elizabeth Tyler became a bankrupt ; a commission issued, and Sir Edward Vernon, Thomas Hankey, John Marr, and Malcolm Cockburn were chosen assignees. It appears also that Elizabeth being greatly indebted to her bankers, Thomas Hankey, Chaplin Hankey, Robert Hankey, Stephen Hall, and Richard Hankey, for money advanced to her, to carry on certain transactions in trade, which she had entered into on her own account, after the death of the testator, they opened certain boxes, which had been deposited with the bankers for safe custody by Richard Kee in his lifetime, and by her after his death ; and took out ten bonds securities on the river Lee for £100 each, numbered from 170 to 180, the last number inclusive, and deposited them among other things, as a security for the monies already advanced, or to be advanced by the bankers, and she is now in their debt more than all the securities she deposited with them are worth.

Hereupon the suit was revived against the assignees ; and the bankers were called upon to account for the ten bonds so deposited with them, and the interest received upon them, as being the property of the [716] plaintiffs, by reason of the above mentioned specific bequests.

Upon this matter two questions have arisen : the rest of the cause being much of course ; First, whether as the case stands, the plaintiffs have any, and what interest, in the £10,000 South Sea annuities ; Secondly, whether the bankers are entitled to hold the ten bonds on the river Lee, as a security for the money due to them by the bankrupt.

The testator makes four several bequests to his daughter : a contingent interest in the £5000 South Sea annuities originally given to Dryer ; the £10,000 South Sea annuities in question ; the freehold tenements ; and the Lee bonds ; all upon the event of her living till the age of twenty-one, married, or unmarried : If she dies before twenty-one, the first, third, and fourth bequests take no place, and yet the interest of the fourth is to be paid to her separate use, notwithstanding her coverture, during her infancy ; but there is an event, upon which the second bequest may take place before twenty-one, namely, if she marries before that age with consent of her mother.

It is impossible not to suspect, that the testator has failed of expressing his full

intention concerning this bequest of the £10,000: He gave it to the daughter on a double contingency, her age, and being then unmarried; he seems to have meant it for the mother on the contrary event; but he has given it over also to her on a double contingency; the death of the daughter before her age, and unmarried. This leaves a middle case, the premature marriage of the daughter, in which neither can claim under the term of [717] this bequest: Again, he has provided for the anticipation of the daughter's title by another double contingency; namely, marriage before twenty-one, and with consent of the mother; but in case of a marriage between twenty-one and twenty-five, with or without consent, half the legacy would remain undisposed of; which it can hardly be imagined he meant.

Some endeavours were used to infer from the terms in which it was given to the mother, that in all other events, it was meant for the daughter; it is more probable, that in the case of the daughter's not becoming entitled, it was meant for the mother: but neither conjecture is sufficiently collected from the actual expression by any admissible rules of interpretation.

The main argument for the plaintiff, turned on this proposition, that one branch of the contingency, upon which the legacy was given (or rather anticipated), implied a condition in restraint of marriage, which is merely void, and consequently the legacy became absolute.

In support of this position innumerable decisions of this Court were quoted: but the cases are so short, and the dicta so general, as to afford me no distinct view of the principle, upon which the rule is laid down; or consequently of the extent of the rule, or of the nature of the exceptions, to which its own principle makes it liable.

The earlier cases refer, in general terms, to the Canon law, as the rule by which *all* legacies are to be governed. By that law, undoubtedly, all conditions which fell within the scope of this objection, the restraint of marriage, are reputed void; and, as they [718] speak, *pro non adjectis*. But those cases go no way towards ascertaining the nature and extent of the objection.

Towards the latter end of the last, and beginning of the present century, the matter is more loosely handled. The Canon law is not referred to, (professedly at least), as affording a distinct and positive rule for annulling the obnoxious conditions: on the contrary, they are treated as partaking of the force allowed them by the law of England. But, in respect of their importing a restraint of marriage, they are treated at the same time as unfavourable, and contrary to the common weal, and good order of society. It is reasoned, that parental duty and affection are violated when a child is stripped of its just expectations. That such an intention is improbably imputed to a parent; particularly in those instances where there was no misalliance; as in marriage with the houses of Bellases, Bertie, Cecil, and Semphle; which the parent, if he had been alive, would probably have approved. These ideas apply indifferently to bequests of lands, and of money, and were, in fact, so applied in one very remarkable case: nay, to avoid the supposed force of these obnoxious conditions, strained constructions were made upon doubtful signs of consent; and every mode of artificial reasoning was adopted, to relax their rigour. This was thought more practicable by calling them conditions subsequent; although, if that had made such difference, they were, and indeed, must have been generally, conditions precedent, as being the terms on which the legacy was made to vest; at length, it became a common phrase, that such conditions were only *in terrorem*. I do not [719] find it was ever seriously supposed to have been the testator's intention to hold out the terror of that which he never meant should happen; but the Court disposed of such conditions so as to make them amount to no more.

On the other hand, some provisions against improvident matches, especially during infancy, or to a certain age, could not be thought an unreasonable precaution for parents to entertain. The custom of London has been found reasonable, which forfeits the portion on the marriage of an infant orphan without consent. The Court of Chancery is in the constant habit of restraining and punishing such marriages: and the Legislature has at length adopted the same idea, as far as it was thought general regulation could, in sound policy, go.

In this situation the matter was found about the middle of the present century; when doubts occurred, which divided the sentiments of the first men of the age. The difficulty seems to have consisted principally in reconciling the cases; or, rather, the arguments on which they proceeded. The better opinion, or, at least, that which

prevailed, was, that devises of land, with which the Canon law never had any concern, should follow the rule of the Common law ; and that legacies of money, being of that sort, should follow the rule of the Canon law.

Lands devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in lands (though I do not find this yet resolved), follow the rule of the Common law, and such trusts are to be executed with analogy to it.

[720] Mere money legacies follow the rule of the Canon law ; and all trusts of that nature are to be executed with analogy to that.

But still, if I am not mistaken, the question remains unresolved, what is the nature and extent of that rule, as applied to conditions in restraint of marriage.

The Canon law prevails in this country only so far as it hath been actually received, with such ampliations and limitations as time and occasion have introduced ; and subject at all times to the Municipal law. It is founded on the Civil law : consequently the tenets of that law also may serve to illustrate the received rules of the Canon law.

By the civil law the provision of a child was considered as a debt of nature, of which the laws of civil society also exacted the payment ; insomuch, that a will was regarded as inofficious, which did not in some sort satisfy it.

By the positive institutions of that law, it was also provided, *si quis calibatis, vel viduitatis conditionem hæredi, legatariove injunxerit ; hæres, legatariusve e conditione liberi sunt ; neque eo minus debitam hæreditatem, legatumve, ex hac lege, consequantur.*

In ampliation of this law, it seems to have been well settled in all times, that, if instead of creating a condition absolutely enjoining celibacy, or widowhood, the same be referred to the advice or discretion of another, particularly an interested person, it is deemed a fraud on the law, and treated accordingly ; that is, the condition so imposed is holden for void.

Upon the same principle, in further ampliation of the law, all distinction is abolished between precedent, [721] and subsequent conditions ; for it would be an easy evasion of such a law, if a slight turn of the phrase were allowed to put it aside. It has rather, therefore, been construed, that the condition is performed by the marriage, which is the only lawful part of the condition, or by asking the consent, for that also is a lawful condition : and, for the rest, the condition not being lawful, is holden *pro non adjecti*.

On the other hand, the ancient rule of the Civil law has suffered much limitation in descending to us.

The case of widowhood is altogether excepted by the novels ; and injunctions to keep that state are made lawful conditions.

So is every condition which does not, directly, or indirectly, import an absolute injunction to celibacy.

Therefore, an injunction to ask the consent, as I have said before, is a lawful condition ; as not restraining marriage generally.

A condition not to marry a widow is no unlawful injunction, for the reason given before.

So of an annuity to a widow during her widowhood.

A condition to marry or not to marry Titius or Mævia is good, for this reason, that it implies no general restraint ; besides, in the first case, it seems to have a bounty to Titius or Mævia in view.

In like manner, the injunction which prescribes the due ceremonies, and the place of marriage, is a lawful condition, and is not understood as operating the general prohibition of marriage.

Still more is a condition good which only limits the time to twenty-one, or any other reasonable age, pro-[722]-vided this be not evasively used as a covered purpose to restrain marriage generally. And this must obtain still more forcibly where the *lex loci* implies the same restraint.

Nay, according to Godolphin, the use of a thing may be given during celibacy : for the purpose of intermediate maintenance, will not be interpreted maliciously to a charge of restraining marriage.

It seems also agreed on all hands, that when, on any condition, however restrictive of marriage, the legacy is given over to pious uses, the intention of the party shall be deemed to regard those uses, and not to have aimed at the objectional purpose of restraining marriage.

As we receive the Canon law, a bequest over to any purpose, or person, shall be interpreted in the same manner, and make a conditional limitation.

It was made a question formerly what a legatee should take on her marriage, under a bequest of £200 if she married, or £100 if she did not. Some thought £300, some £200, some £100. In our books we find it determined formerly in the case of a greater legacy given upon marriage with consent, or after a certain age, and a less in the other events, that the greater legacy was not forfeited, by marrying against the condition ; but those decisions happened in the period alluded to before, when the worth of the alliance was thought a sufficient reason for a favourable interpretation, as it was called, of the condition ; but Lord Cowper determined otherwise, on alternative bequests.

It is true that the foregoing limitations, which are detailed in Swinburn, and Godolphin, are not found in [723] our reports so expressly stated, but the cases did not call for such particularity, except those few alluded to before, which turned upon the looser doctrine of favourable interpretation ; and that which is not to be supported of Underwood and Morris (2 Atk. 184), and which was determined by Mr. Baron Parker sitting for the Lord Chancellor. It does not appear by any report I have seen to have been closely considered ; it is contrary to the Canon and Civil law, and apparently unreasonable, the restraint having been imposed only till twenty-one, and the marriage contracted improvidently at sixteen : I therefore agree with the late Lords Commissioners in denying the authority.

Sir Dudley Rider in arguing the case of Harvey and Aston, expressly founds his argument on the perpetuation of the restraint.

And Dr. Strahan who argued on the same side, admits the qualification of time, place, and person, as given before.

The will before us contains a residuary bequest, but that has been repeatedly and well enough determined, to leave the conditional legacy *in statu quo* ; it only prevents that which has not been disposed of already, whatever be its amount, from falling by order of law, to the executor or next of kin.

But the great vice of the argument in favour of the daughter lies here : It was not contended against the rules above mentioned, if the bequest had been to her at twenty-one, or twenty-five in case she were then unmarried without more, that she could have claimed the legacy at any other time, or in any other case : But, because the mother was empowered to ac[724]celerate the gift by her consent to a proper marriage, and a proper settlement ; it was thence argued, that it was indirectly putting an illegal constraint upon marriage. Now if the first branch of the gift did not impose a direct restraint, in contradiction of law, the relaxation of that condition certainly would not operate as an indirect restraint of the same nature.

I am therefore of opinion, that the daughter having married at eighteen, improvidently so far as appears, and against the anxious prohibition of the mother, never came under the description to which the gift of the £10,000 was attached.

It was therefore void, and a part of the residue ; consequently it belongs to the assignees of the mother the defendants ; and the bill must be dismissed, so far as it seeks to have that trust executed.

The second point made by the plaintiff, goes to recover specifically the £1000 bonds, securities on the river Lee, out of the hands of Hankey & Co., the bankers, with whom they were pledged by the mother the executrix, to secure a private debt of her own.

This must proceed upon the ground of imputing fraud to the bankers, in concerting with the executrix a devastavit, and misapplication of that part of the testator's effects, to disappoint the specific legatee.

The bonds were specifically bequeathed to the executors in trust, to receive the interest for the use of the infant till twenty-one, for her separate use, notwithstanding her coverture, and at twenty-one to transfer the principal and interest due thereon, to the daughter, for her own use and benefit.

[725] The testator died in 1776, leaving an ample sufficiency to pay his debts ; his executrix was therefore bound to assent to the specific legacy.

Three years afterwards in 1779, the bankers took these effects which they must know had been the testator's, from her, whom they also knew to be his executrix ; not by purchase with money then advanced, not as a pledge for money then lent, but as a pledge for a debt contracted with them before, on her own account, and though the debt was contracted after she became executrix, yet it was two years afterwards,

and without any reference to the testator's affairs : The bonds, it is also admitted, were not assigned.

It is of great consequence that no rules should be laid down here, which may impede executors in their administration, or render their disposition of the testator's effects unsafe, or uncertain to the purchaser ; his title is complete by sale and delivery ; what becomes of the price, is no concern of the purchaser : This observation applies equally to mortgages and pledges, and even to the present instance, where assignable bonds were merely pledged, without assignment.

It applies also, where the transaction is with one of many executors, for each is competent.

But fraud and covin will vitiate any transaction, and turn it to a mere colour. If one concert with an executor, or legatees, by obtaining the testator's effects at a nominal price, or at a fraudulent under value, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in any other manner, contrary to the duty of the office of executor ; such concert will involve the seeming purchaser, or his pawnee, and make him liable for the full value.

Upon both grounds I think the defendants Hankey & Co. must deliver up the bonds, and account for the interest they have received upon them. The bonds as a specific legacy were legally vested in the executors, as trustees for the plaintiffs, and the possession of the Hankeys without assignment, gave them but a posterior equity.

They were delivered as a security for the private debt of the executor ; to which the Hankeys knew they were not liable, till all the debts, and legacies of the testator were satisfied.

Therefore let the plaintiff's bill stand dismissed, so far as it seeks the execution of the trust in the will of Richard Kee of the £10,000 South Sea annuities there mentioned.

Let the defendants Hankey & Co. bring the ten bonds on the river Lee, mentioned in the pleadings in this cause, into the Master's Office to be there deposited, subject to the further order of the Court, and let them also account before the Master, for all interest they shall have received on the said bonds, and pay the account thereof into the Bank, in the name of the Accountant General, in trust in this cause, and subject to further order.

And let an account be taken also of what the said executors, or any of them shall have received for interest, on the said bonds on the river Lee, and also for the rents of the freehold houses in Denmark Court.

[727] And let the costs of the plaintiffs and of the defendants the executors, except Elizabeth Tyler, be taxed ; and let what shall be found due for such costs, and also on account of the interest of the said bonds, be raised by sale of so much of the £10,000 South Sea annuities, as will be sufficient for that purpose : The said costs to be paid to the respective parties, and the said interest to be paid into the Bank, in the name of the Accountant General, subject to further order.

And it being admitted, that the defendant Elizabeth Tyler alone received the rents of the said freehold tenements, let an account be taken as against her, of what remains due thereon.

And let an account be taken of what remains due for the £100 bequeathed by the will of James Cockburn, and the interest thereon, from one year after his death.

And let an account be taken of what the said Samuel Scott is indebted to the said Elizabeth Tyler ; and let the same be deducted from the amount of the account lastly before directed ; and let the plaintiff Samuel Scott be admitted a creditor for the balance, under the bankruptcy of the said Elizabeth Tyler, and let such sum as he shall receive for a dividend thereon, be paid into the Bank, in the name of the Accountant General, in trust in this cause, and subject to further order.

Refer it to the Master, to inquire what settlement the plaintiff Samuel hath made on the plaintiff Margaret Christiana ; and whether the same be competent and proper ; and if he shall find that no such settle-[728]-ment hath been already made, let him receive proposals for such a settlement.

And reserve the consideration, in what manner the said freehold tenements in Denmark Court, shall be conveyed and assigned, and the several sums above mentioned shall be paid out, till the Master hath made his report.

And reserve the consideration of subsequent costs, and all other matters, till after the Master shall have made his report.

[Mews' Dig. Condition, 5. d. iv. See *M'Leod v. Drummond*, 1810-11, 17 Ves. junr. 166; *Vane v. Rigden*, 1870, L. R. 5 Ch. 668; *Bellairs v. Bellairs*, 1874, L. R. 18 Eq. 514. See also S. C. with full notes Wh. & T. L. C. 7th ed. vol. i. p. 535.]

HARTLY v. HOBSON.

15 Jan. 1789. Lord Thurlow, C.

All that is necessary on the affidavit to ground an application that an injunction may extend to stay trial, is, that the party cannot safely proceed to trial until the defendant hath put in his answer.

Application that the injunction granted in this cause might extend to stay trial: It was argued, that the affidavit should be precise as to the discovery expected from the answer of the defendant. Upon being applied to, I said, and his Lordship agreed, that the common language of an affidavit necessary on such an application was, that the party was advised and believed, that he could not safely proceed to a trial, until the defendant had answered. The Court granted the order: but the case being very singular, his Lordship, upon revolving it, directed the order not to be delivered.

[729] BETTESWORTH v. BETTESWORTH.

11 Feb. 1789. Lord Thurlow, C.

In this case it was referred to the Master to enquire whether the plaintiff's late father had appointed a guardian for the plaintiff; and if not, that the Master should approve of a proper person to be appointed guardian of the plaintiff the infant.

FARRAR v. LEWIS.

12 Feb. 1789. Lord Thurlow, C. See 2 Bro. C. C. 640.

On the 5th of Feb. 1789, the plaintiff applied upon the usual affidavit, that the injunction granted in the cause might extend to stay trial; but Mr. Mitford, as an *amicus curiæ*, saying the affidavit should be particular as to the discovery expected, it stood over, and I was desired to lay before the Court ancient instances. It was moved again on the above day, the 12th of February, when *Say v. Movel*, 11th February 1745; *Burdet v. Zuchers*, Trinity Term 1745, by Lord Hardwicke; and *Batteslea v. Peach*, 29th July 1783, all expressly to the point, being produced, his Lordship said, they only tended to confirm the opinion he had entertained, and granted the order.

BARCLAY v. RUSSELL.

23 Jan. 1789. Lord Thurlow, C.

Application for an order to direct the Attorney General, as such, to appear to the bill, refused.

Mr. Graham moved, that the Attorney General, on behalf of the Crown, might be directed to appear to the plaintiff's bill. His Lordship asked, if [730] any such order could be recollected. The Attorney General, *qua* such, was always supposed to be in Court. A plaintiff is entitled to justice: and if the Attorney General will not appear, it must be considered as a *nihil dicit*. Suppose I should make an order, and he would not appear under it, can an attachment issue against him to enforce it? Certainly not. But there must be a period of time in which the cause should be concluded: and his Lordship asked, when the Attorney General, on behalf of the Crown, was a necessary defendant, whether he was served with a subpoena; or how he was brought into Court?

Application refused.

ABEL v. NODES.

18 June 1789. Lord Thurlow, C.

Exceptions having been filed, but not set down to be argued, not cause against confirming a report.

His Lordship, in this case, as in that of *Hall v. Mulliner*, *supra* [Dick.] 604, held, that filing exceptions to a report, and not setting them down to be argued, is not cause against confirming the report absolutely.

SMITH *v.* HIBBARD.

11 July 1789. Lord Thurlow, C.

The vendor of a real estate dying before the contract entered into by him for the sale was completed, his heir at law, an infant, declared to be a trustee within the stat. of the 7th of Queen Ann, and directed to convey.

William Smith, being seised in fee of several estates, devised them to trustees, to particular uses; and after giving legacies, devised and bequeathed the residue of his estates, real and personal, to the plaintiff, and appointed him, and Clark and Roberts, acting executors. He afterwards contracted with Hibbard, deceased, for the sale of one of the estates devised by his will; was paid £5 in part; and he [731] delivered possession of the estate to the purchaser. Before the purchase was completed, both the vendor and purchaser died. Smith the purchaser left the defendant Smith, an infant, his heir at law. The purchaser made his will, and devised all his real estate for the equal benefit of his children. He left two; a son, his heir at law, and a daughter, then and now infants. The plaintiff, as one of the executors, and the residuary devisee, and legatee of Smith the vendor, brought his bill against his co-executors and the heir at law of Smith, an infant, and also against the devisees and the executors of the purchaser, to have the contract performed, and to be paid the residue of the purchase money either out of the personal estates of the purchaser; or, if not sufficient, to have it considered as a lien on the estate sold.

The Lord Chancellor was clear, that until the money was paid, the contract could not be said to be completed; and that though possession was delivered, the money contracted to be paid would remain a specific lien on the premises; and therefore ordered the contract to be carried into execution, and the purchase money to be paid by the executors of the purchaser, out of his personal estate, in a course of administration; and if they did not admit assets to account, and if the personal estate should not be sufficient, his Lordship directed the deficiency to be raised by sale or mortgage of the estate comprised in the contract, or a sufficient part of it; and on consideration, declared the defendant Smith, the heir at law of Smith, the vendor, an infant, to be an infant trustee, within the 7th of Queen Ann, entitled, "An act to enable infants to convey, &c.," and directed him to convey to [732] such persons as the Master should find entitled to have the conveyance; the will of the purchaser not having been proved and established against his heir at law.

Note. His Lordship would not direct the purchase money to be paid to the plaintiff as residuary legatee, but as the acting executor of his testator, liable to his debts and legacies.

PRICE *v.* SHAW.

1 August 1789. Lord Thurlow, C.

It is of course to except to a report, that an examination or deposition is impertinent, without previously taking objections, as the Master doth not deliver a draft of such reports.

At the third Seal, Mr. Solicitor General applied, supposing it necessary, that the Master might receive objections to warrant exceptions to his report, that an examination referred to him was impertinent. A doubt arising as to the mode of proceeding, the motion stood over; and the Lord Chancellor having signified his pleasure by Mr. Leake, that I should make known to him what was the course of proceeding, I submitted to his Lordship what occurred to me, of which the following is a copy:

If I am rightly informed, your Lordship seemed to think the Master's report, under such a reference, was final. With the greatest deference, I have ever understood that there is not any judgment, or opinion of a Master but may, if dissatisfactory, be corrected by one of the following modes.

Where a report is under an order of reference for the Master to enquire and state his opinion, whether an infant is a trustee or mortgagee within the Statute 7th of Queen Ann, to approve of a guardian, make an allowance for maintenance, and the like; exceptions do not lie to such reports, but the report is stated, and brought before the Court by petition; and the [733] Court will confirm, or vary it, according as it coincides in, or differs from the opinion of the Master.

When the Master by his report finds a fact, and his judgment is founded on evidence,

he delivers a draft of his report before he signs it, that the parties may take objections : without which, unless by special order, they are precluded from excepting.

But where the reference is to see, whether an answer, examination, or deposition is pertinent or impertinent, the Master's judgment is founded merely on his conception of the matter. These reports are not confirmed : he issues no draft to ground objections ; but the party takes exceptions to the report in the first instance.

Your Lordship seemed to think that exceptions do not lie to reports of the pertinence or impertinence of an examination or deposition.

In *Pinsent v. Pinsent*, 8th August 1747, 3 Atk. 557, Lord Hardwicke seems to go further back. There was a reference of depositions for impertinence : they were found to be so. Exceptions to the report. On argument, his Lordship did not quarrel with the exceptions, but doubted the propriety of the reference not being accompanied with scandal.

In *Phillips v. Muilman*, 6th November 1746, Lord Hardwicke referred to an affidavit for impertinence.

And the referring of depositions is not novel : for by an order in *Irish v. Rook*, dated the 27th of April 1727, the deposition of a witness was referred for impertinence. The Master, by his report, dated the 8th of December 1727, found it to be so. Exceptions were taken by the witness. Those exceptions were argued the 8th of August 1728, Reg. Lib. A. fol. 537, and al[734]-lowed. And, with submission, there seems to be great reason that reports under such a reference should be open to exceptions ; for a penalty attends the finding, that is to say, costs, the consequential order, which is of course, being to expunge, and to tax the costs of the reference, which are more or less, according to the length, and various parts of the examination, &c., referred, the pertinency or impertinency of which is contested.

On the 1st Aug. 1789, this matter was again brought on by petition, when his Lordship read the above in Court, said he was wrong in the opinion he had entertained, and that the petitioner had of course a right to except to the report.

JEFFERY v. CAMERON.

5 March 1791. Lord Thurlow, C.

Answer, though said to be false, must be taken to be true, until there be proof to the contrary.

On shewing cause for continuing an injunction which had been granted, the defendant's answer was stated, by which he denied some facts stated, and charged in the bill : It was said on behalf of the plaintiff, that the answer in that particular was not true. His Lordship said the answer must be taken to be true, until there was proof to the contrary ; but on paying the money into Court, the injunction was to be perpetual.

[735] MOTTEUX v. MACKRETH.

6 May 1790. Lord Thurlow, C.

The name of a plaintiff cannot be struck out of the bill, in order that he may be examined as a witness.

On the 5th of May, the preceding day, application was made for liberty to amend the bill by striking out one of the plaintiffs in order to make him a defendant, and to examine him as a witness. The Lord Chancellor having great doubts as to the propriety of the motion, ordered it to stand till this day for further information. It was accordingly submitted to his Lordship to be a rule well known and established, that after defendants have appeared, a bill cannot be amended by striking out a plaintiff, without the tacit or express consent of the defendant ; for which reason notice is required to be given of the motion, that the Court may hear whether the defendants assent, or oppose it : for when a bill is filed in the names of several, all are jointly and severally liable to costs, and the plaintiff intended to be struck out may be the only one of ability to answer costs. The case of *Titterton v. Osborn*, *supra*, 350, was submitted to his Lordship, and it was further urged, that the ground of the present application was very different : it was avowedly with a view to examine the said plaintiff to support the bill : without which it might probably be unfounded, and dismissed with costs : and therefore, he being liable to costs so long as he was a plaintiff, it could not be said he was not interested. His Lordship denied the motion.

[736] PENDLETON *v.* MACKRORY.

11 June 1790. Lord Thurlow, C.

The Court, after doubting, granted an order to appoint a guardian of the plaintiff, the infant, on filing the bill, and before the defendant had appeared.

On a motion the above day by Mr. Lloyd, on behalf of the plaintiff, to have a guardian assigned him, and for a receiver, his Lordship doubted the propriety of the application, as the defendants had not appeared; therefore notice could not be given of the motion. His Lordship, however, granted the motion as to the guardian, but directed me to think of it before the order was delivered.

In consequence of which I submitted to his Lordship, that the moment a bill is filed on behalf of an infant, such infant becomes a ward of, and under the care of the Court: and I further submitted, that if a guardian is not to be appointed until the defendants have appeared, such infant may be five or six months without having one to take care of his person, or see to his education: for should the defendants abscond to avoid being served with process to appear, or being served, should refuse to appear, the plaintiff will be under the necessity of pursuing the line prescribed by the statute of the 5th of Geo. 2, to render process effectual against persons who abscond, before he can bring the defendants into Court. Upon the above observations being laid before his Lordship, his Lordship directed the order to be delivered.

[737] LOWTHIAN *v.* HASSEL.

23 July 1790. Lord Thurlow, C.

Assets marshalled to let in simple contract creditors and legatees upon legal assets, *pro tanto* as the specialty creditors shall exhaust of equitable assets.

Ex parte HODGSON.

30 July 1790. Lord Thurlow, C.

An infant, the surviving life in a bishop's lease, not beneficially interested, held to be an infant trustee, within the stat. of the 7th of Queen Ann. *Vid. infra* [Dick.] 749.

Hodgson was entitled to an estate held under a Bishop's lease, determinable on the lives of A., B., and C. C. is the survivor; and he being an infant, application was made that he might surrender the lease under the statute of the 29th of Geo. 2, intituled, "An act to enable infants, lunaticks, or femes covert, to surrender a lease in order to obtain a new lease:" Or that he might surrender it under the Statute of the 7th of Queen Ann, intituled, "An act to enable infants who are seised or possessed of estates in fee, in trust, or by way of mortgage, to make conveyances of such estates, the infant not being beneficially interested, but his name only used in trust." His Lordship was clear the infant came within the statute of the 7th of Queen Ann. and ordered him to surrender the lease, in order that a new lease might be obtained.

[*Query.* If this be not going beyond the act; the act only putting the infant into the state of an adult, and not saying for what purpose he shall convey.—J. D.]

[738] ANGERSTEIN *v.* CLARK.

13 Nov. 1790.

The bill was by a bond creditor for an account of the assets of the testator, and to be paid a bond debt in which one Cobb was a surety with the testator. An objection was taken for want of parties, for that Cobb was not a party.

There were cited *Collins v. Griffith*, 2 P.Wms. 313; *Madocks v. Jackson*, 3 Atk. 406. *Lord Chancellor.*—If you sue on a joint and several bond, I have always understood it was necessary to bring all before the Court to prevent circuitry; but if the bill states, and the defendant admits the co-obligor to be insolvent, the objection seems to me to be removed: but that is not so in this case; therefore let the cause stand over, and amend.

SELLERS v. DAWSON.

7 Dec. 1790. Lord Thurlow, C. 2 Anstruther's Rep. 458, in not. S. C.

A plaintiff becomes a bankrupt: the bill cannot be dismissed for want of prosecution, should his assignees not think proper to file a bill in nature of a bill of revivor.

Mr. Abbot moved the above day to discharge, for irregularity, an order to dismiss a bill for want of prosecution: the plaintiff having been, at the time of the order, found to be, and declared a bankrupt: which his Lordship was about to grant: but Mr. Abbot informing his Lordship that the Court of Exchequer had granted such orders under such circumstances, and delivering some cases to his Lordship, he suspended making any order, and sent the cases to his Register, and desired to have his thoughts.

The following are the cases:

[739] *Branchall v. Cross*, Exchequer, Hil. 1790. Motion to dismiss a bill for want of prosecution, with costs, which was granted, unless cause. The cause shewn against it was, that the plaintiff was a bankrupt. After filing the bill, and before it was dismissible, the Court held it to be the rule that they did not give costs against a bankrupt plaintiff; but afterwards took a distinction, whether the bill was filed on an equitable right, which vested in the assignees, or was a mere frivolous bill, from which the assignees had no benefit. On a subsequent day Mr. Abbot shewed for cause, that he had looked into a bill, and found it was a suit to impeach the settlement of a partnership account, and for an injunction to stay an action on a promissory note for part of the pretended balance; that he also stated the bankrupt was never certificated, and that he relied on the precedent of *Tait v. Carwick*, in Exchequer, 27th June 1786. (This was an injunction cause.) The defendant moved and obtained the ordinary order to dismiss the bill for want of prosecution, unless cause. On the 2d July following, it was moved to make the rule absolute, which was enlarged until Mich. Term following, to give the party time to enquire whether the assignees of the plaintiff, who had been found a bankrupt, would revive the suit, (by which it is evident the Court considered the suit as abated). On the 14th of November 1786, cause was shewn as to so much of the order as directed the bill to be dismissed with costs; namely, that the plaintiff was a bankrupt, (and it might have been added, could not do any thing), and his assignees had abandoned the revival of the suit.

[740] On reading an affidavit, the rule was made absolute as to dismissing the bill, but without costs.

Mr. Johnson *contra*. This bill was filed only ten days before the plaintiff became bankrupt, and this is a case for shewing no favour to the plaintiff.

Mr. Baron Thompson was for dismissing the bill with costs generally, and without regard to the particular circumstances.

(Circumstances, I should think, are not to the purpose: for it is either within the rule of dismission, or it is not.)

The Chief Baron thought the circumstances were such as to entitle the plaintiff to favour: and on the general question, he also doubted the propriety of the above case of *Tait v. Carwick*: and thought on a future case occurring of the same nature, it would be worth consideration.

The bill was dismissed with costs.

Mr. Abbot also enclosed a note, that it seemed to have been the general principle as to bankrupts suing, or being sued, that they shall pay costs like other parties.

Nota. Mr. Mitford's manuscript, entitled Briefs, sect. 2, page 442-46. March 31, 1742.

The petition of Berry, in the matter of Berry, to be discharged from costs, and his contempt for non-payment of a sum of money ordered: the petition was dismissed by Lord Hardwicke. (*q. d.* Was it not for this reason that the costs were considered by his Lordship as part of the contemnor's punishment?)

See likewise *Smith v. Williamson, et c. contra*. In Mr. Mitford's manuscript briefs, sect. 2, page 448-46, in Exchequer, Mich. 1746: a bankrupt was made to [741] pay costs of suit brought against him before his bankruptcy.

It is to be presumed the plaintiff revived against the assignees, in order to proceed in the cause to a hearing; for could they proceed without reviving?

Vide Ex parte Sneap, March 4, 1782. Cook's Bankrupt Law, 2d edit. fol. 236, the same point.

The Court probably gave costs against the bankrupt that the plaintiff might be considered as a creditor for such costs on the bankrupt's estate.

Upon the above motion of Mr. Abbot, and the cases and notes from Mr. Mitford's manuscript briefs, the Register submitted to his Lordship, that he had ever understood it to be an established rule, that after a suit is abated by death, or otherwise, no step can be taken in it, until it be revived.

That the bankruptcy of a plaintiff abated a suit, could not be doubted. There were motions almost every Term by which defendants admitted it : for instance, an injunction being under seal cannot be dissolved but by order in open Court : and therefore when a suit was abated in which an injunction had issued, the injunction continued in force until the suit was revived, so that an application might be made to dissolve it : for which reason, when an injunction hath been obtained, and the plaintiff hath become a bankrupt, and his assignees neglect to revive, the motion is of course, "that the assignees may file a bill in nature of a bill of revivor, by a given day, or the injunction be dissolved."

If it were the practice to dismiss a bill so circumstanced, for want of prosecution, why not add it to the same motion, and do it under the same order ?

[742] What was the practice of the Court of Exchequer the Register could not take upon him to say. As to the practice of the Court to which he long had the honour to belong, he could speak ; that, to his recollection, he never met with or heard of such an instance, and was fully persuaded there was not one. The principle, he before observed, recurring, that when a suit was dead, no step could be taken in it until it was revived ; and is absurd to apply to dismiss what did not exist. And he submitted ; suppose a plaintiff, before he was found a bankrupt, had applied to the defendant's answer, notice must by the rules of the Court be given of the motion to dismiss : To whom ? To the plaintiff, who was dead in law ; or to his assignees, who were not in Court ? Should the plaintiff be thought the proper person to serve, and he should appear by Counsel, and say he was bankrupt, could the Court put terms upon him to go to commission ; could they say as much to his assignees, who are not in Court ? It is submitted, the Court would not. It is believed, and with a decree of certainty, there is not an instance of either : therefore, to punish a man with costs, for not doing what he cannot do, or for that which those that can will not do, is, as it was submitted, rather unreasonable. Besides, it is a known rule, that a party cannot revive for costs only, unless they be taxed, and thereby become a duty : and to make a man revive a suit merely that the Court may have it in its power to direct him to pay costs, is against all rule.

On the 18th of December 1790, Lord Thurlow referred the Register to an anonymous case, in 1 Atk. octavo edit. fol. 263, in which Lord Hardwicke is made to say, "Bankruptcy is no abatement."

[743] To which he answered his Lordship, he had looked into that case :

The title of it is : *Campion v. Tomkinson and Johnson*, 14th of March 1747. Upon the plaintiff's shewing exceptions for cause to continue the injunction which had been granted. The common order was made, to refer the exceptions, and the plaintiff to procure the report in four days.

On the 18th March, the answer was reported insufficient.

On the 27th April 1748, the plaintiff obtained an order to amend, and for the defendant to answer the amendment, and exceptions at the same time.

The defendant having put in a further answer on the 3d of November 1748, obtained an order to dissolve the injunction, unless cause.

On the 10th of November 1748, the date of the case in *Atkins*, the defendant applied to dissolve the injunction absolutely, and the plaintiff shewed his former exceptions for cause : when the defendant's second answer was referred, and the plaintiff was to procure the report in four days.

On the 14th November 1748, the answer was reported sufficient.

Upon looking into the Minute Book, the entry of the above orders and the said report, it doth not appear that the plaintiff was a bankrupt : neither is there the least note of what Mr. Atkins makes Lord Hardwicke to say, "that bankruptcy is no abatement." It being novel, I must confess I rather surprised me ; for if such were his Lordship's doctrine, and such the practice, it is wonderful there should have since

been such numberless applications that the assignees of a bankrupt [744] might revive in a given time, or the injunction be dissolved, for the purpose of giving the defendant an opportunity to apply to get rid of the injunction in form : from which it is evident, that until the suit be revived he cannot.

And it is to be observed, that all the applications and orders in the above anonymous case were entirely of course : so that there was no ground for Lord Hardwicke's saying what he is made to say.

At the first Seal after Christmas 1791, Mr. Abbot again renewed his motion, when Lord Thurlow said, he had fully considered the matter : that he was perfectly satisfied the order to dismiss the bill in the state it was (which the application went to discharge), was perfectly irregular : that the granting of the motion would, in effect, be giving existence to that which was a nullity : It could not be enforced ; and for that reason, and that only, he made no order.

[Not followed. *Boddy v. Kent*, 1816, 1 Mer. 361.]

ATTORNEY GENERAL *v.* EARL OF STAMFORD.

24 Jan. 1791.

Question, whether a peer who lived in the country, and was there at the time of being served with a letter missive and a subpoena to appear to the plaintiff's bill, both houses of parliament being at that time convened and assembled, should be considered to be in town. Lord Chancellor was of opinion he was to be considered as being in town, but the matter was compromised.

On the 19th of January 1791, Mr. Green then attending as the Register of the day, Mr. Solicitor General moved, that an order for a sequestration *nisi*, against the defendant for not answering the plaintiff's bill, he having been served with a subpoena, and the Lord Chancellor's letter missive, (both Houses of Parliament having met), might be discharged for irregularity, the defendant's usual residence being in the country, where he then was.

A doubt having arisen, and his Lordship having signified his pleasure by Mr. Green, that I should make known to his Lordship my thoughts ; I submitted to him the following observations :

[745] When both Houses of Parliament are assembled to dispatch the weighty concerns, &c., pursuant to his Majesty's proclamation for that purpose, it is to be presumed the Members of each House are in town, acting in discharge of their duty ; and with great deference, the Statute of the 24th of Geo. 2, chap. 24, seems to confirm that presumption, for by that act, after the Parliament is assembled, no proceeding could be had against any Lord in Parliament, &c., until fourteen days after the adjournment, prorogation, or dissolution of such Parliament : Upon this ground it is submitted, that being presumed to be in town, attending to the weighty concerns of the public, they could not attend to their private concerns ; and it is observable, his Majesty at the close of a Session, after apologising for keeping them so long assembled, and thanking them, concludes with recommending particularly to the Lords in Parliament, presuming all are present, to encourage in their respective counties, industry, good order, &c.

The 24th of January 1791, the motion was renewed : a case in Harrison's Chancery Practice, fol. 46, was cited. The Lord Chancellor, observed upon the above Statute of the 24th of Geo. 2, and said, that if the defendant would take the benefit of the privilege to which he was entitled under that Act, it must be in the full extent, which presumed he is in town attending his duty ; and his Lordship would, from what I heard drop from him, have denied the motion ; but it was compromised by the plaintiff's consenting the defendant should have a month's time to answer.

[746] *WEBB v. WEBB*.

4 March 1791. Lord Thurlow, C.

This was a petition of a party come of age, to have the funds, on which a legacy to him at twenty-one had been placed out, transferred to him ; the funds at the time the legacy became payable, being of greater value than the legacy, a question arose, whether he was entitled to more than barely his legacy ?

Green v. Pigot, in 1 Brown's Chan. Reports, 103, was cited. The Lord Chancellor seemed to be of opinion, that a sum of money paid into the Bank, to answer a contingent legacy, and then laid out in Bank annuities; and these annuities at the time the legacy became payable were of greater value; that as the legatee would have sustained the loss, had the funds fallen, he was entitled to the advantage. (But see the contrary, *Alcock v. Eames*, *supra*, [Dick.] 578, and *Starkie v. Smith*, *supra*, [Dick.] 520.)

DOCKER v. HORNER.

11 May 1791. Lord Thurlow, C.

Creditors or the legal representatives of such of them as were dead, were ordered to be paid the sum reported due to them out of the funds in Court, and the Accountant General directed to draw on the Bank for the same: He issued drafts under provincial administrations to pay such administrators: The Accountant General declining to sign such drafts, not thinking they authorised it, application was made that such drafts might be issued: it stood over for consideration, and on renewing the application, the Lord Chancellor was decidedly of opinion, such administrations did not warrant the payment.

Bill by creditors for payment of their debts out of the estates of Thomas [Daddy deceased, the testator: Upon hearing the cause, the necessary accounts were directed, and the debts directed to be paid out of the personal, and real estate: The Master made his report; and the funds to pay the money reported due to the creditors being insufficient, the Master was directed to apportion the same amongst the creditors, and what he [747] should so apportion, was to be paid to the creditors, or to the legal representatives of such of them as were dead; some of the creditors dying, provincial probates of their wills, or letters of administration were taken out: Under these provincial probates, or administrations, application was made to the Accountant General, to issue his drafts for payment of what was reported due to the deceased creditors; but the sums exceeding the limit he had gone to, he refused to issue his drafts, but under Prerogative administrations: Upon this Mr. Mansfield on the 24th of January 1791, moved on their behalf, that they might be paid the sums reported due to them, under such provincial administrations: that the Accountant General drew for sums to the extent of £30 under such administrations, and why stop there? That the money reported due, did not much exceed that sum; and the expence of taking out a prerogative administration, as the stamp duty was now so great, would exhaust half the money.

Lord Chancellor.—Had the money been in the hands of a third person, could they under such an administration have received it? Certainly not. Would their receipt be good? No. Suppose a Prerogative administration should be granted to another, could not he enforce payment? There could not be a doubt. And is this Court to give sanction to that which is not strictly legal? And his Lordship being told that not one of the public commissaries would permit transfers, or pay dividends, but under Prerogative administrations, he denied the motion; but two or three orders made on similar applications being produced, he said he would consider of it.

[748] On the 11th of May 1791, Mr. Mansfield renewed the application; which his Lordship refused, for his former reasons, with this further observation, that the smallness of the sum made no difference; that if it were right, and the Court were warranted in ordering payment of money under provincial administrations, it might order payment, be the sum ever so large; and therefore denied the motion.

ATTORNEY GENERAL at the relation of a lunatic, and the lunatic informant, and Plaintiff; and PANTHER, the committees of the lunatic, and the executors of her late husband, and who had possessed her property given for her separate use, under a deed executed in her lunacy, Defendants.

27 July 1791. Lord Thurlow, C.

Bill will lie by the Attorney General on behalf of a lunatic, against her committees, for an account of and to secure the lunatic's property.

It was at first doubted, but after a pause was held by the Court, that a bill might be brought by the Attorney General in behalf of a lunatic, against those possessing the lunatic's property, and those attempting to deprive him of it, for an account of, and

to secure such property for the lunatic ; and an issue was directed to try whether she was a lunatic at the time she executed the appointment, under which the executors of the husband claimed.

[For subsequent Proceedings, see S. C., 1792, 3 Bro. C. C. 441.]

[749] *Ex parte* SWANN.

21 July 1791. Lord Thurlow, C.

Master to enquire whether an infant was so within the Act of the 29th Geo. 2, and if he were, whether it was for his benefit to surrender old leases, and to take a new lease.

His Lordship having, on hearing the day preceding a petition under the Statute of 29th of Geo. 2, chap. 31, that an infant might surrender a bishop's lease in order to renew it, and to have the fine paid ; referred it to a Master to see upon what terms, the surrender and renewal should be made, and to state his opinion ; it was submitted the next day, whether the order made by his Lordship was not premature ; by the preamble of the act, it was clear the Legislature meant it should apply to such only as were beneficially interested ; the words (after taking notice that it was sometimes necessary to surrender old leases in order to renew), are, " but by reason of their being infant, lunatic, or feme covert, it could not be done to the manifest prejudice of them and their families," the act then goes on to enact.

The matter being brought on in a summary way, the Court will not take upon itself to determine what their interest is, but from the first, made the following order : Refer it to the Master to enquire and state, whether J. S. is an infant within the intent and meaning of the said Act of Parliament ; and if so, whether it will be for the benefit of the said J. S. to surrender the old lease, and to renew it.

Should the Master find the party comes within the act, the next order is to confirm the report, and to direct him to surrender, and to give directions concerning the fine.

[750] Such references it was submitted to his Lordship were necessary ; for should the infant be found not to be beneficially interested, but to be a mere naked trustee, this Court will consider him as coming within the Statute of 7th of Queen Ann. entitled,

" An Act to enable infant trustees, &c., to convey," and so his Lordship was decidedly of opinion in *Ex parte* Hodgson, 30th July 1790 (*supra* [Dick.] 737) : the petition was in the alternative, that the infant might surrender under the above Statute of the 29th of Geo. 2, or the Statute of the 7th of Queen Ann. His Lordship directed the latter.

The Lord Chancellor upon coming into Court this day (29 July 1791), directed the common order to issue.

SANDFORD v. PAUL.

13 Dec. 1791. Lord Thurlow, C.

A witness whose evidence had been rejected at the hearing under particular circumstances, examined again before the Master, after the decree, but the Master to settle the interrogatories.

At the hearing of the cause, the deposition of one of the witnesses, (who was a creditor of two partners bankrupts, under a separate as well as a joint commission, but who had executed and delivered a release of his debt only under the separate commission, upon being offered to be read, was objected to, and the objection allowed ; and the Court referred it to the Master, to make the inquiry, by the order directed, and the parties were to be examined.

In the course of the enquiry, the above witness was tendered to the Master, having since the hearing, executed, and delivered a complete release of his demand : this being objected to by the other side, it occasioned [751] the present application to the Court for the purpose ; which his Lordship ordered, without any terms, or restriction ; but before the Court rose, his Lordship directed me to look into the cases which had been cited, and to lay before him such as I knew of, with my thoughts.

In obedience to his Lordship's commands, the following was submitted to his Lordship :

The question before the Court is, whether a witness examined in chief, whose deposition was not admitted to be read at the hearing, and which consequently cannot be read before a Master, can be reexamined before the Master to the same matter ?

The plaintiff asserting it is of course, having obtained an order for the purpose ; the defendant insisting, that a witness after a publication, cannot be re-examined to matters to which he hath before been examined ; each side relying on the case of *Sawyer v. Bowyer*, 1 Brown's Chancery Reports, 388, which will be more fully mentioned in its course : It is not however, accurately reported in that book.

To form a true opinion of the question, it may not be improper, to see what hath been the habit of the Court, in ancient and modern times.

In *Keilwey*, 96, Mich. 22 H. 7th, 1512, it was agreed clearly in Chancery, that new proofs may be examined after publication, which are merely supplemental to former proofs, as to add the *causa scientiæ*.

Ibidem, 100, 23 Henry 7, 1513 : Exceptions to a deposition should be taken before publication, or [752] the time is lost ; the party shall not chuse whether he like the deposition, or not.

Langham v. Lawrence, 13 Car. 2, 1661, Hardres 180 : After trial at law directed in a former cause, the same plaintiff exhibited a new bill, to discover deeds ; demurrer, because it was to get new evidence after the first examination ; the demurrer was overruled, for it did not call for supplemental proof, or contradict any testimony on oath.

Randal v. Richford, Trin. 15 Car. 2, 1663, 1 Chan. Cases 25 : A witness having sworn that he was surprised, and had mistaken in his examination, on commission, a special commission issued to re-examine that witness ; but upon consultation with the Master of the Rolls, and the Six Clerks, it was suppressed as contrary to the course of the Court.

The City of London v. Earl of Dorset, 26 Car. 2, May 30, 1674, Chancery Cases, 228 : Upon a commission for charitable uses, a trial at law was directed, when a witness eighty years old, and unable to travel was discovered ; and notwithstanding the rule of publication, a commission was obtained to examine him.

Lord Keeper.—The rule of *non* examining after publication, hath been strict in this point, but the Court is to judge, and the examiners by commission are ministerial to the Court.

Inglet v. Inglet, Easter, 28 Car. 2, 1678, 2 Chancery Cases, 217 : Witnesses speaking uncertainly, on their first examination, shall not be re-examined. And Lord Hardwicke in *Cowslad v. Cornish*, 2 Ves. 270, says, if a witness be once examined, it might be dangerous to let him be examined again ; and the danger is, of drawing in a witness after it is known, what he hath already sworn to.

[753] In 2 Chancery Cases 79, Mich. 33 Car. 2, 1681 : The Master examined one witness three times, in a matter of account ; his depositions were suppressed.

Callow v. Mime, 2 Vern. 472, Mich. 1781 : An interested witness had been examined in the cause ; afterwards he released, and was re-examined : objection to reading his deposition, for that he was engaged by his first examination to abide by what he had sworn ; overruled.

Lord Thurlow upon this remarked, " it seems a better objection, that after seeing the first examination, the party might get him to amend his testimony."

Tendering a written deposition to a witness is good cause for suppressing it.

So where a witness delivers such a written deposition to the examiner.

And his Lordship further observed, that regularly no new witnesses are to be examined after the hearing : but the Court began to do it in special cases ; and afterwards on the Master's certificate only.

In *Spence v. Allen*, Trin. 4 Geo. 1, 1718, Gilbert 150, Prec. in Chancery, 493, depositions had been suppressed, because the interrogatories were leading, and publication passed : Upon looking into the interrogatories, the leading seemed to have been by inadvertency, and the evidence material to substantiate justice : Whereupon the Court ordered new interrogatories to be prepared by the Master : a precedent was produced for the same purpose, and the motion was that a new set of interrogatories might be prepared by the Master.

[754] And Lord Talbot in *Arundel v. Pitt*, said, the permitting of a witness to be re-examined whose deposition had been suppressed, depended upon circumstances.

And Lord Hardwicke in *Bromley v. Child*, 28th May 1747, said, that new interrogatories might be exhibited upon special circumstances, but not of course.

In *Browning v. Barton*, 28th July 1774, Lord Bathurst, after having consulted Sir Thomas Sewel, M. R., gave liberty to examine witnesses before the Master, who had

been examined previous to the hearing, but added, they were not to be examined to any matters to which before they had been examined; and the Master was to settle the interrogatories.)

Upon the above cases it was submitted, that it was clear the Court had leaned against the re-examination of witnesses, and that if such re-examination was granted, it was under pointed restrictions; and as to what was insisted, that the application was of course, it is submitted, that if the Court is not to exercise its discretion, why is the application required to be special, and to be upon notice? And that it is not of course, your Lordship, and your Lordship's predecessors have determined.

To the paper of which the above is a copy, Lord Thurlow added the case of *Dodds v. Billing*, Bunbury, 21; observing that a witness cannot be examined to the same matter to which he hath before been examined; and put this question: Suppose witnesses had been examined on commission, without order, and the deposition suppressed, the party ought not to have the advantage of seeing their evidence to form the re-examination?

[755] In *Practical Register*, 220, it is said, the interrogatories are to be signed by Counsel.

And so it is expressly ordered by rule of Court dated 29th of April 1687: This is confirmed, and directed to be observed by a subsequent order of Court, dated the 15th of July 1700, and entered in the *Register's Book*.

On the 13th of December 1791, Lord Thurlow sent for me, and delivered back to me the paper, which had been submitted to him, with his annotations, and directed me to deliver the order, prefaceing it, under the circumstances of the case; and adding that the Master should settle the interrogatories.

EDWARDS v. EDWARDS.

19 Jan. 1792. Lord Thurlow, C.

If after an injunction is dissolved, the plaintiff amends his bill and requires a further answer, and the defendant prays a *dedimus* to take his answer: the Court will consider it as dilatory, and will revive the injunction, but it must be upon notice, and a special application.

On the 16th of January 1792, Mr. Simeon moved upon notice, that an injunction which had been dissolved, might on the bill which had since been amended, be revived, upon the ground, that the defendant had craved a commission to take his answer. It was opposed by Mr. Richards for the defendant, who insisted that the amended bill was a mere repetition of the original, and that it was fully answered by his answer to the original bill: A doubt arising in regard to the practice, it was ordered to stand over to this day, and the Register was to lay his thoughts before his Lordship in the mean time.

What follows was submitted to his Lordship:

The order granting an injunction, runs, "until the defendant shall fully answer 'the plaintiff's bill, &c.'"

[756] If the defendant hath not answered, or having answered, his answer is reported insufficient, or on exceptions, he submits to answer, and the plaintiff amends his bill, it is one record, and the defendant must answer both: this is manifest by an order which is almost daily, "for liberty to amend, and that the defendant may answer the 'amendments, and exceptions at the same time.'"

Should the plaintiff amend his bill, after the answer is filed, the injunction is of course gone: for by the amendment he admits the answer to be full, and he cannot except; the injunction may likewise be dissolved upon the merits.

This however doth not preclude a plaintiff from applying to revive the injunction, on amending his bill.

Whether the application need be special, it is humbly submitted, depends upon circumstances.

The bill being amended and an answer required, it is not for a defendant to say, that the bill is impertinent, or that it is a mere repetition of the original bill, (if it be, he may refer it for impertinence), nor shall he say that his answer to the original bill, is a full answer to the amended bill; he must answer, and it is for the Court to determine, whether it be sufficient: if it be, the application to revive the injunction, must,

it is submitted, be special, and upon the merits, and if granted, will be until the hearing of the cause, or further order.

But if the defendant will be in contempt for want of his answer, or will pray time to answer, the Court will not let him derive benefit from his dilatoriness, [757] but will, it is submitted, revive the injunction, on an application of course, and by the order granting it, it will be until the defendant shall fully answer the plaintiff's bill, and this Court make other order to the contrary : And so it was laid down by Lord Hardwicke in *Bagster v. Walker*, 14th March 1746 (*supra*, [Dick.] 109) : An injunction had been dissolved on the merits ; the plaintiff amended his bill, and the defendant having prayed time to answer, the plaintiff gave notice, and moved specially, to revive the injunction : After hearing Counsel on both sides, his Lordship said, " that until the equity of the bill was denied, it must be taken as granted, that the plaintiff hath equity ; that had the defendant put in his answer, the Court could have decided on the merits ; that it was owing to the defendant's own laches that it was not : that a plaintiff was not by designed laches to be prevented from reviving the injunction ; that the giving of notice of the application to revive under such circumstances was not necessary : it was of course ; that the injunction when revived, would be as the original was, only until the defendant should fully answer ; and when he had answered, he might apply to dissolve it."

Lord Hardwicke in *Travers v. Lord Stafford*, 2 Ves. 19, which appears to be a very complex case, and to turn upon circumstances, is made to express himself very differently from what he said in the preceding case, that it was irregular to apply as of course to revive an injunction, on the defendant's applying for time to answer the amended bill : which, it is submitted, strongly implies, that his idea was, that a special application on notice, might be made for the purpose.

[758] The application was renewed this day, the 19th of January 1792, when Mr. Richards for the defendant cited the above case of *Travers v. Lord Stafford*, and insisted that the plaintiff, to ground such an application, ought to make an affidavit of his case ; and cited also an anonymous case in 3 *Atkins* 694, in which Lord Hardwicke is made to lay it down as a rule settled, that until an answer to an amended bill is put in, a plaintiff cannot apply to revive an injunction : that it cannot be upon a defendant's praying a *dedimus*.

So that a defendant knowing this, may obtain thirteen weeks to answer, then put in any answer, which being insufficient, he may get ten weeks more, and after that, run through all the process of contempt, and by that means obtain the full effect of his action at law : If such were the rule, it certainly would be against common sense, and common justice : but his Lordship seemed to be clear, and adopted the idea of Lord Hardwicke in the case before stated of *Bagster v. Walker*, that a defendant should not derive an advantage from his own laches, and considered his praying a *dedimus* as a dilatory ; and therefore revived the injunction until answer and further order : he held that notice was proper to be given of such a motion, but that an affidavit by the plaintiff of his case was not necessary.

[759] PYE v. DAUBUZ.

24 May 1792.

A man borrows money and pledges the title deed of his estate, and promises to execute a mortgage, but doth not, and becomes a bankrupt, his assignees were ordered to pay what due, and if they did not, to convey the estate to the plaintiff in fee.

The question in this cause arose on the following case : The bankrupt before he became such, borrowed money of the plaintiff, and lodged the title deeds of his estate in the plaintiff's hands, and promised to execute a mortgage, but did not, and became a bankrupt, and his estate and effects being duly assigned to his assignees, the plaintiff filed his bill to be paid the money due to him on his pledge, and if not, that they might convey the estate to him, and be foreclosed ; and stated, that not having the legal estate, he could not bring an ejectment.

Mr. Solicitor General cited *Beck on demise of Hawkins v. Welch*, Wilson, 276.

Lord Chancellor.—An agreement to make a mortgage will bind as if it were actually made : but I will consider of it.

And on the 24th of May 1792, he directed an account of what was due to the plaintiff for principal, interest, and costs; and the defendants the assignees to pay, and if they did not they were to convey the estate to the plaintiff, and to be foreclosed.

THOMAS ELLIS and SUSANNA his wife, Plaintiffs: MICHAEL ATKINSON and another, Defendants.

24 May 1792. Lord Thurlow, C.

The question was, whether a feme covert having a power of appointing property vested in trustees by her marriage settlement, and to which the baron was a party, must appoint from time to time, or might assign her whole interest? held she might.

On the marriage of the plaintiffs, £2000 a moiety of £4000 and a mortgage for securing such moiety and the interest, were by indentures of settlement, [760] dated the 7th and 8th of February 1786, assigned to, and vested in the defendants in trust, to pay the interest to arise from time to time on the said £2000 to such person, and for such purposes, as the plaintiff the wife should by writing under her hand, attested as thereby required, appoint, to the intent the same might be for her sole and separate use, notwithstanding her coverture, and her receipt to be a discharge; if she survived her husband, the same was to be immediately paid to her; if her husband survived, the same was to go immediately upon her death, as she by deed or will, executed and attested as prescribed, should appoint.

The plaintiff Susanna by deed poll, dated the first day of December 1788, executed and attested as required, appointed, and ordered the said £2000 and interest to be paid to the plaintiff her husband.

Under that deed poll, the bill is filed to have the said £2000 and interest paid according to the said appointment.

Upon this a question arose, and was strongly argued, whether a feme covert having a power of appointing the interest of her separate estate, settled for her separate use, to protect her against the debts of her husband, and to which settlement the husband was a party, and had bound himself to the terms, and in consideration of which, he had received £2000 part of her portion, must appoint from time to time; or could by deed assign the whole of her interest.

The cases cited were, *Peacock v. Monk*, 2 Ves. 190; *Norton v. Turvil*, 2 P. Wms. 144; *Grigby v. Cox*, 1 Ves. 517; *Thayer v. Gould*, cited in the preceding case; *Hulme v. Tenant*, 1 Brown's Chancery Reports, 16; *Pearson v. [761] Brereton*, 3 Atk. 71; *Clarke v. Pister*, 25th March 1778 (see 2 Ves. junr. 494).

Lord Thurlow was much pressed with the argument that by the settlement, the husband was to have, and had received £2000, part of his wife's fortune; the wife was to have the other £2000 for her separate use, and to guard or protect her against any thing that might befall her husband; and by executing the settlement, and receiving the £2000 under it, the consideration for his executing it, he had bound himself to the terms.

The cause was in hearing, the 23d of May, and 26th and 27th of June 1789, and stood over for consideration: And after consideration, his Lordship thought as the £2000 was in the absolute power of the wife, and no appointment intended for children, or other purposes; and as it was evidently her pleasure to give it to her husband, he did not see how he could prevent her. His Lordship therefore, on the 24th of May 1792, decreed the defendants, the trustees, to assign the £2000 to the plaintiff the husband, after retaining their costs.

[Mews' Dig. Husband & Wife, I. 10. b. iii. b. β. *Not followed*, *Socket v. Wray*, 1794, 4 Bro. C. C. 483.]

DAVIDSON v. RUSSEL.

24 May 1792.

A deed obtained by fraud is bad *in toto*, though innocent persons are interested under it.

This cause had stood over upon a doubt, whether a deed could be set aside in part for fraud, and the rest established: Lord Thurlow was decidedly of opinion it could

not, and in his note directing the contract to be set aside, and the order drawn accordingly, said there could be no hesitation.

This cause reheard, and affirmed by Lord Loughborough, C., Hilary, 1794.

[762] In the matter of BROMFIELD, a lunatic.

Hilary or Easter Term, 1792. Lord Thurlow, C. 1 Ves. junr. 453, S. C.,
3 Bro. C. C. 510, S. C.

Where timber is cut down from off a lunatic's estate, because in a perishing state, and for the benefit of the rest, under a reference and order of the Court; Lord Thurlow seemed to think upon a question, between the heir and personal representative, that under such circumstances, the money raised was personalty; but recommended a bill to have a solemn judgment.

There being a considerable quantity of timber on the estate of the lunatic, in a perishing state, and proper to be cut down, the same was cut down and sold, under an order of the Lord Chancellor, and the money paid into the Bank of England, with the privity of the Accountant General of the Court of Chancery, and placed to the credit of the said matter, and to the account of the said lunatic.

The lunatic afterwards dying, the heir at law applied by petition to have the money so raised by sale of the timber paid to him, being still to be considered, as it was argued by his Counsel, as part of the real estate of the said lunatic, and descended with the other estates to the petitioner, as his heir at law.

On behalf of the next of kin, Mr. Solicitor General took this distinction, that as it was cut down under order of the Court, it was severed from the estate, and became the personal property of the lunatic. But suppose the timber on a lunatic's estate was not in a perishing state, and the annual rents of the estate not sufficient to support him comfortably, can it be imagined the Court would let a lunatic live without sufficient accommodations, when a fund could be raised from the timber on it to procure them for him? It can hardly be doubted, but that the Court would take such a step.

In answer to which, Mr. Mitford, of Counsel for the heir at law, observed: That supposing a lunatic so circumstanced as was put by the Solicitor General, it was to be presumed, the Court would, as it ought, do every thing that would tend to the immediate con-[763]-venience and comfort of the lunatic: But could it go further, would it do what the lunatic could not, make a will for him and dispose of his property? And yet, the taking of any step to alter the nature of his property, so as to make it go contrary to what it otherwise would, would in effect be doing what he could not do, make a will. Several cases were cited.

It stood over for two or three days, and in the interim, I laid before his Lordship the two preceding cases of *Audley v. Audley* (2 Vern. 192, and *supra*, [Dick.] 16), and *Gibson v. Scudamore* (2 Eq. Ca. Abr. 773, and *supra*, [Dick.] 45); and likewise the judgment of Sir Thomas Clarke, M. R., in *Tullet v. Tullet* (Ambl. 370, and *supra*, [Dick.] 322); in which case, the mother, the testamentary guardian of an infant, cut down and sold timber from off his estate; upon a bill filed by the heir at law, his Honour declared the money was to be considered as real estate, and belonging to the heir at law. And I likewise submitted, that the former decisions were upon bills filed by the purpose, on which the matters, and upon proper evidence, might be entered into, and the order made appealed. Upon the matter coming on again, the Lord Chancellor was of opinion, that the timber being cut down by order of the Court, and for the convenience of the lunatic, it was severed, and became his personal property, and dismissed the petition; but at the same time recommended it to the petitioner to bring the matter before the Court by bill, when it would be solemnly determined.

(*Qu.* Though the Court will, for the immediate convenience and comfort of a lunatic, order timber to be cut down and sold to raise a fund for that purpose, and that only; there does not seem to be any reason, when that purpose is answered, that the next of kin should be benefited by such a step, at the expence of the heir at law, who is always favoured.—J. D.)

[764] ELCOCK v. GLEGG.

5 July 1792.

An infant having a day to shew cause against a decree of foreclosure, after he attained twenty-one; having attained, and having left the kingdom before he was served to avoid his creditors. Application to serve his Clerk in Court with the subpoena; but Lord Thurlow thought it must be personal service; but being again moved, upon a strong affidavit, it was granted.

A common decree of foreclosure had been pronounced against the defendant, then an infant, with the usual proviso, that the decree was to be binding, unless the infant, upon attaining the age of twenty-one years, being served with a subpoena to shew cause against the same, should within six months after he attained such age, shew good cause to the contrary; the only cause an infant can shew, as was laid down by Lord Talbot, in *Mallock v. Galton*, 3 P. Wms. 352 (*supra*, [Dick.] 65), is error. The infant attained his age of twenty-one years in November last, and having left the kingdom, as it was supposed, never to return, before he was served with a subpoena to shew cause against the decree; Mr. Stanley apprised me of his intention to move that service of such subpoena on his Clerk in Court, should be good service. The application being quite novel, I made Lord Thurlow acquainted with it, and submitted to him, as he desired, my thoughts as follow:

The infant, though foreclosed, unless the decree were made absolute, was not bound; it was always open to the cause he could shew, and the plaintiff could not make a title; and the late infant having left the kingdom, so that he could not be served personally with a subpoena to shew cause against it, and having no place of residence whereto to leave the subpoena, led the plaintiff to make the application. By Lord Clarendon's rules, under title Subpoena, every subpoena to answer or revive, review, rejoin, or testify, is to be served personally, or left at the defendant's dwelling-house or place of residence with one [765] of the family. But although such be the rule, yet the Court hath been in the habit (upon a full affidavit that the defendant absconds to avoid being served), to allow service on the defendant's Clerk in Court, of a subpoena to hear judgment, to be good service; it is therefore to be presumed, if the Court will allow such service of a subpoena to hear the judgment, it will allow the same service to effectuate the judgment. On the 3d of March 1792, Mr. Stanley for the plaintiff, moved as above; but Lord Thurlow thought the service of the subpoena must be personal, or that it should be fully proved that he had left the kingdom, or had absconded to avoid the service. An affidavit having been made, that the defendant was greatly indebted to divers persons, and that he had declared it was his intention to leave the kingdom, to avoid his creditors, on Mr. Stanley's renewing the application this day, 5th July 1792, the Lords Commissioners, without the least hesitation, granted the motion.

SQUIRREL v. SQUIRREL.

16 Jan. 1792. Lord Thurlow, C.

This Court will not make a *prochein amy* in indigent circumstances give security to answer costs

At the fourth Seal before last Christmas, it was moved by Mr. Abbot, that a *prochein amy* might give security to answer costs; not for that he had since filing the bill left the kingdom, to reside out of the jurisdiction of the Court; but for that he was in indigent circumstances, and the defendant might lose his costs, should costs be awarded him. The Lord Chancellor being struck with the novelty of the application, ordered it to stand over, and to be renewed this day, [766] and wished me to let him know my thoughts, and if I recollected an instance of such an application: The following thoughts were submitted to his Lordship:

To lay it down as a principle, that no one in indigent or narrow circumstances, unless he can qualify himself to sue as a pauper, by swearing he is not worth five pounds, the matter in question excepted, shall be permitted to sue for any claim he may have, until he give security to answer costs (which, being a poor person, he may not be able to procure), would in effect be putting a negative upon his claim unheard. Suppose

an infant, three or four years of age, whose parents and relations are in low circumstances verging on indigence, becomes entitled to real and personal property, which is withheld from him, and the person withholding it is committing waste, by cutting down timber, &c., and a bill should be thought advisable for an account, and for an injunction; if he is to stay until he attain twenty-one, before he is relieved, because no one of property will adopt his cause; and his father, who is the most proper person to be his *prochein amy*, by reason of his circumstances cannot be so, without giving security to answer costs, which he is not able to procure, the estate may in the interim be ruined, and the infant's property wasted: Were this to be the rule, infants, who cannot sue as paupers, would be in a worse situation than real paupers. This Court will not suffer a defendant to be harassed by two bills for the same purpose; so likewise, if two bills are filed on the behalf of and in the name of an infant, the Court will stop that suit, which upon reference shall be found least for his benefit to prosecute: but I do not believe there is an [767] instance of a reference to see if a bill is proper to be filed on behalf of an infant, to secure his property, and for the Master to consider who is a proper person to be his *prochein amy*. Any person, as it is said in the case of *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 102, and so it is generally understood, may file a bill in the name of an infant for an account, &c., but he does it at his peril; and as to what was said (as I am informed) by the gentleman who made the application, that it was analogous to one that is almost daily made, for a plaintiff to give security to answer costs, it is, with submission, not in the least so: The order that directs security to be given, states the plaintiff to live out of the jurisdiction of the Court, consequently the Court cannot enforce a duty; but in the case before your Lordship, it is not suggested the *prochein amy* is out of the reach of the process of the Court, therefore the defendant hath a double remedy; he may attach and hold his person, and sequester what property he may possess; the former to answer the contempt, the latter *ad satisfaciendum*. The motion was renewed the 16th of January 1792. His Lordship adopted the above reasons, and denied the motion.

Ex parte WALLUP, an Infant.

July 1792. Lords Commissioners Eyre and Ashhurst.

A writ of *de ventre inspiciendo*, on the application of an *hæres factus*.

The curator was ordered to make out a writ *de ventre inspiciendo*, directed to the sheriff of any county (it being apprehended the woman would change her place of residence) to whom the plaintiff should apply; but it was to remain in the office twenty-one days, and [768] not to be delivered if she in a given time signed the Register's book, consenting that two midwives, to be named by the Earl of Portsmouth, the petitioner's father, should examine her, and actually permitted them to examine her. The Lords Commissioners at first doubted whether such a writ had issued on the application of any other than a *hæres natus*, the petitioner being a *hæres factus*.

ANDREE v. —.

17 July 1792.

Liberty given, after replication, to amend bill, without withdrawing replication, by changing one of the defendants, who was the administrator, which was, in effect, adding a party.

At the third Seal after Trinity Term, Mr. Richards moved, that the plaintiff might be at liberty to amend his bill without withdrawing the replication, on notice. (He had before moved it as of course, and obtained an order; but the circumstances not being stated, and it being novel, the Register declined to issue it.) The case he now stated was, that one of the defendants was the administrator of J. S. but as he had not been brought before the Court in that light, there would be a manifest want of parties when the cause came on to be heard. The Lord Chancellor said, had the cause been brought on to hearing, it would have been ordered to stand over, with liberty for the plaintiff to amend by adding parties. Replications in such instances are not ordered to be withdrawn; and therefore he saw no reason why the same order could not now be made, and the parties saved that expence; and therefore granted the motion.

[769] SMITH v. KEMPSON.

29 Nov. 1790. Lord Thurlow, C.

Injunction granted to stay a legatee from proceeding in the Spiritual Court for a legacy, until the hearing of the cause.

Bill by one of the executors, against a legatee and the other executor, for an account of, and to have the assets administered in payment of debts and legacies, and for an injunction to stay the legatee from proceeding in the Ecclesiastical Court for his legacy : On application for these purposes the 25th of November 1790, two doubts were raised ; first as to the propriety of the motion, on the ground there was not an instance of such an application ; but on being shewn the case of *Stonehouse v. Stonehouse*, by Lord Hardwicke, 19 Feb. 1745, *supra*, 98, his Lordship granted an injunction : But it being questioned, whether this Court had ever granted such an injunction, until after the hearing, his Lordship directed me to withhold the order ; having laid before him the order in *Stonehouse v. Stonehouse*, which runs, " Let an injunction be granted to stay " the defendant from proceeding in the Court of Arches for his legacy, until the hearing " of the cause, which the plaintiff is to speed," his Lordship directed me to deliver a similar order.

Ex parte SALTER.

17 Dec. 1791. Lord Thurlow, C. 3 Bro. C. C. 500, S. C.

An order having been made on the 4th of the above month, to approve of a person to be appointed guardian of an infant, and to have an allowance settled for his maintenance : there being no cause in Court, I paused to deliver it, and being apprised an application was intended the above day by Mr. Abbot, [770] that the order might be delivered, I wrote to Lord Thurlow, on the 24th of November 1791, as follows :

The order is on an *ex parte* petition of George Elliot Salter an infant. The petition states, that Elizabeth Todd spinster, by will, dated 18th of February 1780, devised certain freehold, copyhold, and leasehold estates to the petitioner absolutely (said to be the heir at law, though not so stated), if so, fraudulently against creditors ; and also bequeathed to the petitioner an Exchequer annuity of £10 : It states further, that the testatrix died the 14th of October 1790 ; that the petitioner is of the age of seven years, and is desirous to have a proper guardian, and an allowance for his maintenance, avowedly, as it is admitted, that the mother who is intended to be proposed for guardian, may have a comfortable subsistence ; and prays a guardian, maintenance, and a receiver of the estates, and also of the annuity ; and that he may out of the rents and profits, and annuity, pay the maintenance that shall be allowed. The receiver, and costs which were prayed at the Bar your Lordship negatived : The petition, so far as it went to the approving of guardian, and maintenance, your Lordship granted ; the first readily, the later seemingly with doubt, although two instances were mentioned, the first by Sir Joseph Jekyl, M. R., the other by Lord Hardwicke confirming it ; which was thought at the time by some of the first gentlemen at the Bar, as it since hath been, to have been more in compliment to Sir Joseph Jekyl, than his own opinion ; and it is certainly true, as Mr. Abbot stated, that there have since been many like orders ; but having been informed, that Lord Kenyon when Master of the Rolls, had rejected several similar applications, upon the ground, [771] that there not being any suit, the Court was not in possession of the property, and therefore had no controul over it : That where an infant had a testamentary guardian of his person and estate, such guardian wanted not the authority of the Court : That maintenance was in his discretion, and that the granting of maintenance would be acting blindfold, and might give sanction to a fraud against creditors, by misapplying that, which they had a primary right to, as their debts might absorb the whole of the property : And Sir Pepper Arden the present Master of the Rolls, following Lord Kenyon's opinion, or by his advice, having as Mr. Dickens hath been informed in several instances of late refused to allow maintenance, until there was a cause in Court, that he might know on what ground he acted, Mr. Dickens thought it his duty to submit the same to your Lordship : Besides which in the present case, the application is to have the maintenance paid out of real estates devised ; whereas even should there be a cause, and should the will, if not admitted, be not proved *per testes*, the Court will dismiss the bill, or at least not make any decree on it, so far it prays any thing respecting the real estate : And as where

estates descend, and on a bill by creditors, the parol may demur, the Court hath of late been in the habit of appointing a receiver, with directions to pay his balances into Court, not to the account of the infant, but to the credit of the cause, subject to further order; and as in the case where a bill is brought to secure a legacy, will not apportion a fund to answer it, until it be seen the debts are paid (according to the common language of the decree, which directs them to be first paid) and the fund is [772] clear; it is rather singular, that the Court should do it in an *ex parte* matter, without knowing whether there be any thing to which the infant is intitled: It may be said, the case of an infant is pitiable, be it so; but pity is not to take place of justice.

For the above reasons, Mr. Dickens hath deferred the delivery of the order, and being actuated by what he conceived to be his duty, he humbly hopes, he shall not be thought, by your Lordship, reprehensible.

On the 24th of November, it was again mentioned by Mr. Abbot, when the Lord Chancellor still expressing his doubts, he ordered it to stand over.

On the 17th of December 1794, it was again mentioned by Mr. Abbot, and he stated several precedents.* The Lord Chancellor said, although he could not bring his mind to coincide with them in general, as he hath since expressed himself to Lord Loughborough; he was borne down by their authority: And as a particular instance, he put this case: Suppose an infant appears to be intitled to a specific fund, that is, where an infant is intitled under a settlement to an estate, or a portion, which is certain, and not subject to charges and debts (which was in effect saying, he did not approve of a general application), it would be hard to oblige him to have a bill filed in his behalf, in order to obtain an allowance for maintenance: His Lordship therefore ordered the Master to enquire whether any and what allowance ought to be made for the maintenance of the petitioner, and out of what fund.

Ex parte Duke of Newcastle, 1793, Lord Loughborough, C. A similar application, to refer it to the Master to consider of a proper allowance for the Duke who was an infant: Submitting again to Lord Lough-[773]borough, my doubts as to the propriety of the application and my former reasons, his Lordship said, that he had conversed with Lord Thurlow, who said it was true, that he had confirmed a report, under such an order of reference, in *ex parte* Salter, being borne down with precedents, but that he was still dissatisfied, and would not now make the order; and upon the parties undertaking to file a bill, to bring the infant's affairs into Court, Lord Loughborough granted a reference to the Master, and afterwards confirmed the report, allowing £4000, but refused to direct payment of the allowance, until a bill was filed: a bill being afterwards filed, and the cause brought on to hearing, his Lordship after directing the necessary accounts, directed the allowance so made as aforesaid, to be paid.

And in *ex parte* —, Trin. 1790, a similar application was made to Sir Pepper Arden, M. R. His Honour referred it to the Master, to consider of an allowance for maintenance: The Master made his report, and on application to confirm it, his Honour directed the allowance to be paid for a limited time, that a bill might be filed, and a decree obtained in the mean time.

KINASTON v. MILLER.

[11, 15 Nov. 1762.]

This cause was heard by Sir Thomas Clarke, M. R., the 11th and 15th of Nov. 1762: Judgment given 22d Dec. 1762, entered Reg. Lib. A. fol. 214. Mr. Perrot and Mr. Altham for the plaintiff; Mr. Sewel and Mr. De Grey for the defendants: The plaintiff by his bill stated, he was Rector impropriate of the pa-[774]-rish of St. Botolph Aldgate, in the City of London, and as such was under the decree in the 37th of Hen. 8, confirmed in Parliament, entitled to the tithes, duties, and profits, or the rates or composition for the same, due and payable for the several houses, warehouses, &c., in the occupation of the defendant; and by the bill, prayed an account, and payment of such tithes, and that in confirmation of such his right, on a bill filed by him in 1740, an issue was directed, to try whether the premises on which the plaintiff claimed tithes were in London, which being found, on hearing the cause on the equity reserved, the Court declared the plaintiff as impropriator of the said parish was entitled to tithes

* See 3 Brown's Chan. Rep. 500 for the cases, but it is a bad report of the principal case.—J. D.

of such part of the said parish, as was situate in London, or the liberty thereof, according to the Statute of the 37th of Hen. 8. and it was decreed accordingly : that some of the defendants having died, the plaintiff prayed, that such of the defendants as were in the occupation of the said houses, &c., might account.

The defendants by their answer disputed the right, insisting that the land on which the houses were erected, was formerly, at the dissolution of the monasteries by the Act of the 31st of Hen. 8. parcel of the Abbey of Grace, which was of the Cistercian order, and at the time of the dissolution, was in the hands and possession of the said Abbey, exempt from tithes, and so had continued for near two hundred years : but that if the defendants were subject to tithes for the said houses, they submitted, whether as the plaintiff claimed under the decree in the bill, his suit should not have been instituted conformably to the said decree, and brought before the Mayor of London.

[775] On the 22d December 1762, his Honour gave judgment, and was clearly of opinion, that this Court had cognisance of such suit : and decreed the defendants to account for, and pay what should be found due with costs.

Minor Canons of St. Paul's *v.* Crespigny in 1794, before Lord Loughborough, C. A like claim under the decree of the 37th of Hen. 8. and the jurisdiction of this Court disputed : upon laying the preceding case before his Lordship, he was satisfied as to the jurisdiction of the Court, and made a decree.

— *v.* —
28 Nov. 1791.

Affidavit to ground an order for a plaintiff to give security to answer costs, when it doth not appear by the bill he lives abroad out of the jurisdiction of the Court, if he hath left the kingdom since filing the bill, must go on and say, to settle abroad.

On a special application, that the plaintiff who had gone abroad since filing the bill, might give security to answer costs, but the affidavit on which it was founded not going on to swear, he had left the kingdom to settle abroad : his Lordship doubted, and by Mr. Green the Register, who then attended, directed me to acquaint his Lordship what I conceived to be the course on that head : Upon which I wrote him as follows : That upon my coming into the office, which was in the year 1737, a list of applications, such as are of course, with a book of the forms of orders on such applications (and which corresponds with a book of precedents, which belonged to a clerk in the last century), was put into my hands to copy : among which is one for a plaintiff to give security to answer costs : It runs thus :

[776] " Upon motion, &c., it was alleged, it appears by the plaintiff's bill that he " lives at _____ out of the jurisdiction of this Court, and therefore it was prayed " that the plaintiff may give security to answer costs (in the usual way), which is " ordered accordingly."

So likewise if a plaintiff, after filing a bill, leave the kingdom for the purpose of settling and do actually take up his residence in foreign parts, it is a ground in any stage of the cause for a like order : but that it was never understood that a party's going to Spa, or Lisbon for his health, to Holland, &c., upon business, or engaging himself with a sailing party to see the Rock of Gibraltar, &c., was that kind of living abroad, that would warrant such an application. On renewing the application this 28th of Nov. 1791, the Lord Chancellor was decidedly of opinion there was not sufficient ground for the order : but the plaintiff having made an affidavit upon another occasion in another Court, that he was gone to reside abroad, which was intended to be brought forward : he therefore by his Counsel consented, and by such consent it was ordered, that the plaintiff should give security to bear costs.

ANDERSON *v.* LEWIS, *et e contra.*

23 Jan. 1792. Lord Thurlow, C. 3 Bro. C. C. 429, S. C.

Application to serve the Clerk in Court, for plaintiffs in the original cause who were defendants in the cross cause, with a subpoena to appear to and answer the cross bill, refused ; as being contrary to all rule.

Mr. Graham moved on behalf of the plaintiffs in the cross-cause, that service of a subpoena to appear and answer on the Clerk in Court for the [777] plaintiffs in the

original cause (who were defendants in the cross-cause), might be good service on them, not for that all of them could not be found, but for that they were numerous, some of them insolvent, some in Scotland, and others Peers, who would be to be served with the Lord Chancellor's letter missive, as it would save much time and trouble. The Lord Chancellor, without hearing Counsel against the motion, said it was contrary to rule: *non constat* their Clerk in Court as plaintiffs, would be such as defendants; each might chuse to appear and answer separately, by different Clerks in Court: and that were he to make such an order, he could not compel the Clerk in Court to appear for them: and were he to appear, process of contempt could not be carried on against the defendants, and therefore he denied the motion: And his Lordship said, he knew but one instance in which this Court permitted such service, and that was, service on an attorney for a plaintiff at law, and the plaintiff was abroad, or could not be found to be served with a subpoena: and such service was merely to ground an application for an injunction, and no farther: and as improper use had been made of such permission, it having frequently happened that a defendant at law after a verdict against him, having learnt that the plaintiff at law was gone to the East Indies, or some parts beyond the seas, and that it would be a considerable time before he could return and answer, so as to get rid of the injunction, filed a bill merely for delay, without the least equity, this Court having adopted the practice of the Court of Exchequer, requires, when a defendant at law [778] having filed a bill in this Court against a plaintiff at law for an injunction, and applies to serve the attorney at law with a subpoena to appear and answer, that such application shall be accompanied by an affidavit of the plaintiff's case, and the equity he sets up under it, that the Court may see whether the plaintiff hath any equity.

— v. —

25 April 1792. Lord Thurlow, C.

The Court will not order a plaintiff to produce a deed so stated in his bill, at the instance of a defendant before hearing: he must file a cross bill for the purpose.

Bill by an executor for the direction of the Court: he states by his bill he hath several balances in his hands of different stocks, cash, &c., and submits to account.

Application by Mr. Stratford for the defendant the above day, that the plaintiff might transfer the funds, and pay the cash in his hands to the account of the Accountant General of this Court, on the credit of the cause generally: no one appearing for the plaintiff, an affidavit of service was read.

Lord Chancellor.—Did you ever know an instance of a defendant's applying against a plaintiff, even to produce deeds? There cannot be any; it hath been denied. If you want it, you must file a cross bill for the purpose. Take nothing by the motion.

[See *Brown v. Newall*, 1837, 2 My. & C. 574.]

[779] SKINNER v. WARNER.

15 Nov. 1792. Lords Commissioners Eyre and Ashhurst.

A father a bankrupt and separated from his wife, and on bail to articles of the peace sworn against him by his wife, ordered not to remove the children from the schools at which they were placed, and not to interfere in their education.

This came before the Court on the petition of the infant children, stating, that previously to the marriage of the petitioners' father and mother, £2000, part of the mother's fortune, was vested in trustees, for her separate use, during her life, and afterwards for the child or children of the marriage, and if there should be no children, to her appointment.

That the infants' mother, after the settlement and marriage, became entitled to a legacy of £2000, and her husband, the plaintiffs' father, having become bankrupt, his assignees, the plaintiffs in the cause, filed a bill against Warner and his wife, and their children, and the trustees in the above settlement, for an account of, and to be paid the said legacy. On hearing the cause the 12th of March 1786, before the Master of the Rolls, the said legacy of £2000 was ordered to be paid into the bank, and laid out in the name of the Accountant General, which was done accordingly, and the same amounted to £3879, 8s. 6d. Bank Annuities; and the assignees were to lay proposals before the Master, for a settlement on the wife and her children.

The assignees having proposed that £1000 should be paid to them, and the rest settled for the separate use of the wife for her life, and then for her children ; the Court confirmed the report, and ordered £1000 to be raised, and paid to the assignees, and the rest secured for the wife and the children.

The petitioners, the infants, being the issue of the marriage, and their father not being able to maintain and educate them, the trustees in the settlement, their uncles, took that charge upon themselves.

[780] That the petitioners' father having, by his cruel treatment, obliged the petitioners' mother to exhibit articles of the peace against him, on which he was then on bail ; and having no settled place of abode, and being unable to maintain the infants, but claiming to be their guardian by nature ; the infants prayed by their petition that it might be referred to one of the Masters to approve of a proper person or persons to have the care of the petitioners' persons, and to superintend their education : and that the father should be restrained from removing, or using any means to remove the children from the schools at which they were then placed : which, after hearing Counsel, their Lordships ordered.

MOORE v. AYLET.

27 April 1797. Lord Loughborough, C.

Arresting a party going to attend, or returning from attending an arbitration, having been summoned for the purpose, held a breach of privilege, and he was ordered to be discharged.

The defendant Aylet being arrested as he returned from attending Samuel Compton Cox, Esq. to whom the matters in difference were referred, and to attend whom he had been summoned ; he complained, and prayed to be discharged, being, as he submitted, under the protection of the Court. A doubt having arisen, whether arresting a party going to, or returning from attending a Master or an Arbitrator under an order of Court, who was his substitute, was to be considered as a breach of privilege ; it stood over : And his Lordship this day said he had looked into his notes of practice, and found a party attending a Judge at chambers, the prothonotary, or executing a writ of enquiry, was under the protection of the [781] Court, and could not be arrested : That a man's house was his castle, and that so long as he kept himself close in his house, he could not be arrested : And to allow him to be arrested when drawn out by an order, or summons of the Court, which, if he had not obeyed, he would have been guilty of a contempt, and liable to be attached, was absurd : Here the party was drawn from his house by a summons : His Lordship therefore ordered him to be discharged.

WALKER v. THOMAS.

31 Jan. 1785. Lord Thurlow, G.

It is of course to examine a guardian *ad litem*, as a witness.

Application to examine the guardian *ad litem* of a defendant : His Lordship was of opinion it might have been done without an order ; but, to quiet the parties, he ordered it.

Ex parte BILLET.

20 Dec. 1786. Sir Lloyd Kenyon, M. R.

The Cursitor was ordered to make out a writ *de ventre inspiciendo*.

THE ATTORNEY GENERAL v. THE MAYOR OF COVENTRY.

5 Feb. 1712. Reg. Lib. A. 178.

The Mayor of Coventry committed for not obeying an order of the Court.

Thomas Owen, the Mayor of Coventry, was ordered to stand committed for not putting the Corporation Seal to some leases, pursuant to an order for that purpose.

[782] CHEVELEY v. STONE.

26 Feb. 1771. Lord Bathurst, C.

A creditor by covenant, equal to a creditor by bond.

The plaintiff, a creditor, under a covenant in her marriage articles, to settle an estate of such a value, and likewise administratrix of Jeremiah Cheveley her late husband.

The defendant's bond creditors bring an action against her on their bond; she files a bill in this Court for an injunction, and obtains an injunction.

Cause shewn this day for continuing it.

Lord Chancellor.—A creditor by covenant is equal to a creditor by bond; and therefore, upon payment of costs at law, let the injunction be continued till the hearing.

TERRAN v. WAITE.

24 July 1741. Lord Hardwicke C.

The plaintiff allowed to rehear the cause, when his bill had been dismissed for want of appearing at the hearing.

The cause was set down to be heard *ad requisitionem defendantis*: the plaintiff appeared, and prayed to adjourn the cause, consenting to appear *gratis*, and open his bill. The cause came on again to be heard, when the plaintiff made default in appearance, and the bill was dismissed with costs. The plaintiff obtained an order to rehear the cause. On application the above day to discharge the order, it was ordered, upon the plaintiff's paying costs to the defendants, and consenting also to pay such costs as should be awarded against him on rehearing the cause, the order should stand, or otherwise be discharged.

[783] ATTORNEY GENERAL v. BRERETON, *et e contra*.

14 July 1752. 2 Ves. 425, S. C. Lord Hardwicke, C.

Flint Chapel. In whom the right of nomination of a curate, whether in the bishop who is sinecure rector, or in the vicar, held to be in the vicar, without power of removing.

These causes came on upon two bills: the first by way of information, at the relation of Mr. Tamerlane, to establish his right to the Chapel of Flint, as Curate thereof.

The cross-bill, by Mr. Brereton, as Vicar or Northop, to establish his right to the chapel.

Two objections arose for consideration: one made at the Bar, the other occurred to me: It was objected, first, That this Court hath not jurisdiction to determine rights of this kind, and an information can only be brought in the name of the Attorney General for a charity; but I shall here consider the augmentation made by Mr. Stone of £20 a-year, and the confirmation by Bishop Barrow as a charity, by virtue of the Act of 29th of Car. 2, chap. 3, and therefore I am of opinion an information is proper.

The second objection is, that the relator founds his case on a right of nomination in the Rector, or Bishop of St. Asaph, who is a sinecure Rector, whereas he was nominated by the Vicar; but I hold, if the right to the charity appears, though that right be not properly laid in the information, the Court must make a decree to establish the charity.

And this brings me to the consideration of the three questions relating to the merits:

First, What is the species and nature of the Chapel of Flint: whether a perpetual Curacy, or temporary only?

Secondly, In whose right the nomination is?

[784] Thirdly, Whether the Rector, or Vicar who hath the right of nomination, hath the right of a motion of the Curate or Chaplain at will?

On the first question it appears, that this is a Chapel belonging to a county town, and hath belonging to it all sorts of parochial rights; the inhabitants have no right in the parish Church of Northop, and are not liable to the repairs of the Church: which shews the Chapel of Flint to be a perpetual Chapel.

Vide Selden's *History of Tithes*, vol. 3, column 1212. Further, the rights and dues of the Curate concur to shew it to be a perpetual Curacy, the Curate enjoying all small tithes, and the surplice fees; besides the above augmentation by Mr. Stone, and which augmentation shews it was understood to be a perpetual Curacy. And therefore am of opinion, this is a perpetual Curacy.

Upon the second question, In whom is the right of nomination?

I am of opinion the right is in the Vicar: there is no proof in these causes that any nomination hath been made by the bishop, nor that any nomination hath ever been

made by the sincere Rector, further than by granting the licence, and the evidence as to the nomination by the Vicar is very considerable, there being evidence of three nominations by the Vicar.

And upon the third question, Whether the Vicar can remove ?

If this is a perpetual Curacy, it cannot be at the pleasure of the Vicar, for if it could, the Vicar might take the whole of the endowment to himself, which is contrary to the intention of Mr. Stone, and the town of Flint would be without a Curate residing.

His Lordship therefore decreed for the relator.

[*Mews Dig. Charity*, VII. 3: *Ecclesiastical Law*, V. 2: XV. 1. See *M'Allister v. Rochester* (Bishop of), 1880, S. C., P. D. 204.]

[785] *TOOK v. ———*

28 Nov. 1784. Lord Thurlow, C.

A mortgagee after he hath foreclosed the mortgagor, cannot bring an action on his bond, or the covenant in mortgage, until the estate hath been fairly sold, and it is seen whether the purchase money is deficient ; for until it is sold, the estate remains a pledge, and *non constat*, but it may be ample. *Sed vide supra*, *Aylet v. Hill*, *supra*. 551.

The bill in the original cause by the mortgagee was, that the defendant, the mortgagor, might redeem, or stand foreclosed ; and there was the common decree of foreclosure : the defendant not paying the money reported due by the time appointed, he was absolutely foreclosed. The plaintiff, the mortgagee, afterwards sold the estate so foreclosed, and the money produced by the sale not amounting to what was reported due on the mortgage, he brought his action against the mortgagor to recover the deficiency. The plaintiff in this suit thereupon brought his bill for an injunction, to stay the defendant's proceeding at law, upon the ground that having got his pledge, he could have no more, and obtained an injunction till answer, and further order.

Upon shewing cause this day, for the continuance of the injunction, his Lordship was clear that the defendant, the mortgagee, under the mortgagor's covenant in the mortgage deed, was entitled to be paid what was due on the mortgage ; that so long as he kept the estate, he must take the pledge as a satisfaction, because, by not knowing what it would produce, he could not say any thing was due ; but if he sold the estate fairly, and without collusion, and for the best price, it would then appear whether it produced the amount of the money reported due ; and to the extent of what it did not, the mortgagee had a right, and so it was now established, to bring an action against the mortgagor to recover the deficiency ; and therefore his Lordship disallowed the cause, and dissolved the injunction.

[786] *ROBERTSON v. WILKIE.*

Easter Term 1753. Lord Hardwicke, C.

A writ of *ne exeat regno* issued against the defendant, whose place of residence was at Port Mahon, with whom the plaintiff's testator was in partnership, and to be marked in £2000 the amount of what he believed the defendant to be indebted on a balance of accounts.

William Robertson, deceased, a merchant in London, and the defendants, who then resided at Gibraltar, having agreed to become partners in thirds, on his own credit purchased several large quantities of goods and merchandise, and consigned the same to the defendants, which they received and sold to great advantage, but always refused to account with him, although applied to for that purpose. The said William Robertson died in 1751, and the plaintiff became his administrator : After giving the said defendants credit for every sum of money remitted by them to the said William Robertson, they stood justly indebted to him at his death in £1395, 17s. 7½d., on the balance of accounts between them for the prime costs of the said goods, over and above the sum of £765, 18s. 10d. on a stated account of interest due for the advance of money, which account of interest was settled and allowed by the said Robert Wilkie, when he was last in England, and also besides a very considerable sum, of money due for the profits of the said several cargoes so consigned to them : The usual place of residence of the defendant was at Port Mahon in the island of Minorca,

out of the jurisdiction of the Court : The defendant, Robert Wilkie, was in London, and proposed to continue there about ten days, or a fortnight at farthest, at which time the plaintiff was credibly informed, and verily believed, the said defendant Wilkie would proceed and sail to Port Mahon without any prospect of his returning to England, whereby the plaintiff, as administra-[787]-tor of the said William Robertson, would not only be deprived of having a fair account from the defendants of the several matters aforesaid, but also of receiving the said two sums of £1395, 17s. 7½d. and £765, 18s. 10d. from him to the plaintiff, as administrator of the said William Robertson. The plaintiff preferred his petition to the Lord Chancellor, stating to the effect aforesaid, with an affidavit annexed, verifying it, and praying a writ of *ne erant regno*, which was ordered ; and that the same should be marked in the sum of £2000, and the writ be endorsed in words at length, and not in figures.

SLEEMAN v. SLEEMAN.

3 March 1772. Lord Bathurst, C.

Bill to establish a will ; the heir at law by his answer admitted the will, but died before the cause was brought to hearing, and left an infant heir ; and by a bill of revivor the infant was made a defendant, and the suit revived. It was held, that the bill, was be proved *per testes* against such infant heir.

[Mews' Dig. Will, VIII, b. *Accuracy questioned*, Lock v. Foot, 1833, 4 Sim. 132.]

MITCHEL v. DUKE OF MANCHESTER.

8 Dec. 1750. Lord Hardwicke, C.

Tenants directed to pay their rents, in a given time, on the first application, or to stand committed ; and the Receiver to be at liberty to distrain on one tenant ; the like as to paying rent : Heaviside v. Heaviside, Weston, 6 November 1754 ; and Bolas v. Corbet, 1st November 1756.

[788] DUKE HAMILTON v. MEYNAL.

10 July 1754. Lib. A. fol. 306. Lord Hardwicke, C.

Depositions of witnesses taken *de bene esse* in 1711, and publication not having passed till 1743, the depositions ordered to be published without prejudice.

The plaintiff applied, that the depositions of witnesses taken *de bene esse* in the original cause, might be published at the time publication passed in the supplemental cause ; but the bill having been filed in the year 1710, and the examination taken in the years 1710 and 1711, and no replication till 1742, the Lord Chancellor said he would cause precedents to be searched ; and on the above day directed the depositions to be published ; without prejudice to any exceptions that might be made by any of the defendants at the hearing against the reading of any of the depositions against them.

Note.—This was granted upon particular circumstances, and the delay is accounted for in the suggestion of the order.—J. D.

[Mews' Dig. Evidence, III, b, 2, c ; VII, 4, a, v. S. C. 2 Ves. 497. *Followed*, Moggridge v. Hall, 1879, 13 Ch. D. 380.]

JAMES v. DORE.

8 Dec. 1744. Lord Hardwicke, C.

A person ordered to be examined *pro interesse suo*, was permitted to prosecute, and make out her right *in forma pauperis*.

One Julia Crees claiming title to some lands taken under a sequestration, she was ordered to be examined *pro interesse suo*, and was accordingly examined : but being unable, through poverty, to make out and support her right, liberty was given to prosecute and make out her right *in forma pauperis*.

[789] SMITH v. SMITH.

26 March 1751. Lord Hardwicke, C.

Schedules of accounts referred to in the Master's report, must be annexed to and filed with the report, and not entered in a book, and kept in the Master's office, as was attempted in this case.

The Master in taking the accounts of the personal estate of the testator Sir Robert Smith, of whom James Smith and Cecil, two solicitors of the Court of Chancery were executors; at their instance, instead of annexing the schedules to his report, as had been usually done, and in fact to create new fees in his office, for making copies of them, entered the schedules in books, as was the custom of the schedules allowed in passing Receivers accounts.

Mr. Scott then the clerk of the reports, with whom reports were filed, refused to file the report, unless the schedules were annexed and filed with it, for that he considered them as part of the report being referred to by it; that the schedules were confirmed as part of the report; that exceptions to reports were chiefly to the items in the schedules, brought in as charges and discharges, and either allowed, or disallowed.

Upon this refusal, Mr. Smith and Mr. Cecil applied by Mr. Solicitor General their Counsel, that Mr. Scott might be ordered to file the report as tendered to him.

Mr. Attorney General and Mr. Wilbraham, were Counsel for Mr. Scott.

Lord Chancellor.—From 1703, the Masters have exercised a discretionary power in accounts of infants' estates, whose annual accounts are to be passed, of entering schedules in books.

In the order of the Lords Commissioners, made an order of Court the day of 1742, not the least variation is intended to be made to it.

[790] The case of the suitor is meant by their order, not confining it to those accounts, but generally, as where there are numbers of creditors, they may take copies of what relates to their own debts; but from whom are they to take those copies? Certainly not from the Masters: they make their report, they deliver it out, and are paid for it: when it is delivered, the order of Court directs it to be filed with the proper officer, to be preserved, and as it were made a record: If an advantage is to arise to any one, certainly the officer who hath the custody and care of the report, should have the benefit; it is absurd to suppose, that 4d. allowed for filing every report, is the only recompence or benefit the Master of the Report Office is to have for his trouble, and care.

As to the account of the Capital of the personal estate, I have no doubt but that it ought to be annexed by way of schedule, and filed; and that would be right to be done in this case; and I shall expect the Master to alter his report, by annexing the capital of the personal estate by way of schedule.

I shall make no order about it, but acquaint the Master, that I would have the report altered in that manner.

Care must be taken, that no new fees be created in the Master's Office, for it may be easily seen what that would tend to.

[See *Macintosh v. G. W. Ry. Co.*, 1863, 1 De G. J. & S. 450.]

[791] DUKE OF BEAUFORT v. BERTIE.

5 July 1721. Lord Macclesfield, C. Reg. B. A. fol. 310, -1 P. Wms. 703, S. C.

It was laid down that statute guardians, are the same as guardians in socage; and if a guardian be attainted, the guardianship devolves on the Great Seal.

WILKES v. WILKES.

25 March 1757. Lib. B. 177. Sir Thomas Clarke, M. R.

This Court will not establish an agreement between a man and his wife to live separate.

The defendant Mary Wilkes the wife of the plaintiff was at the time of her marriage, seized of real estates, and possessed of considerable personal property: On her marriage, by indenture dated 21st of May 1747, her real estates were settled; part of her personal

estate was to be assigned and transferred to the plaintiff, and the rest was vested in the defendants the trustees, subject to the appointment of the defendant the wife: Differences arising between the plaintiff, and his wife, they agreed to live separate: and the plaintiff agreed that she should live unmolested with her mother; and by indenture dated the 23d of September, the plaintiff agreed to pay his wife £200 a year during his life, and to give up all power over her, and that she should live separate from him; and she executed the power of appointment reserved to her by her marriage, in favour of the plaintiff, and the indenture dated the 7th of December 1756, was executed by the plaintiff and his wife, and the trustees for the carrying the said appointments, and agreements into [792] execution, by which it was particularly agreed, that the plaintiff and the defendant should live separate, and the plaintiff consented to it.

The defendants the trustees declining to act without the direction of the Court: the plaintiff filed his bill to have the deed of appointment carried into execution.

On the above 25th March 1757, the cause was heard, and his Honour dismissed the bill so far as it went to establish the agreement for a separation, saying that was not the province of this Court, but without prejudice to any other remedy or agreement the parties may take, or have taken, or may make, or have made, concerning the same, and by consent of the plaintiff by his Counsel, and the defendant the wife present in Court consenting that all the other parts of the bill, and also the deed of appointment might be carried into execution; the same was decreed.

[793] MOUNT v. TURNER.

25 July 1732. Lord King, C.

A special injunction dissolved upon original motion.

A special injunction dissolved upon original motion, without having an order to dissolve it unless cause was shewn to the contrary.

NORTON v. AYLET. 22d April 1749, Lord Hardwicke, C., the like.

NEWTON v. FOOT.

2 James 2d. Reg. Lib. B. fol. 629.

Depositions suppressed, because the clerk of the plaintiff's solicitor, sat as clerk to the Commissioners.

The clerk of the plaintiff's solicitor, sat as clerk to the Commissioners for the examining of witnesses. Upon application to suppress the depositions taken under the commission, they were for that reason suppressed.

[See *Mostyn v. Spencer*, 1843, 6 Beav. 140.]

BARNESLY v. POWEL.

18 Dec. 1747. Lord Hardwicke, C. 3 Atk. 593, S. C.

By the rule of the Court, the plaintiff is first entitled to sue out a commission to examine witnesses, and if the defendant hath an opportunity to examine his witnesses also, and doth not, he is not entitled to a new commission; but if the plaintiff neglect to sue out a commission, the defendant may; and so it was laid down by the Lord Chancellor. See *Minie v. Raw*.

[794] MEGGOT v. MEGGOT.

1742. Lord Hardwicke, C.

Dower to be assigned.

Dower decreed to be assigned.

BUCKTON v. BUCKTON.

14 March 1769. Lords Commissioners.

The *prochein amy* of the plaintiff an infant, ordered to pay the costs of an improper and unfounded application.

Application on the behalf of the plaintiff who was an infant, that the defendant, the executor, might be restrained from receiving any more of the testator's personal

estate, denied, and the *prochein amey* of the plaintiff, ordered to pay the costs of the application.

ROACH v. GARVAN, *et v. contra*.

3 Dec. 1742. Lord Hardwicke, C. 2 Atk. 469, S. C.

Two printers committed to the prison of the Fleet, for publishing a letter touching the proceedings of this Court in these causes.

Upon special application of the defendants Hall and Garvan, stating that John Huggins, in the order mentioned, had caused to be printed and published in a paper, entitled No. 471. *The Champion*, or the *Evening Advertiser*, by Captain Hercules Vinegar, of Pall Mall, Tuesday, 23 Nov. 1742, a letter directed to the *Champion*, beginning with these words: viz. "Sir, It hath been observed long ago," and ending with these words: "but even receive the sanction of a Court of Judicature:" as by the said paper more fully appears: that the said letter, so printed and [795] published, contained several aspersions upon the said defendants Garvan and Hall, touching their proceedings in the matters in these causes, and upon several persons who have made affidavits concerning Marianna Rouvite and her children, and do grossly misrepresent the proceedings in these causes, insomuch, that the said defendants Hall and Garvan hoped the Court would censure Mary Read and John Huggins, (who were the printers of the said paper), for the same.

His Lordship, upon hearing a certificate read, that John Huggins was a prisoner in the Fleet prison, ordered the said Mary Read and John Huggins, for their contempt of this Court, to stand committed to the prison of the Fleet, and that the said John Huggins should be confined within the walls of the prison.

On the 13th February 1742, they were ordered to be discharged as to their said contempt, on their payment of costs to be taxed.

[See S. C. more fully reported *sub nom.* St. James' Evening Post case, 2 Atk. 469.]

CANN v. CANN. 3 July 1754. A like order upon a similar application.

GOODENOUGH v. GOODENOUGH.

31 Jan. 1772. Lord Bathurst, C.

Dower to be set out by the Master, and the dowress to be let into possession.

Dower decreed to be allotted, to be set out by the Master, and the dowress to be let into possession.

[796] CARR v. ELLISON.

9 May 1786. Sir Lloyd Kenyon, M. R.

Personal estate devised by will, to be laid out in the purchase of lands, to be considered as land until laid out.

This was a question between the heir of the devisee and the personal representative, whether personal estate directed by the will to be laid out in the purchase of land, and the devisee dying before it was laid out, was to be considered as real, or personal estate?

Sir Lloyd Kenyon, M. R.—Where personal estate is directed to be laid out in land, such personal property is to be considered to all eternity as land until laid out; and a husband will take an estate in it by the curtesy: And his Honour cited *Bowes v. Lord Shrewsbury* and declared the plaintiff as heir *ex parte materna* was entitled under the will to the money; and he electing to take the same in specie, instead of having the same laid out in the purchase of land, the same was decreed to be paid to him.

DEVIE v. LORD BROWNLOW.

15 June 1784. Lord Thurlow, C.

The costs of an application for a new trial of an issue directed out of Chancery, denied: They do not of consequence in this Court, come within the costs of suit.

Application, after trial of an issue, directed from the Court of Chancery, to establish the plaintiff's right, and to be paid costs of suit including therein the costs of an application by the defendant for a new trial, which had been denied.

The Lord Chancellor said, if a party apply at law for a new trial, and fail, the Master of the King's Bench taxes the costs of such application, as incident to the costs of the trial, and argued, that by parity of reason [797] so that rule ought to be held in this Court; but such costs do not in this Court, of consequence, come within the costs of the suit; for if they did, there would be no occasion for the Court, on denial of such an application, to deny it with costs, but to be silent: Every day's experience proves it; for when a cause is brought to hearing upon the equity reserved, after trial of an issue, on a particular action directed by this Court, the Court, if they mean to give the costs at law, especially direct payment of such costs, together with the costs of the suit in this Court.

WOODWARD v. KING.

Mich. Term, 26 Car. 2, 1673. Lord Nottingham, C. 2 C. C. 203, S. C.

A copy of an injunction was served, and the original shewn; the party serving the injunction was held not to be bound to leave the original injunction to be compared with the copy; and his Lordship likewise held, that although the injunction might issue irregularly, yet, till found so, it ought to be observed.

SHEPPARD v. MESSIDER.

Sir Thomas Sewel, M. R.

Bill by a legatee for his legacy; there had been a suit by another legatee, and a decree for account of testator's estate and payment, the plaintiff in this cause at liberty to prosecute that decree.

The plaintiff was a legatee in the will of Elizabeth Walker, and brought his bill for payment; the cause came on this day.

There had been a decree in another suit, brought by another legatee.

His Honour gave liberty for the plaintiff to go before the Master in the former cause and claim his [798] legacy, and the Master to take an account of what was due to the plaintiff in respect of it; and if the suit is abated, the parties to revive it forthwith, and the plaintiff to be at liberty to prosecute the accounts directed by the said former decree, and reserve costs; and after the report, the plaintiff to be at liberty to set down the cause as to costs, and such further directions as may be necessary at the same time; but the accounts, so far as they are already taken, are to be considered as binding on the plaintiff, and they are not to disturb the same.

And if it shall appear the suit hath abated, let such of the parties in the former cause as are parties in this cause forthwith revive the same.

ATTORNEY GENERAL v. TANCRED.

A receiver having been appointed, with the usual directions for the tenants to attorn; and a tenant having been served with a writ of execution of the order, and arrested upon an attachment, and turned over to the Fleet, application was several times made for a sequestration, but the Court refused it as a double execution, he being no party to the suit.

(Note.—The party seems to have proceeded irregularly from the first; there was no need to have served the tenant with a writ of execution of the order and report, but only with a copy, to ground an application for a commitment, which is the course against persons not parties; it being laid down as an established rule, that nothing under the Great Seal can issue, but *inter partes*; and therefore, instead of an attachment, the party should have moved to commit the tenant for disobeying the order.)

[799] LONERGAN v. ROKEBY.

23 Nov. 1749. Lord Hardwicke, C.

Discovery after publication that the plaintiff lived abroad, he was ordered to give security to answer costs.

It being discovered, after publication had passed, that the plaintiff resided abroad, as he had many years, all proceedings on the original and supplemental bills were stayed, until the plaintiff should give security to answer costs.

HOLDSWORTH v. HOLDSWORTH.
8 Feb. 1783. Lord Thurlow, C.

This cause came to be heard the above day, on an appeal from a decree at the Rolls : Parties appeared to be wanting : It was ordered to stand over, with liberty for the plaintiff to file a supplemental bill, merely to add parties.

HEWATSON v. TOOKEY.
6 July 1785. Lord Thurlow, C.

A bankrupt plaintiff, though he hath obtained his certificate and hath released, cannot be examined as a witness, as he is liable to costs.

The plaintiff in the original cause having been concerned in a transaction of negotiating notes, of which he was an indorser, he filed his bill to be relieved against the transaction, and afterwards becoming a bankrupt, his assignees filed a supplemental bill in nature of a bill of revivor, to have the benefit of the suit, so instituted by the bankrupt. The bankrupt afterwards, as was said, had his certificate, and as was further said, released all claims, &c.

[800] On the 22d of June 1785, the plaintiffs, the assignees, again applied by motion to the Master of the Rolls, Sir Lloyd Kenyon sitting for the Lord Chancellor, that they might be at liberty to examine the said other plaintiff, the late bankrupt, as a witness, not to prove an exhibit, but to the transaction at large. And his Honour granted the motion, saving just exceptions. It striking me that though the said plaintiff should have released, as it could not be said he was disinterested ; for should the bill filed by him be dismissed with costs, he would, as he continued a plaintiff, be liable to pay such costs, as the defendants may call on which of the plaintiffs they please to pay them ; and therefore it was his interest to support the bill filed by him : for these reasons I suspended the order, until I had an opportunity of speaking to his Honour ; but his Honour being confined by illness in the Country, Mr. Hollist moved it again this day, and in support of it, cited *Troughton v. Getley*, by Lord Northington, C., 12 May 1766 (*supra*, [Dick.] 382) ; but the Lord Chancellor reprobated that case, said the present motion was against all rule and principle ; and without hearing the other side denied the motion.

EVELYN v. EVELYN.
1 Aug. 1750. Lord Hardwicke, C.
Receiver of an undivided estate.

Receiver appointed of an undivided estate.

[Questioned, *Tyson v. Fairclough*, 1824, 2 Sim. & S. 142.]

[801] EARL PLYMOUTH v. LEWIS.
29 March 1749. Lib. A. fol. 256. Lord Hardwicke, C.

The form of an order giving leave to a male infant to marry after a reference to the Master, to consider if the match proposed were proper, and to approve of articles.

A male infant married with leave of the Court, after report of the Master, that it was a proper match, and that he approved the marriage articles.

The order was as follows :

" Let the report be confirmed, and let articles be entered into, in order to the carrying into execution the proposals mentioned in the report, as far as the nature and circumstances of the case will admit, with the approbation of the Master, and upon the execution of such articles, by such parties as the Master shall direct, let the plaintiff be at liberty to intermarry with the said
Archer."

BROOK v. BROOK.
18 Dec. 1789. Lord Thurlow, C.

The like, following the order in the preceding case of *Earl Plymouth v. Lewis*.

PARFIT v. SHERSTON.

20 Jan. 1754. Lord Hardwicke, C.

Infant heir decreed to join in sale of leasehold for lives, unless he shew cause against it.

Leasehold for lives decreed to be sold; the infant heir to join when twenty one, unless he shew cause to the contrary.

[802] ANONYMOUS.

Mr. Justice Buller sitting for Lord Thurlow, C.

A client not liable to the agent employed by his solicitor, farther than what he may be indebted to his solicitor, for business done in the cause.

An application having been made to Mr. Justice Buller, sitting for Lord Thurlow, for an agent to deliver up papers to the party (which had been sent to him by the solicitor for the defendant), upon his being paid the whole that was due to the solicitor: I mentioned it to his Lordship, and he directed me not to deliver the order, but to tell the parties to move it again before him, which I did, and sent him the following case:

Chapman v. Clarke, by Lord Thurlow, the 2d of April 1784. On the 10th of January 1784, the defendant Clarke, and others, petitioned, and obtained of course, an order, that Mary Palmer, the executrix of John Palmer, the late solicitor for the said defendant, should deliver a bill of his fees and disbursements to be taxed, and that upon payment of what was due to him, or if already paid, to deliver books, &c.

The said John Palmer employed one Thomas Law, of Furnival's Inn, as his agent, not only in this, but in other causes and business, and paid him money from time to time on account; the said John Palmer having sent up the said defendant's papers, &c., in this cause to the said Thomas Law, and being indebted to the said Thomas Law, on a general account, Robert Law, the administrator of the said Thomas Law, refused to deliver to the said defendant the said papers, &c., without being paid what the said John Palmer was indebted to the said Thomas Law, insisting he had a lien on them: The said defendant being in [803] contempt for not producing the said papers before the Master, pursuant to the decree in the cause, on the 9th of March 1784, presented a petition to your Lordship, praying "That the said Robert Law, the administrator of the said Thomas Law, might deliver back all the books, &c., in his custody or power which had been delivered by the said defendant to the said John Palmer, that they might produce the same before the Master, submitting to pay whatever might happen on a taxation of his bill to be due from them on account of their defence in this cause, on having credit for the sums paid by them to the said John Palmer, and that the plaintiff might be restrained from proceeding against them under the decree for not producing the same." This petition was heard the 2d of April 1784: Mr. Price, Counsel for Robert Law, the administrator of the said Thomas Law, insisted that the papers were a pledge in his hands, and that he had a right to detain them until he was paid what was due from the said John Palmer to the said Thomas Law.

Your Lordship said, as Lord Macclesfield said, in *Farewell v. Coker*, 2 P. Wms. 460, and Lord Hardwicke, in *Grey v. Cockeril*, 20 January 1740, 2d Atkins, 114 (which were against Clerks in Court, persons, according to the present constitution of the Court, necessary for the carrying on a cause, and to whom particular fees are due); that the defendants were strangers to Thomas Law; that the credit given by him was to John Palmer, and therefore from his estate he must seek payment: And your Lordship said, Suppose a solicitor's client pays money from time to time to his solicitor, almost to the amount of his bill, and thereby enables him to [804] pay sums to his agent on account generally; if the client were liable to the agent, he might place the money so paid to him to the account of those he suspected could not pay; and to make those who were able, pay twice; it was absurd, and unjust. But as this Court, in *Stevens v. Avery*, 1 May 1753; *Jesse v. Hill*, 19 May 1758; *Chaloner v. Chaloner*, 3 April 1759 (cases submitted to your Lordship); and in a like case in 2 Strange, 1126, *Ex parte Waldron*, a Clerk in the Crown Office; restrained the client from paying to the executor of the late solicitor any part of his bill for business done by the respective Clerks in Court in the said causes; and as the petitioners in the case before your Lordship submitted to pay what was due from them in the cause, having credit for

what they had paid to their late solicitor John Palmer : your Lordship ordered the said Robert Law, the administrator of the said Thomas Law, to leave with the Master, without prejudice, the several books, &c., mentioned in the petition ; and that the same, when left, should not be delivered out without notice to the said Robert Law ; and that in proceeding under the said order of the 10th of January last, the Master should enquire whether any thing, and what, was due from the said John Palmer deceased to the said Thomas Law ; and that the Master should likewise take an account of what money had been paid by the said John Palmer to the said Thomas Law, and upon what account, with the usual direction for taking the accounts.

It should seem the parties compromised the matter, as there doth not appear that any proceedings were had under the order.

In the principal case, the Lord Chancellor granted the order.

[805] MARLAR v. WHITAKER.

1 May 1784. Lord Thurlow, C.

A bill merely to rehear and establish wills, &c., and to execute the trusts, without praying anything more, is not to be brought to hearing, and if brought to hearing, will be dismissed with costs, *Qu.*

The validity of a will being disputed, the devisee in trust brought his bill to establish it against the heir at law, and to have the trusts executed ; but prayed nothing more.

On the cause coming on to be heard, it being said that nothing more could be done than to direct an issue, as the heir at law disputed the sanity of the testator, the cause was scarcely opened, and the Court directed an issue *devisavit vel non*.

The issue was tried, and there was a verdict in favour of the will.

It was set down, and came on this day on the equity reserved ; and all that was prayed, was, that the will might be established.

The uses having been executed, and there being no trusts for the Court to direct an execution of, the Lord Chancellor said, the bringing of such a cause to a hearing was improper ; that it was merely legal ; and all that was necessary to have been done in such a case, was, to file a bill to perpetuate the testimony of the witnesses ; that such bills are never brought to hearing, and if brought to hearing, are dismissed ; that this bill should not have been brought to hearing ; and therefore dismissed the bill with costs.

But this judgment was reversed on a rehearing.

[806] LEE v. LEE.

20 Dec. 1758. Lord Keeper Henly, afterwards Lord Chancellor.

The wife, by her settlement, entitled to separate property ; the husband possessed it : She having eloped, without cause, and refusing to return, the Court would not restrain him. Same case as *supra*, 321 ; but as it is reported more at length, it was thought proper to insert it.

On the marriage of the plaintiff with the defendant, the defendant covenanted that four houses, her property, should be settled to her separate use ; he having entered on and received the rents of those houses, she filed her bill to restrain him from receiving the rents, and for a Receiver ; and on the above day applied for an injunction ; for the defendant her husband it was alleged, and sworn, that the plaintiff had eloped from and refused to return to him, although he had applied to her to return.

Lord Keeper. Although a wife have a separate estate, it must be supposed, that while they lived together in harmony, it was contributed to the support of the family : the principal motive for providing a wife with a separate estate, is to protect her against the debts, or misbehaviour of her husband ; and not to put her into a state of independency, which is too often the case : Here the wife hath thought proper to leave her husband, without any apparent cause, and he hath applied to her to return ; which she refuses to do. Should I grant the motion, it would probably be the means of preventing her return, and therefore take nothing by the motion.

The EARL OF OXFORD'S CASE in CHANCERY. With the Lord Chancellor's Arguments, touching the Jurisdiction of the said Court. Mich. 13 Jac. 1 [1615].

Magdalen College, 39 H. 8. seised in Fee of the Rectory of Christ's Church, and the Covent Garden, without Aldgate, London, containing seven Acres, demised them for seventy-two Years, rendring £40 per Ann. for the Rectory, and £9 for the Garden. And 17 Eliz. (fifty Years of the said Lease being expired) the Queen at the Suit of the said College licensed them to alien, which they did, and then received for the Rectory £25 per Ann. and £15 for the Garden. It being her Majesty's Intent, That the College should be advanced greatly in Profit, by having the Rectory to them and their Successors [2] discharged of the Lease for Years, which in Present was worth to them but £50 per Ann. the utmost Rent; the same was accordingly performed by a Conveyance to her Majesty, and from her Majesty to Spinola, and the Rectory, from Spinola to the College, after which Spinola and the Earl of Oxford his Assignee, and his Under-tenants, have built upon the Garden 130 Houses, and therein bestowed £10,000, which Assignee and his Under-tenants have Bonds and Security given for the Enjoyment thereof, to the Sum of £20,000.

Note; The College is hereby advanced £1700 more than they should have been, if the former Lease had continued, which is not yet expired.

This Conveyance having been in Peace forty Years, and thus advanced by the Purchasers from a Thing of little Value to a great and considerable one; and it being a general Case wherein Persons of all Degrees and Callings have made Purchases, they resting secure on its Passing thro' the Crown, the greatest Protection.

The present Master of the College having by undue Means obtained the Possession of one of the 130 Houses, whereof one Castillion was Lessee, who being secure of his Title both in Law and Equity, [3] sealed a Lease thereof for three Years to one Warren, who thereupon brought an Ejectment against one John Smith, for Trial of the Title in B. R. wherein a Special Verdict was had; and while that depended in Argument the Lease ended, and so no Possession could be awarded for the Plaintiff, nor Fruit had of his Suit.

Yet he proceeded to have the Opinion of the Judges to know the Law (which was a voluntary Act of his), to the Intent, if the Law were with him, he might begin a new Suit at Law, and spare to proceed in Equity; and if the Law were against him, that then he might proceed in Chancery. And the Judges of that Court having delivered their Opinions against his Title, before any Judgment entred upon the Roll, the Earl and Mr. Wood, for themselves and their Lessees, preferred their Bill in Chancery; and then Judgment was entred, *Quod Querens nil capiat per Billam*.

To which Bill in Chancery the Defendant put in a Plea and Demurrer, alledging the Conveyance to be void by the Statute of 13 Eliz. and that they evicted one House, Parcel of the Premises by Judgment at Law; which Plea and Demurrer were referred by Order to Sir John Tindal and Mr. Woolridge, who reported, [4] That they thought it fit the Cause should proceed to Hearing, notwithstanding the Plea and Demurrer; and afterwards in Default of an Answer, an Attachment was awarded against the Defendants, whereupon they were attach'd, and a *Capi Corpus* return'd, and by Order of the 22d of Octob. 13 Jac. 1 [1615], they were committed to the Fleet for their Contempts in refusing to answer; and do now stand bound over to answer their Contempts, they still refusing to answer.

And now this Term it was argued, That the Defendants thus standing in Contempt, &c., may be sequestred until Answer.

1. The Law of God speaks for the Plaintiff. Deut. 28.

2. And Equity and good Conscience speak wholly for him.

3. Nor does the Law of the Land speak against him. But that and Equity ought to join Hand in Hand, in moderating and restraining all Extremities and Hardships.

By the Law of God, He that builds a House ought to dwell in it; and he that plants a Vineyard ought to gather the Grapes thereof; and it was a Curse upon the Wicked, that they should build Houses and not dwell in them, and plant Vineyards and not gather the Grapes thereof. Deut. 28. v. 30.

[5] And yet here in this Case, such is the Conscience of the Doctor, the Defendant, That he would have the Houses, Gardens and Orchards, which he neither built nor planted: But the Chancellors have always corrected such corrupt Consciences, and caused them to render *quid pro quo*; for the Common Law it self will admit no Contract to be good without *quid pro quo*, or Land to pass without a valuable Consideration, and therefore Equity must see that a proportionable Satisfaction be made in this Case.

As in the Case of *Peterson vers. Hickman*, the Husband made a Lease of the Wife's Land, and the Lessee being ignorant of the defeasible Title built upon the Land, and was at great Charge therein: the Husband died, and the Wife avoided the Lease at Law, but was compelled in Equity to yield a Recompence for the Building and Bettering of the Land. For it was so much the more worth unto her: And wheresoever one hath a Benefit, the Law will compel him to give a Recompence, as if *Cestui que use* sell the Land to one that hath no Notice of the Use, and dieth; by Reason that he had the Benefit of the Sale, his Executors were ordered to answer the Value of the Land out of his Estate, as appeareth by a Judgment-Roll of 34 H. 6.

[6] And (his Lordship) the Plaintiff in this Case only desires to be satisfied of the true Value of the new Building and Planting since the Conveyance, and convenient Allowance for the Purchase.

And Equity speaks as the Law of God speaks. But you would silence Equity.

1st. Because you have a Judgment at Law.

2dly. Because that Judgment is upon a Statute-Law.

To which I answer,

First, As a Right in Law cannot die, no more can Equity in Chancery die, and therefore *nullus recedat a Cancellaria sine remedio*. 4 E. 4, 11. a. Therefore the Chancery is always open, and although the Term be adjourned the Chancery is not; for Conscience and Equity is always ready to render to every one their Due, and 9 E. 4, 11, a. The Chancery is only removable at the Will of the King and Chancellor; and by 27 E. 3, 15. The Chancellor must give Account to none but only to the King and Parliament.

The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.

The Office of the Chancellor is to correct [7] Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be, and to soften and mollify the Extremity of the Law, which is called *Summum Jus*.

And for the Judgment, &c., Law and Equity are distinct, both in their Courts, their Judges, and the Rules of Justice; and yet they both aim at one and the same End, which is, to do Right; as Justice and Mercy differ in their Effects and Operations, yet both join in the Manifestation of God's Glory.

But in this Case, upon the Matter there is no Judgment, but only a Discontinuance of the Suit, which gives no Possession; and altho' to prosecute Law and Equity together be a Venation; yet voluntarily to attempt the Law in a doubtful Case, and after to resort to Equity, is neither strange nor unreasonable.

But take it as a Judgment to all Intents; then I answer,

That in this Case there is no Opposition to the Judgment; neither will the Truth or Justice of the Judgment be examined in this Court, nor any Circumstance depending thereupon; but the same is justified and approv'd: and therefore a Judgment is no Let to examine it in Equity, so as all the Truth of the Judgment, &c., be (not) examin'd.

[8] No Possession is established by the King's Writ after that any Judgment is sought to be impeached; for when the Plaintiff by his Lessee seeking Relief at the

Common Law is barred, then is his Time to seek Relief in Chancery, when the Common Law is against him, Doctor and Student, fol. 16. A Serjeant is sworn to give Counsel according to Law, that is, according to the Law of God, the Law of Reason, and the Law of the Land; and upon both the Laws of God and Reason, is grounded that Rule, viz. To do as one would be done unto.

And therefore where one is bound in an Obligation to pay Money, payeth it and takes no Acquittance, by the Common Law he shall be compelled to pay the Money again. But when it appeareth, that the Plaintiff will recover at Law, the Serjeant may advise the Defendant to take a Subpoena in Chancery, notwithstanding his Oath.

So 1 H. 7, 14. If he deliver an Acquittance without Seal, or the Money is paid within a short Time after the Day, or if he lose the Acquittance, if Judgment be had in any of these Cases the Party may resort to Equity. 22 E. 4, and 7 H. 7, 11.

Also, after Judgment in those Cases, if the Party have a Release he may have [9] an *Audita Querela*, which is a Latin Bill in Equity, if the other Party's Conscience be so large as to demand a double Satisfaction. So if the Statute be entred into by Duress or Menace, though the Party be in Execution, yet he may avoid it by Duress of Imprisonment, 15 E. 4; Fitz. Nat. Bre. 104, L. 5, Ed. 4; *Audita Querela*, 27. And yet it is a Judgment upon Record, and so of a Judgment by Confession, and Satisfaction acknowledged by a Letter of Attorney which is lost, or cannot be produced.

And in the Case of Harning *vers.* Castor, Mich. 3 Jac. in B. R. on an *Audita Querela* brought *per Opinionem Curie*, If a Judgment be given upon an usurious Contract, and it is Part of the Agreement to have a Judgment, the Defendant may avoid such Judgment by an *Audita Querela*, or by a *Scire Facias*, brought upon the same.

So if a Judgment be had against an Infant by Covin, as if an Infant be inveigled to be Bail for one in any Court at Westminster, he may have an *Audita Querela* to avoid the same, Trin. 7 Jac., Markham *vers.* Turner, and 8 H. 6, 10. So if Judgment be had by Covin or Collusion against an Executor to defraud the Creditors, if it be pleaded in Bar, the Covin and Collusion may be averred at [10] Law by Replication, and the Judgment frustrated thereby, 3 H. 6, 36. And note; Every Outlawry is a Judgment, yet the Party may have Remedy in Conscience against him that caused him to be outlaw'd without just Cause. Doct. & Stud. lib. 2, c. 21; 21 H. 7, 7; 9 H. 6, 20.

So if one neglect to inrol his Deed of Bargain and Sale, being his only Assurance, as in Jaques and Huntley's Case in this Court, 13 Junii 1599, and the Bargainor brings an *Ejectione firmæ* against him, and hath Judgment, the Bargainee may resort to Chancery, and there be reliev'd, if not for the Land, yet for the Money paid.

And in Morgan and Parry's Case, Pasch. 27 Eliz. A Woman had an Estate in a House for her Life dispunishable of Waste; and yet she was enjoined not to commit Waste in the House, contrary to the Case of Lewis Boles, Lib. 11. (*Quære*, If not because of the Prejudice to him in Remainder?)

By all which Cases it appeareth, That when a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgment, but for the hard Conscience of the Party; and that in such Cases the Judges [11] also play the Chancellors; and that these are not within the Statute 4 H. 4, cap. 23. Which is, That after a Judgment given in the Court of our Sovereign Lord the King, the Parties and their Heirs shall be in Peace, until the Judgment be undone by Attaint or Error.

But secondly, It is objected, That this is a Judgment upon a Statute-Law.

To which I answer, It has ever been the Endeavour of all Parliaments to meet with the corrupt Consciences of Men as much as might be, and to supply the Defects of the Law therein, and if this Cause were exhibited to the Parliament it would soon be ordered and determined by Equity; and the Lord Chancellor is, by his Place under his Majesty, to supply that Power until it may be had, in all Matters of *Morum* and *Tuum*, between Party and Party; and the Lord Chancellor doth not except to the Statute or the Law (Judgment), upon the Statute, but taketh himself bound to obey that Statute according to 8 Ed. 4, and the Judgment thereupon may be just, and the College in this Case may have a good Title in Law, and the Judgment yet standeth in Force.

It seemeth by the Lord Coke's Report, fol. 118, in Dr. Bonham's Case, That Statutes are not so sacred as that the Equity [12] of them may not be examined. For

he saith. That in many Cases the Common Law hath such a Prerogative, as that it can controul Acts of Parliament, and adjudge them void; as if they are against Common Right, or Reason, or Repugnant, or impossible to be performed, and for that he vouches 8 E. 3. 30; 33 E. 3; Cessavit, 41, 42; Nat. Brev. 209; Plowd. 110; 27 H. 6; Annuity, 41; 21 Eliz. Rot. 303. And yet our Books are, That the Acts and Statutes of Parliament ought to be revers'd by Parliament (only), and not otherwise. Bro. Tit. Error, 65, &c., and 7 H. 6, 28; 21 E. 4, 46; 29 E. 3, 24, and upon that Reason the Lord Chancellors, since the Device of the Action, to be brought by Parsons upon the Statute of 2 Ed. 6, have enjoyned the Stay thereof.

And the Judges themselves do play the Chancellors Parts (upon Statutes, making Construction of them according to Equity, varying from the Rules and Grounds of Law, and enlarging them *pro bono publico*, against the Letter and Intent of the Makers, whereof our Books have many Hundreds of Cases, 15 H. 7, and 14 H. 7, 14; 42 E. 3, 6, &c. Will you then have Equity suppressed in all Cases, wherein a Judgment at Law, or upon Statute, is had?

[13] The Use of the Chancery has been in all Ages to examine Equity in all Cases, saving against the King's Prerogative, as 35 H. 6, 27; 11 H. 4, 16; and Doctor and Student, lib. 2, cap. 5, 16, then you must have a Special Statute to except the Chancellor. For general Statutes do extend to the particuliar Usages of all the great Courts at Westminster, especially of the Chancery, and especially for Matters of Equity.

In Chancery upon a Recognizance, a *Capias* may be awarded, and the Precedents of that Court shall close up the Mouths of the Judges of the Common Law, notwithstanding the Statute of Magna Charta, cap. 29. *Qued nullus liber homo capiatur aut imprisonetur nisi per legale Judicium Parium suorum vel per Legem Terræ.* And so it was adjudged in Clement Parson's Case, 21 Eliz. in the Exchequer, which you may see in 8 Coke, 142, and 25 Eliz. in Martin and Bye's Case, and in 7 Jac. in Com. Banco, Higham's Case, and Kilway's Case vouched to be adjudged, 9 Co. 29. *Vide* Doctor and Student, 306 a, and every Court at Westminster ought to take Notice of the Usages and Customs of the Rest of the Courts at Westminster, which are as a Law to those Courts, and of which the Common Law takes Notice. 2 Co. 53, 65, 503, 4; 11 E. 4, 2.

[14] The Statute of 5 Eliz. of Perjury directeth how Perjury shall be punished, saving the Authority of the Star-Chamber; yet for Perjury committed in Chancery, either in an Affidavit, or an Answer, &c. If such Perjury appear to the Chancellor, the Party may be punished according to his Direction.

Also, No Exchequer Man hath Privilege against a Subpoena, for Matters between Party and Party, where the King's Interest cometh not in Question, 20 Eliz. Cutts *contra* Peter Goodwin *et al'*, and yet their Privilege hath several Statutes that give Strength thereunto; but the Use and Precedents of the Chancery are not altered by those Laws.

And if a Statute Staple be extended, which by the Statute is a Judgment of it self, and the Execution thereof is directed by the Statute; yet it hath been usual in all Ages to moderate the hard Consciences of the Conuzees, and if they have been satisfied with their Costs and Damages, after the Rate of the full Value of the Land, the Land hath been discharged by a Decree of Equity.

Thirdly, The Law of the Land speaks not against this.

For by 9 ed. 4, 15. The Chancellor sits in Chancery according to an absolute and uncontrollable Power, and is to judge [15] according to that which is alledged and proved; but the Judges of the Common Law are to judge according to a strict and ordinary (or limited) Power.

As 7 H. 7. fo. 10. A had Lands extended to him in ancient Demesne upon a Statute Merchant. B purchased the Lands, and had a Recovery by Sufferance in the Court of ancient Demesne with Voucher, and entred, and ousted A. A brought a Subpoena, and it was holden, That A could not falsify the Recovery at Law, and therefore he should be restored to the Possession, by the Chancery, for he had not any Remedy by the Common Law. Where note, That notwithstanding a double Judgment, yet the Judges directed them to the Chancery.

And the Statute of 4 H. 4, cap. 23, was never made nor intended to restrain the Power of the Chancery in Matters of Equity, but to restrain the Chancellor and the Judges of the Common Law, only in matters meerly determinable by Law, in legal

Proceedings, and not in equitable, and that they should be constant and certain in their own Judgments, and not play Fast and Loose. For by 37 H. 6, 13, and divers other Authorities; no Writ of Error or Attaint lieth when the Suit is by Subpoena, and the Party only seeks to Equity for the Equity of his Cause.

And therefore Judgments by Default, Confession, &c., and not by Verdict, are not within this Law, so as to bind the Judges in their legal Proceedings; as 5 E. 4, 38. In Debt upon an Obligation against A, B, C, and D, Judgment by Default is had against A and B. C demurs, and D pleads to Issue, and by the [16] Opinion of the Judges a Supersedeas was awarded, & *huc causa Conscientiæ*, for that the Judgment was by Default.

In the next Place it is considerable, how far the Statute of 27 E. 3, cap. 1, doth extend, to check the Power of the Chancery in this Case. Now the proper Exposition of this Statute is from those Statutes that were the Foundation thereof, and whereupon this Statute was built, it being not introductive of New Law; but declarative *Antiqui Juris*.

The precedent Statutes, which do explain this Statute, are 31 E. 1, made at Carlisle 4 Ed. 3, c. 6, in Confirmation thereof, 25 E. 3, cap. 22, and 25 E. 2, cap. 1, of Provisions of Benefices, these being in Time before 27 E. 3, and 38 E. 3, which comes after and recites the Statute of 25 E. 3, and this Statute of 27 E. 3, and confirms them with Additions for further Remedies, they being all link'd together in one Chain, which is further apparent by the Recitals in the Law, and by the Preamble thereof, which doth manifest the Minds of the Law-makers, and do naturally explain the Laws, that they do all extend to Ecclesiastical Jurisdiction and Conuzance, and not to Temporal; and the same is more apparent by other subsequent Laws in several Kings Reigns following.

But for the Temporal Courts, and the Support of their Judgments, there are only two Statutes, viz. Westminster 2, cap. 5, and 4 H. 4, cap. 23, which are already answer'd.

Vide the Argument for the Authority and Jurisdiction of the Court of Chancery, at the End of this Volume, where these two Statutes are explained.

[See S. C. with full notes, Wh. & T. L. C. 7th ed. vol. i. p. 730.]

REPORTS and CASES Taken and Adjudged in the COURT OF CHANCERY, in the Reign of Kings Charles I., Charles II., James II., William III., and Queen Anne. Vol. I. [1625–1668].

FARMER *contra* COMPTON.
1 Car. 1, fo. 1088 [1625–26].
Marriage with Consent, &c.

That the Plaintiff and Defendant came to a Treaty for a Marriage between Sir Jo. Farmer, the Plaintiff (Sir Richard Farmer's Son), and Dame Cecily, Daughter of the said Defendant Sir Henry Compton, with whom he was to have £4000. And it was agreed that £800 per Annum should be settled on her for a Jointure, and that the Plaintiff should deduct £200 [2] per Annum thereout during his Life; that Direction was given to draw Writings accordingly; but before the Assurances were perfected, the said Sir John, the Son, married her without the knowledge of the said Fathers; and the Plaintiff and Defendant being ignorant thereof made the Assurances, and the Defendant Sir Henry Compton agreed they should marry; but in the said Assurances the Deduction of £200 per Annum, as is aforesaid, was omitted in the Drawing of the said Deeds. And after the Marriage was confessed by the said Sir John to one Benskin, who acquainted Sir Henry therewith, and £1150 of the £4000 was paid to the Plaintiff, which Portion of £4000 was originally to be raised out of the said Lands according to a Conveyance thereof made by the Countess of Dorset, the same Dame Cecily's Grandmother, unto the said Benskin and others, to the Intent that they should, out of the Profits thereof, pay to the same Dame Cecily her said Portion of £4000 at her Age of twenty-one Years, or when, with the Consent of her Father, she should be married, which should first happen; and if she should die before such Age or Marriage, then £1000 of the said Portion should be paid to her Sister Anne, who had the like Portion given unto her by the said Countess, and the [3] other £3000 to be distributed amongst other the younger Children of the said Sir Henry Compton. And for that the said Sir John Farmer died before any of the £2850 (being the Remainder of the £4000 Portion given by the said Countess to the said Dame Cecily, as aforesaid) was paid, and the said Dame Cecily being married, as aforesaid, and the Defendant Benskin being trusted by the said Countess, as is afore-mentioned, he doubts that if he should proceed to pay the said remaining £2850 and Increase thereof according to the Agreement aforesaid, whether he might not again be called in Question for the same by the said Lady Farmer and the younger Children, if the said Dame Cecily should die before twenty-one Years of Age, and prays the Judgment and Decree of the Court for his Indempnity.

And *per Cur'*; As touching the Payment of the Residue of the £4000 according to the Conveyance made by the Countess to Benskin and others in Trust as aforesaid, for raising of the said Portion, and how the said Benskin shall be discharged thereof, and of the Money already paid: This Court ordered a Case to be made out of the Deed, and a Case being made and agreed unto, was by the Lord Keeper sent to the Judges at Serjeants Inn in Fleet Street, and all of the said Judges were [4] of Opinion, that the said Marriage between the said Sir John Farmer and his Lady, having taken Effect in Manner before declared, ought in Equity and Justice to be esteemed a Marriage had

with the Consent of the said Sir Henry Compton her father, of which Opinion his Lordship is also, in Respect there was an express Consent of the said Henry both before and after the said Marriage consummated, and no Disagreement or Alteration of his good Liking in the mean Time. And this Court decreed the Residue of the Money to the Plaintiff, and the said Benskin and his heirs, &c., discharged of the said £4000, notwithstanding that the said Marriage was had without the Assent of the said Sir Henry Compton as aforesaid, or any other Pretence or Matter whatsoever.

PLUNKET *contra* BRERETON.

That Sir Randall Brereton seised in Fee of the Manor of Creswel and Blunhil, made a Lease of the Manor of Creswel to Dr. Compton for divers Years to come, rendring £40 per Annum to Sir Randal, his Heirs and Assignees, after which Sir Randal, in Consideration of a Marriage between Richard Brereton his Brother and Heir, and the Plaintiff Mary, Daughter of Sir Walter Heveningham, and [5] of £2000 Portion paid by Sir Walter, agreed that the said Mary should have in Augmentation of her Jointure the £40 per Annum reserved on the Manor of Creswel, and £10 per Annum reserved on Blunhil, and thereupon Sir Randall conveyed the said Manors to the Feoffees and their Heirs, to the Use of himself for Life, and after to the Use of the said Richard his Brother, and Heirs Males of his Body, and after to the Use of the Defendant Sir Thomas Brereton; yet nevertheless, that the said Mary, Wife of the said Richard, might have the said Rents of £40 per Annum, and £10 per Annum for her Life for Supply of her Jointure: which Conveyance being settled, Sir Randal died, and Sir Richard his Brother entred and made a Lease of Blunhil with a Covenant to free it from the said £10 per Annum, and died without Issue Male; and so the Inheritance in Tail of all the Lands came to the Defendant Sir Thomas Brereton, who refuses to let the said Plaintiff Mary have the said Rents of £40 and £10 per Annum, he claiming the same as due to himself.

This Court, having maturely considered of the said Conveyance and of some Cases in Law presented by both Sides, declared they were clear of Opinion, that the said Rents of £40 and of £10 per Annum in [6] Equity are due and ought to be paid to the Plaintiff Mary during her Life; howbeit the said Plaintiff in Point of Law cannot distrain for the same, unless the said Leases are out and determin'd, and decreed the same to be paid according to the Intent of the said Conveyance made to her thereof, as aforesaid.

CORNWALLIS, VISCOUNT, *contra* SAVAGE & CORNWALLIS.

4 Car. L. A. fo. 995 [1628-29].

Will—Grant—Annuity—Lease.

This Case is to be relieved for several Annuities: The Case is (viz.), That one Henry Breton, Gent. being possessed of a Lease of 99 Years of the Lands in Question, made in the Time of King Edward VI. by the then Bishop of Salisbury, did assign the Residue of the said Term unto George Breton his Son, and Anne, the Wife of the said George, who by their Deed the 19 Eliz. [1576-77] assigned the said Lease to one Thomas Cornwallis and Lady Katherine his Wife, one of the Daughters of the then Earl of Southampton; and afterwards the said Thomas Cornwallis dying, and the Lady Katherine surviving, she by Deed 6 Jac. [1608-9] granted to the Plaintiff William Cornwallis, and to the Plaintiff his then Wife, two several Annuities of £15 per Annum to be issuing out of the Premises during the Residue [7] of the said 99 Years then to come, if the said Plaintiff Will. Cornwallis and Mary his then Wife, or any Issue of their Bodies should so long live, to have and to hold the one Annuity of £15 per Ann. from Lady day or Michaelmas, which first happens after the Death of the said Lady Katherine; and that the Lady Katherine by her Will in May 1623, gave to the Plaintiff Dennis Breton and Mabel his Wife £10 per Ann. to be issuing out of the Premises during the Years to come, if the said Breton and Mabel his Wife should so long live; and also by the said Will gave to the Plaintiff William Breton, Son of the said Dennis, 20 Nobles per Annum, to be issuing out of the Premises during the Years to come, if he so long liv'd; and that the said Lady Katherine by Deed in 1 Car. [1624-25] granted an Annuity of £10 per Annum to Elizabeth Breton out of the said Premises, during the said Term, to hold after the Death of the said Lady Katherine; and the said Lady intending to establish the said Lease upon one Thomas Cornwallis, her Husband's near Kinsman,

by Deed 8 Decemb. 22 Jac. [1624], assigned the said Lease for 20 Years, to begin after her Decease, and caused the said Thomas Cornwallis to covenant, that he should after her Decease allow to the Plaintiffs all Annuities by her granted, or [8] to be granted, and after the said Lady died in 2 Car. [1626-27] and the said Thomas Cornwallis survived, and by several Deeds confirmed the said Annuities to the said Plaintiffs; but by his Deed 2 Car. assigned his Interest in the Premises to the Defendant Viscount Savage in Trust for Payment of his Debts and other Trusts, and died about January last.

The Defendant Viscount Savage insists, that the Grants of some of the said Annuities are void in Law, by Reason of the said Incertainties of the Habendum, and that the Covenant of the said Thomas Cornwallis, Assignee of the said Lady Katherine, extends only to Grants by her made and to be made, and not to the Bequests by her Will, and that the said Thomas Cornwallis had assigned his Interest in the said Lease to the Defendant Viscount Savage, before he did confirm the said Annuities, so as the same were void in Law.

Yet this Court notwithstanding upon the whole Case, did declare, that the said several Grants and Bequests of the said several Annuities are good in Equity to bind the said Thomas Cornwallis, the Assignee of the said Lady, and all claiming under him, and decreed that the Defendant Viscount Savage should pay the Plaintiffs [9] their said Annuities and Arrears, according to the said Grants and Bequests to them made during the said Lease.

LYDDAL *con.* VANLORE.

FO. 452, 720, L. B. 2 Car. [1626-27].

This Case is where a Trust for Children in an Estate was removed, in order to have the Estate sold for Payment of Debts.

The case is (*viz.*) That Sir Richard Lyddal, by and under several Grants and Assignments made unto him, was, before any Assurance made thereof by him to Sir Peter Vanlore, possessed of all the Premises, for several Terms of Years unexpired, the old Rent of all which comes to £20, 6s. 6d. yearly: That the said Sir Richard Lyddal, by Deed 1 Jan. 7 Jac. [1610] in Consideration of a Marriage between him and Dame Judith, and for a Jointure for the said Judith, did assign such of the Terms, as he had at the Time of the said Assignment, making unto James Askew, Sam. Hare, and William Holiday, upon this Trust expressed in the said Deed (*viz.*), That they, their Executors and Assigns, should permit the said Sir Richard Lyddal during his Life, and the said Dame Judith after his Death, during [10] her Life, and the heirs Males of their Bodies, after their several Deceases, to take all the Rents, Issues and Profits of the said Premises, during the several Terms therein to come, if the said Sir Richard Lyddal and Dame Judith, or any Issue Male of their Bodies, should so long live; and if they should be all dead, then that such Daughters, as the said Sir Richard and Dame Judith should have between them, should equally, during all the said Terms, take the profits thereof; and in Default of such Daughters, then to the Executors of the said Sir Richard, to take the Profits during the Terms, with a Covenant therein contain'd on Sir Richard's Part, to procure the Reversion and Inheritance of Parcel of the Premises (*viz.*), of the Mill and Water of Sonning, both which were of the yearly Rent of £6, 6s. 8d. to be conveyed unto the said Sir Richard and Dame Judith, and the heirs of the said Sir Richard of the Body of the said Dame Judith, the Remainder to the right heirs of the said Sir Richard, of the Body of the said Dame Judith, the Remainder to the right Heirs of the said Sir Richard.

And further, upon Purchase of the Inheritance of any other of the Premises assigned as aforesaid, to procure the like Conveyance to be made thereof; and that [11] the said Mills and Water were 20 June, 8 Jac. [1610] accordingly conveyed, after which the said Sir Richard conveyed as well all the said Leases and Inheritance, as also one other Lease for Years, of Part of the Premises which the said Sir Richard did purchase after the said assignment of the said Sir Peter Vanlore, for the Consideration in the Order of Reference mentioned.

This case was referred to the Judges, who having advisedly considered thereof, do find, that the Trust here is not fixed or settled upon any Person certain, after the Decease of the said Sir Richard and Dame Judith, but generally upon the Heirs Males of their Bodies, and after upon their Daughters, they then at the Making of the said Assignment having no Issue at all, and as yet no Daughter: and if a Conveyance were of Land of Inheritance in such form, the Words Heirs Males would be Words of

Limitation, and not Words of Purchase; and if they should be Words of Purchase, yet it would be in the Power of the Tenant for Life to destroy such a Remainder; and being in a case for a Term of Years, if such Term had been limited to the said Sir Richard and his Lady and the heirs Males of their Bodies, by Way of Estate and Interest, and not by Way of Trust, such Limitation to the Heirs Males had been utterly void, and [12] the said Term for Years should have gone to the Executor, and not to the Heir Male, and Sir Richard had then had Power to dispose of his Term at his Pleasure, so as it may be doubtful whether the said Sir Richard and Dame Judith have not the like Power in Equity to dispose of the Trust in this Case; and the Judges do further observe, That there is no other Consideration mentioned in the said Deed to make this Assignment, but only to make Provision for Dame Judith during her Life; neither is there any Person *in esse* now, nor at any Time hereafter during the Lives of the said Sir Richard and Dame Judith can be *in esse*, that can complain of any Prejudice done them by granting or selling over of the said Terms, though the Executor of the surviving Trustee should join with Sir Richard and Dame Judith in the Sale thereof; nor can any of their children, though they were all of full Age, make any Assurance thereof, for till the Death of the said Sir Richard and Dame Judith, it cannot be known who shall be the Heir Male of their Bodies, and that it appears, that the Lease of the said Mills and Water being £6. 6s. 8d. per Annum, of the said yearly old Rent of £20. 6s. 6d. there is not above twenty Years to come; and in another Lease but thirty two Years to come; and in [13] another but twenty four Years to come, and another but forty-five Years to come; so as it is not unlikely but that the said Sir Richard and the said Dame Judith or one of them may survive the said Terms, which would prevent all Questions touching the same; wherefore, if the Agreement between the Parties for the Purchase of the Premises should not now take Effect, we conceive that it would tend to the extream Damage and prejudice, if not to the utter Undoing of the said Sir Richard and Dame Judith and of all their Children, for then the said Sir Richard and Dame Judith would not only want Means of present Relief and Maintenance for themselves, but Education for their Children. For all which Reasons we are of Opinion, That this Case falls not within the general Case of Trusts; and further, That in this special Case, accompanied with these several Circumstances, the said Dame Judith being willing thereto, to join with her husband in a Fine, it is just and fit that the said Agreement should be decreed.

Judges Certificate confirmed.

ATKINS *contra* TEMPLE.

1 Car. 1, f. 1064 [1625-26].

The Bill is to restrain the Defendant from plowing up ancient [14] Meadow and Pasture Grounds, being the Plaintiff's Inheritance; which Premises, according to the Grant of them, were to be used only as Meadow and Pasture, and not otherwise, and which Ground was rich and fertile, little or nothing inferior to good Meadow Ground, for Goodness of Soil, or yearly Value to be letten, and hath not been plowed in the Memory of Man.

This Court, in Respect of Generality of the Case, directed Precedents to be produced: the Precedents being produced, his Lordship, assisted with Judges, declared, That he did find by divers Precedents, Part in the Time of the Lord Evesham, and others since, that the Plowing of ancient Pasture has been restrained by Decrees of this Court, and declared, that in those Cases so decreed it did not appear, that the Pasture restrained from Plowing were either so ancient or so rich and fertile as in this Case; and his Lordship did further declare, That whereas Plowing of Meadow by the Law is Waste, he conceiveth, that the Plowing of ancient Pasture is of equal Value with Meadow, as no less prejudicial either to the Landlord or to the Commonwealth, than the Plowing of Meadow, and therefore fit to be restrained in Equity, the Judges being of the same Opinion: [15] and decreed the Defendant to forbear Plowing, as aforesaid.

KINASTON *cont.* COM. DERBY.

2 Car. 1, f. 1441 [1626-27].

Copies of Depositions, Records, &c., Authentick.

This Court with the Assistance of the Judges, ordered Copies of Depositions and other Records to be recorded and used, and to be authentick.

POWEL *contra* MOULTON.

2 Car. 1 [1626-27].

That Robert Moulton, Father of the Plaintiffs, Amy, Merriel, Margaret, Mellicent and Mary, being possessed of the Manor of Churchamborne, by Virtue of several Leases, and having but one Son named William Moulton, the said Robert Moulton and one Savage, who had an Estate therein, in Trust by Deed 6 June, 13 Jac. granted several Leases to William the Son, but upon Trust and Agreement, that the said William should grant the same to Friends in Trust to the Uses agreed; and though after (viz.), 7. Ju. 13. Jac. [1615] William assigned the said Leases to the Defendants Croker and Palmer, to commence immediately after his Decease, for the Residue of the said Term in the said Leases, to the Use of the Defendant and Issue Male of William, and for [16] Default of such Issue, to the Use of his Issue Female, equally to be divided between them; and for Default of such Issue, to the Use of the said Merriel, Mellicent, Margaret, Mary and Amy, by equal Parts to be divided, and to the Issue of their Bodies; and for Default of such Issues, to the Use of the several Executors and Assigns, of the said Merriel, Mellicent, Margaret, Mary and Amy, for their several Parts and Portions, with Covenants for quiet Enjoyment of the said Leases, according to the Meaning of the said Deed; and a Covenant for farther Assurance within two Years, with Proviso and Condition, that if William died within twenty Years after the date thereof without Issue, that it should be lawful for him to charge, or otherwise by Will to devise £300 out of the Profits for Payment of his Debts or otherwise, before his five Sisters should take the benefit thereof: That William being since dead without Issue, he made the Defendant Amy his wife Executrix, who claimeth the said Leases as Executrix, and insists the Agreement to be void in Law, and William's Debts at his Death to be £700, and that without the Leases she hath not Assets.

This Court, on reading the Deeds and William's Will, was fully satisfied, that it was the Intent of Robert Moulton the [17] Plaintiff's father, and of William, that for Want of Issue of William, the Leases should go to the Use of the said Merriel, Mellicent, Margaret, Mary and Amy, by equal Parts, and to their Issues, and for Default of such Issue, to the several Executors and Administrators of the said Merriel, Mellicent, Margaret, Mary and Amy; and the said Assignment by William was in Pursuance thereof; and William doth affirm the said Assignment, having thereby bequeathed the Defendant Amy £300, which was reserved by Proviso in the Assignment; and though the Assignment be questionable in Law in Respect of the Commencement for quiet Enjoyment according to the Intent and the Covenant for farther Assurance; and though the Defendant Amy insists there are Debts owing by William whereto she is liable: This Court on the Plaintiff's Offer do decree the said Assignment shall take Place, and the Plaintiffs shall enjoy the said Leases during their Continuance, according to the Meaning of the Assignment; and that if there be Debts exceeding the Personal Estate, and Monies which is or shall come to the Defendant's hands, the Plaintiffs shall pay the same out of the Profits of the Premises, and discharge the Defendant Amy of the same.

[18] POOL *contra* POOL.

1 Car. fo. 4 [1625-26].

Heir bound by his Father's Covenant, the Lands being conveyed to him.

That the Plaintiff being order'd to perform his Father's Covenants refused, insisting that he is not chargeable with his Father's Covenants as Heir, the Lands being conveyed to him; nor as executor, having no assets.

This Court ordered, That the Plaintiff shall seal the said Covenant according to the said Articles of his Father, and thereby covenant to free the Premises from Leases and Incumbrances, or stand committed to the Fleet.

MAGR. & SOCII EMANUEL COLLEGE, IN CANTAB. *contra* EVANS.

1 Car. 1, L. A. f. 980 [1625-26].

Defective Conveyances, &c., help'd in Equity.

That the Earl of Huntingdon seised in Fee of the Manor of North-Cabury with Advowson appendant, and for payment of Debts by Way of Mortgage, 25 El. [1582-83]

made a Lease for 500 Years of the said Manor with Appurtenances, not mentioning the Advowson by express Name, with a Clause of Redemption, and for Advancement of Learning and Religion, of his free Disposition in 28 El. [1575-76] by Deed granted the said Advowson to Sir Francis Hastings, and others, and their Heirs, to the Use of the said Earl for [19] Life, Remainder to the Master, Fellows, &c., of the said College, and their Successors, for ever; and shortly after in the same Year paid his said Debts, and for valuable Considerations the said Earl sold the said Manor to the said Sir Francis Hastings, yet the Advowson was not mentioned in the said Deed of Sale, but was mentioned in the Fine; which this Court observed, and conceived thereupon, That it was purposely omitted in the Deed, for otherwise the Covenant of the said Earl had been broken; but it was put into the Fine on Purpose to convey the Advowson to the said Sir Francis Hastings, during the Life of the said Earl only.

And this Court conceived the said Advowson being leased not by special Name, but as appendant to the Manor, and that only by Way of Counter security, and the Money thereby secured but £100, and at the Time of granting the said Advowson to the said College, the said Earl took no notice of the said Lease of 500 Years, as a Thing of Validity, for that it had been absurd in the said Grant to reserve to himself an Estate for Life after 500 Years, that the said Lease was assigned by the said Earl to Matthew Evans the Defendant's Uncle, in Trust for the said Sir Francis Hastings, for [20] securing his Purchase; and this Court conceived the said Lease being but a Security, and that Money paid, the said Lease had been void, as well against the said College, as against any other; and though the Money not paid at the Day, but afterwards, the said Lease ought to be void in Equity, as well as on a legal Payment, it had been void in Law against them.

The Defendant insisted, That Sir Francis Hastings after his Purchase of the said Manor and Advowson, did present thereunto one Sibthorp, who was instituted and inducted, and enjoyed the same, as under the Title of the said Sir Francis. This Court therein declared, the said Sibthorp was presented in the Life-time of the said Earl, by the said Sir Francis, according to the Intention of his Purchase; and he being then in Possession of the said Manor, whereunto the said Advowson was appendant as *Cestui que* Trust, the same was no Usurpation; but the said Sir Francis, after the Death of the Earl, selling the said Manor with the Appurtenances to Matthew Evans, under whom the Defendant claimeth, there was no Mention made of the Conveyance or Fine of the said Advowson; and the Defendant also insisting, that he claims as Heir to a [21] second Purchaser, both being for valuable Considerations.

This Court conceives, That neither the said Sir Francis, nor the said Matthew Evans were any clear Purchasers of the said Advowson, but the said Lease was intended only to be kept on foot to defend the said Manor from Incumbrances, and not to carry away the said Advowson any longer than the said Earl's Life, nor to prejudice the Earl's Grant to the said College: And this Court observed, That the said Matthew Evans himself, who was a learned Man in the Laws, and one of the Barons in the Exchequer, would not upon his second Purchase have left the said Advowson out of the Deed and Fine, if he had thought he had purchased the said Advowson. So this Court is of Opinion, That neither the said Sir Francis's, nor the said Baron Evans's Purchases ought to be admitted in Equity, to take away the Benefit of the Gift to the said College, but that the Plaintiffs have good Right in Equity to the said Advowson, and that a Charity of this Nature ought to be relieved as soon as a Purchaser against such a Lease. Decreed the Plaintiffs to enjoy accordingly.

[22] HERBERT *contra* LOWNS.

3 Car. 1, fo. 665 [1627-28].

Will concealed.

Suit is touching some Conveyances made by Peter Bland deceased, whereby he convey'd to the Defendants Laurence Lowns, James Mills and Jolliff Lowns, several Lands to them and their Heirs, and also touching a Will made by the said Bland. 1 Car., against which the Plaintiff prays Relief.

That in the Year 1615, the said Bland made his Will, whereby he divided all his Estate amongst his three Children and their Issues; and that in the Year 1617, the Defendant Laurence Lowns being a Scrivener was intrusted with the Management

of Bland's estate, and in the Year 1621, the said Bland settled his Estate on his Brother John Bland and the Defendant Laurence Lowns and their Heirs, in Trust to sell and dispose of the Money according to his Will, and in Default of such Appointment to be distributed amongst his Children and Grandchildren, as the said Trustees should think fit, with a Proviso to revoke the same, paying to the said Trustees £200 apiece: And in 1622, the said Bland made a second Will, and thereof made the Defendant Laurence Lowns, John Bland, and one Baldwin Executors, and put the said [23] Will in a Box under three Keys, and each Executor had a Key, which said Will is not extant, but supposed to be for the good of his Children and Grandchildren, as the said Bland had declared, but the said Will was concealed or burnt by the said Lowns; and the said Bland afterwards in the year 1624, being very weak, was by the said Lowns drawn to make two other Wills, and the said Estate being re-assured to the said Bland, he was procured to convey the same again to the aforesaid Defendants and their Heirs, and other Writings were made declaring the Considerations of the said Deeds; and afterwards 1 Car. [1625-26] the said Defendant Lowns, when the said Bland grew weak, got him to make a new Will and other Deeds, and to levy a Fine, and do other Acts much to his and his Childrens Prejudice.

That the Defendant excepts to the Plaintiff's Bill, because it was exhibited by the Children and Grandchildren, to question the said Will and Conveyances in the said Bland's Life-time. The Lord Keeper did now declare, That although he could not upon this Bill Decree any particular Sums of Money, either to the Plaintiff or any other of the said Bland's Kindred, yet the Bill was sufficient to ground a Decree to reform any Circumvention, Fraud and Practice wrought upon the said Bland in his [24] Weakness, and to remove any Deeds so fraudulently obtained, and that the Estate of the said Bland might come to those who of Right it doth belong to by Law.

Several Debates of the Counsel on both Sides, whether the said Bland were of sound and disposing Mind: This Court declared, That although it hath been often taken, that a Testator answering ordinary and familiar Questions, was not a sufficient Proof of a disposing Memory; because to a disposing Memory it is necessary there be an understanding Judgment, fit to direct an Estate; yet this Court would not pronounce that the said Bland was not of a disposing Memory at the Making the said Will and Conveyances, but this Court was fully satisfied, and did pronounce that the said Bland was a very weak Man, and apt to be circumvented; and that therefore altho' the said Deeds and Will were not void in Law, as not being made by a Man of non sane Memory, yet so much thereof as was drawn from him by Practice and Circumvention ought to be made void in Equity.

This Court declared upon all Circumstances now appearing, That they would not make void the latter Will and Conveyances, because a Man somewhat imperfect, yet disposing his Estate, with the Advice of his Friends and good [25] Counsel, and amongst his Friends and Kindred, its hard to avoid it, by saying he was not of a disposing Memory, whereof this Court is and shall be very tender. But this Court and all the Masters then assisting were clear of Opinion, That the Benefit redounding to the Defendant Lowns by the said Deeds drawn from Bland in his Weakness by Circumvention, being a Paralytick Man, without Consideration, and the Intention of Bland was always to advance his Children and Grandchildren until this Fraud: This Court decreed that the said Lowns and the other Trustees, their Heirs and Assigns shall not have any Benefit from henceforth by the said Conveyances, but shall convey the said Lands to the Six Clerks to be by them conveyed to whom of Right they shall belong. And the Defendant Lowns shall not meddle in performing of the Will without his Co-executors.

YATE *contra* SOUTHEY.

3 Car. 1, fo. 1159 [1627-28].

Tithes. Decree denied to be revers'd.

A Bill of Review brought to reverse a Decree for Tithes made by the Lord Evesham in Respect the Plaintiff hath had a Verdict at Law, and Sentence in the Ecclesiastical Court since the Decree: This Court would not reverse the Decree notwithstanding any Thing urged against it.

[26] RICKSERS *contra* HERNE.

3 Car. 1, fo. 883 [1627-28].

A Feme Sole makes an Agreement with others to distribute the Residue of the Estate of one Katherine Debel amongst them, and after marries the Defendant. The Question is, Whether the Defendant is bound by this Agreement of his Wife's as to any of the Residue which came to his Wife after Marriage.

This Court is of Opinion, that what came in between seven and eight Years after Marriage by the Death of the said Katherine was not within the Compass of the Agreement, but was to go to the Benefit of the Husband.

HAVERS *cont.* BURTON.

4 Car. 1, L. A. fo. 47, 714 [1628-29].

Custom of London. Orphans.

That Robert Havers the Plaintiff's Husband deceased, having £1000 left to him by his Father, being a Citizen and Freeman of London, and the said Plaintiff's Husband being an Orphan under Age, and his Portion being in the Chamber of London, the said Robert Havers married the Plaintiff, who brought unto him a good Portion: and afterwards, and before the said Robert Havers came of Age, he died, but by Will gave the Plaintiff the £1000.

[27] The Defendant insists, that the said Robert's Portion by the Custom of London survived to his Brothers and Sisters, and that £500 of the £1000 in the Chamber of London was a Legacy given to the said Robert to be paid at twenty-one, or if he died before, then to go to his Brothers and Sisters, and so he could not dispose of it.

This Court nevertheless conceiving it an hard Case against the Plaintiff, who brought a Portion, ordered it to be referred to the Master of the Rolls and two Serjeants at Law to settle the Difference, who did order the said Brothers and Sisters to pay the Plaintiff £240.

BROWN *cont.* THETFORD.

4 Car. 1, L. A. fo. 62 [1628-29].

Tithes. *Modus Decimandi*.

The Bill is to maintain the Prescription of a *Modus decimandi*, to which Bill the Defendant demurred, and says it is proper for the Common Law or Ecclesiastical Court. This Court allowed the Demurrer and dismiss'd the Bill. But note the Time, &c., such Bills having been often allowed both before and since.

GAME *contra* HOE.

4 Car. 1, L. A. fo. 65 [1628-29].

Personal Estate limited in Remainder.

That Richard Hoe by Deed gave to Elizabeth his Daughter all his Plate, Jewels, Houshold-stuff, and other his personal Estate whatsoever; and all the [28] Jewels, Wearing Apparel, and Ornaments of Alice his Wife upon Trust, that the said Eliz. her Executors, &c., should permit the said Richard during his Life, and the said Alice during her Life, to have the Use of the said Plate, Jewels, and personal Estate.

Touching the Disposition of which personal Estate, this Court made no Question, the said Alice being dead, but the same do appertain and belong to the said Plaintiff as Administrator to the said Eliz. his Wife, according to the said Deed of Grant, and decreed the same accordingly.

DAVIS *contra* HIGFORD.

4 Car. 1, fo. 204 [1628-29].

Though a Statute want a day of Payment, yet good in Law.

The Question is touching the Validity of a Statute in respect the same wanted a Day of Payment, which was debated in the Court of Common Pleas, and upon several

Arguments, both at the Bar and Bench there, was adjudged good in Law; and this Court would not allow Interest for the Sum of £60 being Interest-Money, and the Defendants to allow the Plaintiffs Interest for such Monies as hath been made out of the Lands extended. *Vide* this Case in Winch's Reports.

[29] WARMSTREY *cont.* DOMINAM TANFIELD.

4 Car. 1, L. A. fo. 151 [1628–29].

A Possibility granted.

The Plaintiff's Title appeared to be, that one William Freeman being possess'd of the third Part of the Parsonage for the whole Term to come, granted all his Interest therein to one Alborough, in Trust for the Use of the said William Freeman and Alice his Wife, during their Lives, and after to the Use of such Issue Male of their two Bodies as the said William should by Will appoint, and after the said Will, appointed the Premises after the Death of the said Alice unto Richard Freeman, Son of the said William and Alice: And that the said Interest in Law of the said Alborough came by mean Conveyance unto John and Robert Palmer, and that the said Richard Freeman during the Life of the said Alice, who not long after died, assigned the Premises unto the Plaintiff, and also released to the Plaintiff, and the said Palmers assured their Interest in Law in the said Premises to the Plaintiff.

The Defendant insists for Title, that the said Richard Freeman about two Years after his Assignment aforesaid to the Plaintiff, made a Lease of the Premises to Walter Thomas, and John Makerith, who passed their Estate to one Evans, and [30] Hawkins, in Trust for the Defendant the Lady Tanfield, and had Possession given her.

This Court with the Judges taking Consideration of the said Assignments, Grants and Release, were of Opinion, and declared, that howbeit a Grant of future Possibility is not good in Law, yet a Possibility of a Trust in Equity might be assigned, and the said Richard Freeman's Assignment of his said Trust unto the Plaintiff is also confirmed by the Assignment of the said Palmer, who had the Interest in Law, and the said Plaintiff's Assignment is also precedent to the Deed made to the said Thomas, by which the said Defendant the Lady Tanfield claimeth the said Lease.

FERRERS *cont.* FERRERS.

4 Car. 1, L. B. fo. 948 [1628–29].

Heir. Portion to be laid out in Land to the Use of the Wife and Issue, the Remainder over, Wife dies before the Purchase, and the Issue dies leaving Executor, the Money decreed to the Executor.

This Suit is touching a Portion of £1000, the Plaintiff claiming the same as Heir to William Ferrers: The Case is, That a Marriage being intended between the said William Ferrers and Jane Vanlore, Daughter of Sir Peter Vanlore, the said Sir Peter agreed to give with his Daughter to the said William £4000, to be laid out in a Purchase of Land, to be settled on the said William and Jane, and the Heirs of their two Bodies, the [31] Remainder to the Right Heirs of the said William; and Sir Peter gave bond of £8000 for the Payment of the said £4000 within three Months after Demand, and to pay £100 per Annum in the Interim, and that by Deed of the same Date with the Bond made between William Ferrers, Father of the said William, of the first Part, the said William of the second Part, and Sir Peter of the third Part, it was agreed that the said Sir Peter should detain the said £1000 until such Purchase as aforesaid: But before the said Purchase made, Jane died, having Issue a Son, who soon after died, and the said William the Younger surviving and accounting the £1000 and Interest as Part of his personal Estate, declared it should go to his Executors, to pay his Debts and Legacies, and that the said William the Younger had received £100, Part of the £1000 of the said Sir Peter, and the said William the Younger died leaving the Defendant his Executor.

This Court with the Judges declared, and are of Opinion, that if the Land had been purchased, yet the said Jane and her Son being both dead, the said William the Younger might have conveyed away the same from the Heir at Law, notwithstanding the Agreement: and by the said Bond of £1000 being to be paid to the [32] said William Ferrers, his Executors or Administrators, the same in Law and Equity belongs to the Defendant, and decreed the Money to the Defendant as the Law had appointed it with Interest.

OWEN *cont.* APRICE.

4 Car. 1, L. B. fo. 1247 [1628–29].

Mean Profits.

This Court left the Plaintiff to take her Remedy at Law for the Recovery of the mean Profits, notwithstanding a Decree for the same in the Marches.

HOW *cont.* VIGURES.

4 Car. 1, L. A. fo. 307 [1628–29].

Heir—Mortgagor—Devisor.

That William Grills being in his Life time seized of Fee and Right in a Reversion of Lands depending upon the Life of one Katherine Hicks, Mother of the said Grills, being the Jointure of the said Katherine; and the said Grills by Deed 25 Nov. 18 Jac. [1620] mortgaged the said Lands unto William Atwel and William Gallion, and their Heirs, which Mortgage became forfeited, and afterwards the said Gallion by Deed, 1 Mar. 22 Jac. [1625] released all his Right, Title, and Interest in the said Lands unto the said Atwel and his Heirs for ever; and that afterwards Atwel, by Will, devised the same Premises to the Plaintiff and his Heirs for ever. [33] and the Plaintiff being a Merchant, and his Livelihood consisting in the Returns of Money, and the Consideration in the said Deed of Mortgage being £340, disburs'd in 18 Jac. [1620–21] as aforesaid, upon a dry Reversion, the Plaintiff by his Bill seeks, that the Defendants who are Heirs at Law unto William Grills the Mortgagor, may repay the said £340 with Damages, or else the Lands be decreed to the Plaintiff, to the End he may sell the same.

This Court declared, that no decree could be made against the Heir of the Devisor, but only against the Mortgagor and his Heirs; and decreed the Heirs at Law of the Mortgagor to pay the Plaintiff the £340 with Damages, or in Default, the Premises mortgaged are decreed to the Plaintiff, to be sold for Satisfaction of his Debt: This was *nisi causa*, and none shewed.

MIDDLETON *cont.* JACKSON.

5 Car. 1, fo. 353, 397 [1629–30].

A moderate Year's Value, a reasonable Fine in Case of Tenant-Right.

The Plaintiffs and Defendants were to produce Precedents for Fines, in Cases of Tenant Right, in what Manner they had been assessed formerly by this Court; the Defendant now offering to give the Plaintiffs a moderate Year's Value [34] for a Fine; this Court in Case of Tenant Right conceiving the said Offer to be fair and reasonable, decreed the Defendants to pay the Plaintiffs for the present, one whole Year's Value of their Lands for a Fine, and as Land riseth or falleth upon every Alienation or Death of the Tenant, or Death of the Lord, a moderate Year's Value; and the Defendants to give Notice of every Alienation at the Lord's Court; and the Fine now assessed is not to be taken as a Fine certain; and a Master of his Court to set the said Fine.

The said Master assessed the Defendants to pay for a Fine to the Plaintiff for every Acre of Land, according to the usual Measure in those Parts, which in a Tenant-Right they shall hold of the Plaintiff's Manor, the Sum of 7s., except it be a Land called Moss Land, which he rateth at 12s. the Acre, which the Defendant submitted unto, which this Court decreed accordingly.

[See *Popham v. Lancaster*, 1636–37, 1 Chan. Rep. 96; *Fraser v. Mason*, 1883, 11 Q. B. D. 579.]

PETER *contra* RICH.

5 Car. 1, fo. 315 [1629–30].

Surety.

That the Plaintiff and Defendant, with one Southcot and Grimes, became bound to the Lord Russel in two Bonds of £1600 a-piece, for Payment of £800, £100 being Purchase-money, and the Plaintiff and Defendant entred [35] into two Counter-bonds

to the said Southcot for his Indemnity, and the first Bond of £800 was paid, and the Plaintiff and Defendants Richard Sheppard came to account, upon which the Plaintiff appeared to have paid all his Part of the said Purchase-money save £10, for which the Plaintiff gave the Defendant Rich alone a Bond of £80, and thereupon was to be freed by the said Defendants of the £800 Bond, and was to give over the said Purchase wholly unto them; yet notwithstanding £100 of the said Purchase-money being not paid, the Plaintiff was compelled to pay the same, being formerly bound with the Defendants in the said Bond of £1600, together with £5 Interest thereof, which said £105 this Court conceived ought to have been paid by the said Sheppard as the Residue of his Part of the said Purchase money, but the said Sheppard being insolvent, the said £105 in the Opinion of this Court ought to be equally paid and born by the Plaintiff and Defendant Rich, and decreed accordingly.

[Distinguished, *Hitchman v. Stewart*, 1855, 24 L. J. Ch. 690.]

[36] HUDDLESTONE *contra* LAMPLUGH.

5 Car. 1, fo. 796 [1629–30], & 7 Car. fo. 370 [1631–32].

Dower confirmed.

This Case is touching a Lease of the Manor of Little Hatley and other Freehold Lands, made by Simon Perrot and Mary his Wife, 19 Eliz. to Will. Gibbens and Edw. Gibbens for ninety Years, contrary to the Purport of a Decree in the Court of Wards, by which the said Perrot had only Power to make Leases for twenty-one Years, if he had Issue by his Wife, as Tenant in Tail might do, and not otherwise. The Plaintiff insisted, that the said Lease was kept on Foot by the Plaintiff's Father, only to accompany the Freehold and Inheritance, and not for any Profit to be made by the said Lease: That the Plaintiff's Father 28 Eliz. [1585–86] by Feoffment of Livery and Seisin settled the Premises to the Use of the Plaintiff immediately after the Death of William Huddlestone the Plaintiff's Father, who died in March, 3 Car. [1628] and the Tenants attorned to the Feoffees, and the Defendants insisted, that the said Lease was kept on Foot by the said Will. Huddlestone for benefit:

This Court on first Hearing forbore to give Judgment, but would advise with [37] the Judges touching the said Estate made to the Plaintiff, and the Assignment made on the Defendant's Behalf, being both done voluntarily and without any Consideration, the one being his Son and Heir, and the others the Defendant Elizabeth's Children, the said William Huddlestone's Wife, born for the most Part of them before the Marriage in the Lifetime of the Plaintiff's Mother, whether the said Lease for Years ought in Equity to follow and attend the Conveyance of the Inheritance or no.

His Lordship with several of the Judges did now declare, that he and other Judges also, to whom the Case had been put by him, were all of Opinion, that it was just to decree that the said Lease should be brought into this Court, and be assigned over unto the Plaintiff, and decreed the Plaintiff to enjoy the Manor and Lands in the said Lease contained against the Defendants, and the Defendants to assign the said Lease to the Plaintiff: And as touching Mrs. Eliz. Huddlestone the Defendant's Thirds, which she hath recovered at Law against the Plaintiff, and is kept out of Possession thereof.

His Lordship in Regard this Point is not judicially before him, cannot make Order therein, the said Eliz. having no Bill in Court.

[38] HUDDLESTONE *contra* HUDDLESTONE.

7 Car. 1, f. 370 [1631–32].

Dower.

The said Eliz. having exhibited her Bill, and therein setting forth, that she had obtained several Recoveries at Law for her Dower in the Premises in Question; but the Defendants detain the Possession from her, so that the Plaintiff Eliz. hath been kept without her Means since the Death of her Husband. The Defendant insisted, that the Thirds allotted unto the Plaintiff out of the Lands in Yorkshire was unequal, and Commissioners had allotted her the third Part of the said Lands for her Dower, and therefore she ought to be concluded thereby.

This Court ordered a Commission.

MOOR *contra* ROW.

5 Car. 1, fo. 168 [1629-30].

A Counsellor's Bill for Fees dismissed upon Demurrer.

The Plaintiff being a Counsellor at Law brought his Bill for fees due to him from the Defendant being a Solicitor, and was to account with him at the End of every Term. The Defendant demurs. This Court allowed Demurrer *nisi causa*: Demurrer affirmed, and the Bill dismissed.

[See *Kennedy v. Brown*, 1863, 13 C. B. N. S. 706.][39] TUPHORNE *contra* GILBIE,

5 Car. 1, fo. 357 [1629-30].

This Case is touching an Occupant in Trust.

That the Defendant Gilbie conveyed Lands to the Defendants Heyward and South and their Assigns, to the Use of them, their heirs and Assigns, during the Lives of the said Gilbie and Eliz. his Wife, and to the longer Liver of them, with a Proviso, that if the said Gilbie shall pay unto Thomas Bennet the Intestate £120 in Feb. 1628, then the Estate to be void, and the said Gilbie to re-enter, and the £120 not being paid, the Estate became forfeited; and the Testatrix Anne Mansel having paid divers Debts for the said Tho. Bennet, for whom her Husband stood engaged, she had the Order of this Court for the Defendants Hayward and South to convey their Interest to her, which they did; and the Tenants of the Lands having been ordered to pay their Rent, and the Estate of the said Anne Mansel in the said Premises hath been settled in the Plaintiff, who is her Executor, by the order of this Court; but there being no Decree in the Cause, the Plaintiff hath exhibited this Bill to have the said Estate confirmed to him by Decree.

[40] This Court with the Advice of Judges, and View of Precedents of this Court, whereby in some special Cases the Court hath ordered the Possession against an Occupant, did declare that where in Case of an Occupant upon a general Trust, this Court did rest doubtful how to decree any Thing upon a Matter of Equity in Opposition to a Ground or Rule at Law.

But this Court finds this Case to be much differing from a general Trust upon an Estate granted *pur auter vie*; this being a conditional Estate *pur auter vie* granted as a Security or Pledge for a Debt, which being not paid, the Estate by Forfeiture becometh Assets in the Plaintiff's Hands to pay the said Bennet's Debts.

This Court decreed the said Lands to the Plaintiffs and Assigns absolutely, during the Continuance of the said Estate for Satisfaction of the said Bennet's Debts, and Tenants to attorn *nisi causa*, and none shewed. *Vide* Stat. of Frauds and Perjuries, as to Estates of Occupancy being Assets.

WINCHCOMB *contra* HALL.

5 Car. 1, fo. 385 [1629-30].

The Plaintiff seeks to have a Conveyance of his Father's Estate set aside, which was made twenty Years since, when he was eighty Years old and *non compos mentis*. This Court was of Opinion and declared, that after twenty Years and two [41] Purchasers, it was not proper for this Court to examine a *non compos mentis*, and did dismiss the Bill. (*Vide* Eq. Rep. 306; *post*, 106, 206.)

MORGAN *contra* CLARK.

5 Car. 1, fo. 445 [1629-30].

Inclosures.

That by Consent of the Freeholders of Kingsthorp the Plaintiff inclosed Lands there, and the Defendant being Parson of the said Church, and seized in Right of his Parsonage of some Glebe within the Plaintiff's Inclosure; it was agreed between the Plaintiff and Defendant, that the Plaintiff and his Heirs should inclose and keep in Severalty the said Glebe; and that the Defendant and his Successors, Parsons of Kingsthorp, should enjoy in lieu thereof Freehold of the Plaintiff's, being as good in Quantity and Quality

as the Glebe within the Plaintiff's Inclosures. The Plaintiff exhibited his Bill to have the Inclosures established by the Decree: The Defendant confesseth the Agreement; but because it is to bind the Inheritance of the Church, desired a Commission to examine the Quantity and Value of both Lands, that the Church might receive no Prejudice, whereby it appears the Lands in Lieu of the Glebe are full as good as the Glebe. This Court decreed the Plaintiff, his Heirs and Assigns, to enjoy the said Glebe [42] in Severalty to their own Use, and that the Defendant and his Successors, Rectors of Kingsthorpe, and all claiming under them, the Defendant and his Successors to enjoy the said Freehold according to the said Agreement.

BARKER contra ZOUCHE.

5 Car. 1, fo. 202 [1629-30].

Will Revocation.

That the Lord Zouch, in June 1617, made his Will in Writing with a Schedule annexed, and thereby directed, that his Feoffees in Trust for the Manor of Greevil should make a Lease thereof to the Plaintiff and one Moor for eighty Years, if either of them should so long live, at 5s. per Annum Rent, payable to the Executors of the said Lord Zouch, and appointed Edward Mountague, and Robert Fulnethy, his Executors, and that many Years after the said Will and Schedule, the said Lord Zouch being desirous to change his Executors, but fearing that Change might impeach the said Will or Schedule, about two Years before his Death made this Memorandum and Schedule at the End of the said Will.

Memorandum, If by Law this my last Will may stand and be in Force with this Schedule thereunto annexed, that I revoke my Executorship of Robert Fulnethy and Edward Mountague, and do hereby [43] appoint and constitute Sir Edward Zouch my only Executor to perform this my Will and Schedule, and after the said Memorandum made, resolved to change the Feoffee in Trust of the said Manor of Greevil for some Reasons, and in 1625, caused the then Feoffees or some of them to join with the said Lord Zouch in making a Feoffment of the said Manor of Greevil, to the said Defendant and one Arthur Worth and their Heirs, to the Use of the said Lord Zouch, and the Defendant Sir Edward Zouch, and others, until the Lord Zouch limit or order new Uses thereof, which he never did, and died, and Sir Edward Zouch proved the said Will, &c., but refused to assure a Moiety of the said Manor of Greevil to the Plaintiff James Barker, according as the said Will and Schedule directed, pretending the said Feoffment being made after the said Will and Schedule was by Law a Revocation of the said Will.

This Court, having well advised and considered of this Point, was of Opinion, that the said Feoffment was in Equity no Revocation of the Plaintiff Barker's Moiety of the said Manor of Greevil, but it ought to be settled on him, the said Defendant Sir Edward Zouch, having performed some Part of the said Will.

[44] *LASBROOK contra TYLER.*

6 Car. 1, fo. 329 [1630-31].

Alimony decreed, and also the Benefit of a Bond before Marriage.

The Plaintiff on the Behalf of the other Plaintiff Margaret his Sister, sought to be relieved against the Defendant Tyler her Husband for Allowance to be given her for Maintenance, for all the Time she departed from him, which was a Year and a Half, which this Court decreed, and also the Benefit of a Bond given before Marriage.

MAYOR OF LONDON, &c. contra BENNET.

6 Car. 1, fo. 649 [1630-31].

Injunction to stop Suits of Bankers who lent the King Money.

That King James borrowed £100,000 of the City upon their Common Seal, and an Act of Common Council was made in London, by which the Bonds were to be made

in the Names of the Plaintiffs under their Common Seal for Payment of the said £100,000 and Interest, to such Persons as would lend the same, and amongst others the Defendant lent the Plaintiffs at their Request £1000, for Payment whereof the Plaintiffs became bound in £1500, and his now Majesty Car. 1. borrowed £60,000 more, and secured that and the £100,000 by Mortgage; and his Majesty, for further Satisfaction of the Lenders Debts and [45] Damages, agreed to sell Lands in Fee-Farm, which was accepted of and yielded to, and an Act of Common Council made, but the Defendants said Debt cannot receive such sudden Satisfaction, and the Defendant requires Money not being to be raised so suddenly; and at another Common Council the City used all Endeavours for the raising of Money, and they promised to deal with the Defendant as well as any other of the Lenders, as to the speedy Payment of his Debt; yet the Defendant proceeds at Law against the Plaintiffs upon the said Bond. This Court granted an Injunction.

This Defendant offer'd divers Reasons against the Injunction, but this Court liked of none, there being a Precedent where, in the like Case, an Injunction was granted, and this Court ordered an Injunction till hearing.

PEACOCK *cont.* GLASCOCK.

6 Car. 1, fo. 656 [1630-31].

That Weston Glascock, former husband of Anne the Plaintiff's Wife, about fourteen Years since, upon his Inter-marriage with the said Anne, became bound to one Boosey in a Bond of £3000 to acknowledge a Statute of £2000 within six Months after his Marriage with the said Anne, unto the said Boosey, [46] defeazanced, that if the said Weston Glascock should not in convenient Time after the said Marriage, before his Death, convey to the said Anne Freehold Lands in Essex, of the clear yearly Value of £500 for her Life for her Jointure, then the said Weston should leave the said Anne at his Death £1000. And the said Weston did by his Will devise unto the said Anne Lands to her and her Heirs; agreed now in Court to be £52 per Annum; but the said Plaintiff insisted, that the Lands so devised were a voluntary Gift of her said Husband, and not in Respect of the said Bond of £3000 or Jointure, and produced two Witnesses to prove the same.

This Court, nevertheless, is clear of Opinion, That the said Lands so devised were in Lieu of the said Anne's Jointure, and that the said Proofs are but meer Conjectures, and therefore decreed the said Bond of £3000 to be delivered up to be cancelled.

And as to the Lease of 1000 Years of the Lands claimed by the said Peacock and Anne his Wife, Executors of the said Weston Glascock, the same was made over unto the Defendant Ignatius Glascock, by the said Weston, redeemable on Payment of £373, and the said Weston by his Will appointed all the Rents and Profits of [47] the said Land unto Ignatius for Payment of his Debts and Legacies, until the said Tho. Glascock shall come to his full Age, and if the said Ignatius refuse to give a Bond of £1000 to his Executors, to pay his said Debts and Legacies, and discharge the said Anne of all Debts due unto him, the said Ignatius, Weston Glascock, or to any other, then the said Anne should have the said Rents, Revenues, Goods and Profits of the said Lands, to pay the said Debts and Legacies. Now for that Ignatius refused to render the said Bond of £1000, and for that by his Answer he confesseth the said Lease was made to him in Trust, and as a Security for the said £373, which if he may have damaged, and what Money is owing to him from the said Weston, he will assign the said Lease to the Plaintiffs; and for that all the Debts and Legacies are to be paid out of the said leased Lands, it is ordered, That the said Plaintiffs paying first unto the said Ignatius his Money due on the said Lease, and what Money is due to him from Weston with Damage, which this Court alloweth the said Plaintiff again out of the Rents and Profits with the like Damages, then the said Lease shall be assigned to the said Plaintiffs till Satisfaction be made them for the Debts and Legacies, and also for what they shall pay as aforesaid, [48] and both Parties to account before a Master.

And it is decreed, That after the said Debts and Legacies paid, the Plaintiffs shall take no further Benefit of the said Lease, but shall account to the said Thomas Glascock the Heir at twenty-one Years of Age, and declared the personal Estate of the said Weston bequeathed unto the said Anne by his said Will, shall not be subject or liable to the said Debts and Legacies as aforesaid.

DEAN *contra* WADE.

16 Car. 1. f. 80, 710 [1610-41].

Relief for the mean Profits.

The Suit is touching Lands, and the mean Profits thereof taken by this Defendant : This Court would be attended with Precedents touching Relief for Mean Profits : the Plaintiff producing a Precedent made between Drury and Drury, this Court upon deliberate Advice, and reading the Precedent, is well satisfied, and is of Opinion, that the Defendant ought to answer the Mean Profits of the Premises to the Plaintiff made and rendered by the Defendant, and accrued since the Time of the Bill.

[49] DRURY *contra* DRURY.

6 Car. 1, f. 74 [1630-31].

That William Smith seized of the Manor of Coles, made a Lease of the Demesne thereof to one Clark for twenty Years, and died, leaving the Reversion to descend to the Plaintiff and Defendant William Drury his Co-heirs, and that the said William Drury hath entred into the whole Manor, and the said Defendant Clark is charged to be behind with his Rent. The Defendant saith, that without the consent of the Plaintiff he entred upon the Defendant Clark for not Payment of Rent, and conceives that thereby he hath wholly avoided the Lease ; which being a Point doubtful in Law, whether the Lease be wholly avoided, or but for Half, this Court referred that Point to the Judges, who certified, that a writ of Partition be brought between the said Co-heirs.

This Court order'd the same according to the said Certificate, and the Defendant Drury shall answer to the Plaintiff a Moiety of the Profits of the Premises, from the Time of the Avoiding the Defendant Clark's Lease, according to the just Value of the Lands.

[50] COMES NEWCASTLE & ELIZ. UXOR *contra* COM. SUFFOLK.

6 Car. 1, fo. 644 [1630-31].

Jointure—Lease—Trust—Of Jointures, Dowers, &c.

That the Plaintiff claims the Premises by Deed in 11 Jac. [1613-14] executed by the late Earl of Suffolk to Dame Judith Corbet, Mother of the Plaintiff's Wife Dame Eliz. in Consideration of a Marriage between Hen. Howard Esq., the third Son of the said late Earl of Suffolk and the said Lady Eliz. Daughter of the said Judith Corbet, and by fine levied thereupon by the said late Earl and Dame Katherine his then Wife, and the Defendant the now Earl of Suffolk his Son, unto the said Dame Judith Corbet with general Warranty to and for the Use and Behoof of the said Henry Howard and the said Eliz. his then Wife for their lives in Part of her Jointure.

The Defendant insists, that the said Fine and Conveyance ought not to take place, or work upon the said Lands and Premises ; for that, as touching Part of the Premises ; (viz.) Tollesbury, Abshall, &c., there was a Lease in 3 Jac. [1605-6] made by the said Earl unto Roger Pennel his Servant for fifty years from Michaelmas then next, in Trust for the said Countess of Suffolk, under which said Lease and Trust by Agreement and Permission of the said [51] Countess of Suffolk, the said William Howard received the Profits of the Manor of Tollesbury, having the Inheritance thereof settled in him by Deed from the said late Earl his Father ; and the said now Earl in Avoidance of the Plaintiff's Title to the Manors of Abshot, Salkot and Wigborrow, did alledge the like lease to be made to Pennel upon the same Trust for the said Countess Dowager of Suffolk, and that the same Manors descended to him as Son and Heir to the said late Earl his Father ; and it was insisted, that the said late Earl had no Estate in the Manors of Wendon and Westbury at such Time as the said Fine and Conveyance were made and levied, but that the Interest thereof was then in Henry Speller and Michael Humphrey, and that Sir Henry Speller being Survivor granted and demised the same to the Lord William Howard and Marmaduke Moor for 500 Years, and afterwards conveyed the Inheritance to the now Earl of Suffolk.

This Court did therefore now declare, that the said Fine, wherein the said Countess Dowager of Suffolk is a Party, is sufficient to bind the Trust of the said lease made to Pennel, being for the said Countess's Use ; and howbeit the estate in Law of the

said Manors of Wendon and Westbury was in the said Sir Henry Speller, yet [52] the same was then in the said Sir Henry Speller and Michael Humphrey in Trust for the said late Earl of Suffolk and his Heirs : for that it appeared he held the Possession thereof, and disposed thereof at his Will and Pleasure, and of Part thereof made a Lease of twenty-one Years, and several other Leases, all which Leases did precede the Plaintiff's Jointure, and are yet in Being ; and it not appearing whether the said Lease of 500 Years made to the said Lord William Howard and Moor was made before the Commencement of this Suit, or the Process or Letter served touching the same, nor whether the Lessees had any notice of the said Trust.

This Court decreed, that the Plaintiffs and their Assigns during the Life of the said Lady Eliz. shall enjoy all the Lands in the Bill against the Defendants, their Heirs, &c. But if hereafter the Lease of 500 Years shall appear not to be made *pendente lite*, then it is decreed, the said Earl of Suffolk shall recompence and satisfy the Plaintiff by Reason of the said Lease.

LEVINGTON *cont.* WOTON.

7 Car. 1, fo. 360, 388 [1631-32].

Jurisdiction of the Dutchy Court over-ruled in Chancery. Injunction against Proceedings in the Dutchy Court.

That an Injunction might be granted by this Court ; it was insisted by the Plaintiff, that this Court hath Priority [53] of Suit ; Sir Ja. Levington having exhibited four several Bills in this Court ; one for the Execution of a Trust ; two against Carrant and others, to discover secret Estates which had been made, and for producing Letters Patents and Writings touching the Lands in Question ; and the fourth against the Defendant Wotton upon a private Agreement with him and others, for a full eighth Part of the whole Land when first the said Sir John Levington entertained and presented the Suit to his late Majesty, and the said Injunction being not dissolved : two Informations have been this term exhibited in the Duchy Chamber on Claim of divers Acres of Marsh Ground, and the Information by Dacombe against the Plaintiff and others on Pretence of a Trust devolved upon him and Ma—— Carrant, wherein he is a Competitor for the same Lands with the now Plaintiff, grounded upon the same Patent ; and to one of these Informations, notwithstanding a Plea and Demurrer thereto, the Relators have obtained an Injunction out of the Dutchy for dividing and ploughing the said Lands, and staying of Suits, as well at Common Law as in all other Courts, and Possession to remain with the Relators. And the Lands, for which the Plaintiff in this Court prays Relief, are Lands gained from the Sea, and belong [54] as well to the Crown as the Dutchy, and held of his Majesty's Manors of East Greenstead and Enfield in Middlesex, and are granted in Fee-Farm : His Lordship upon reading the Order made in the Dutchy Court, ordered, That if the Defendant do not shew better Matter, this Court will maintain and continue the Injunction granted in this Court ; and at the Time of shewing Cause, all the Letters Patents and the Certificate heretofore made by his Lordship, and other Lords Referees, unto his Majesty touching this Matter, and all Proceedings both in this Court and the Dutchy, are to be ready.

This Court, upon reading the Order of the Dutchy Chamber being, as aforesaid, to enjoin this and other Courts to stay Proceedings touching the Marsh Grounds : nothing then was said by the Court of the Defendants Competitors and Pretenders to the Marsh Grounds to oppose the Jurisdiction of this Court, but that the same of Right ought to be maintained notwithstanding the Injunction of the Dutchy Court.

His Lordship doth not conceive it any doubtful Question, Whether in Case any Lands (at first being Dutchy, and after granted from the Crown by the King's Letters Patents in Fee-simple or Fee-Farm under the Great Seal and Dutchy Seal) [55] are not upon a Trust and other equitable Causes to be debated, and held Plea of in this Court ; and upon Complaint made to his Majesty on the Plaintiff's Behalf, 5 Junii, 7 Car. [1631] touching the Premises, his Majesty was graciously pleased to refer the Consideration of this Cause to the Lord Keeper, Chancellor of the Dutchy and Chancellor of the Exchequer, who were to take such Course for his Relief as they should think fit in Justice and Equity, which they did, and certified their Proceedings to his Majesty, which Certificate his Majesty approved of.

And his Lordship doth still maintain and continue the Injunction granted by this Court, and granted a new Injunction against all that are since made Defendants :

and whereas the Defendants have pleaded the Jurisdiction of the Dutchy Court, and will not answer in this Court, his Lordship over-ruled them all as to the Point of the Jurisdiction of the Dutchy.

Ordo Curie, 7 Car. 1 [1631-32].

The Lord Keeper finding much Inconvenience and Prejudice to fall upon divers of his Majesty's Subjects, who are Suitors in this Court, by the undue Proceedings of such as sue out the Process of the Court upon Contempts, the [56] same oftentimes running out to a Commission of Rebellion, or to a Serjeant at Arms before the Party, against whom the Process is made out, hath had Notice of the precedent Process issued forth against him, which is occasioned by Reason the Process is oftentimes made into a County where the Party is not resident, and when it is made into the right County, by Reason of an unusual Neglect, and Want of Care of the Prosecutor to get the same executed, the Sheriff returneth a *non est inventus*, or a *proclamari feci*; and sometimes the Return made by others in the Sheriff's Name in an ordinary Course. His Lordship therefore, to remedy such Inconvenience and Abuse hereafter, and to prevent the Vexation of the Subjects in this kind, doth think fit and order, that all Process hereafter to be made upon any Contempt, be made out in the proper County where the Party, against whom the same Process issueth, shall be resident or dwelling, unless he shall be then in or about London, in which Case it may be directed into the County where he shall then be, that it may be served upon him there. And that every Suitor, who prosecuteth Process of Contempt against any of his Majesty's Subjects, shall do his best endeavour to procure the said Process to be duly executed, [57] and the supposed Contemnners to be apprehended thereby. And if any be hereafter arrested upon a Proclamation or Commission of Rebellion, or by the Serjeant at Arms, and shall make it appear unto this Court, that the Prosecutor hath not done his best endeavour to have had the first and precedent Process duly executed, then that Party so offending shall pay unto the other very good Costs.

EYRE *contra* WORTLEY.

3 Car. 1, fo. 314 [1627-28].

Damages.

Twenty Marks per Cent. Damages allowed till the Performance of the Decree.

PETTY *contra* STYWARD.

7 Car. 1, fo. 93 [1631-32].

No Survivorship to joint Mortgagees.

That the Defendant Nicholas Styward, and one Simeon Styward (whose Executor the Plaintiff is) lent £2500 to Sir Thomas Glenham. £1450 of the said Money being the proper Money of the said Simeon, and £550 Residue was the Defendant's Money, and for security the said Sir Thomas Glenham mortgaged Lands to the said Simeon afterwards, and the Defendant Styward and their heirs, redeemable at a Day prefix'd upon Payment of £2630, that the said Simeon before the Day of Redemption [58] made his Will and disposed of the said £550, and therein recited that the £1450 was delivered by him to the said Defendant his Father, which appeared by a Note under both their Hands; and that if the said Lands should be redeemed by Payment of the said £2500 with Interest, then the said £1450 with its Interest should be deliver'd into the Plaintiff's Hands for the Uses in the said Will, the very Day of Redemption the said Lands were redeemed, and the whole Money and Interest paid unto the Defendant, which the said Defendant claimeth by Survivorship.

This Court is clear of Opinion, that by Equity in a Case of this Nature there ought to be no Survivorship, in Respect the same was but a Mortgage, and the Money was repaid at the Day, and the Note under both the said Parties Hands, and the Will of the said Simeon sheweth plainly a Trust each in the other, and an Intention, that if the Money was repaid, either of them should have his Money again with Interest, and decreed the Defendant to pay to the Plaintiff the £1450 and Interest so by him received.

[S. C. 1 Eq. Ca. Abr. 290.⁴ See *Steeds v. Steeds*, 1889, 22 Q. B. D. 541.]

[59] THROGMORTON *con.* WAGSTAFF.

8 Car. 1, f. 59, 154 [1632-33].

Occupant—Assets.

The Plaintiff seeks to be reliev'd against Ingagements enter'd into by him as Surety for the Defendant's late husband, the said Defendant having sufficient of her Husband's Estate to discharge the same; and the Plaintiff insisted to have Leases for other Lives whereof the Testator was seized at the Time of his Death (and on which the said Defendant entered as an Occupant) to be Assets in Equity.

This Court, in Respect the Plaintiff did not get a Case made of this Point by such a Time, ordered the Defendant to be discharged of and from the Plaintiff's further Demands. *Vide* for this Point the late Statute of Frauds and Perjuries.

SIBSON *contra* FLETCHER.

8 Car. 1, fo. 529 [1632-33].

Mortgage—Possession and Equity.

The Defendant had a Mortgage of the Lands of one Briscoe, 14 Jac. which Lands the Plaintiff since purchased, which Mortgage Money was payable three Years after, and the said Briscoe hath had the Possession of the Lands ever since the making of the said Deed of Mortgage, till 21 Jac. [1623-24] at which Time he sold to the Plaintiff, who was never [60] interrupted till now of late; the Defendant sets the Mortgage on Foot, pretending the Mortgage-Money was unsatisfied. Now, for that the Defendant did not upon the Plaintiff's Purchase, tho' he saw the possession altered from Briscoe to the Plaintiff, make any Claim to the Land, nor give any Notice of his Mortgage; and the Defendant hath since purchased Lands of Briscoe and paid him Money, so as in all Presumption this Mortgage-Money is satisfied, and Possession hath been seventeen Years in Briscoe and the Plaintiff;

This Court was fully satisfied, that there is nothing due on the said sleeping Mortgage, and decreed the Deed of Mortgage to be delivered up to be cancelled.

STOIT *contra* AYLOFF.

8 Car. 1, fo. 530 [1632-33].

Coverture—Debt—Promise by an Husband to a Wife to pay her £100. void.

The Defendant after Marriage of his Wife promised Payment to her of £100, and since they are separated, the Plaintiff's Bill is to charge the Defendant with the £100, but the Debt being sixteen Years old, and the Promise made by a Husband to a Wife, which this Court conceiveth to be utterly void in Law, and would not relieve the Plaintiff.

[61] HARDING *con.* COUNTESS OF SUFFOLK.

8 Car. 1, f. 502 [1632-33].

Annuity—Rent-charge, &c.

The Plaintiff's Suit is for a Rent-Charge of £200 per Annum, granted by the late Earl of Suffolk with the Privy and Consent of the said Countess 15 March, 7 Jac. to Sir John Townsend deceased, during the Life of the Plaintiff Katherine, to be issuing out of the Manor of Walden in Trust, and for the Use of the Plaintiff Katherine, which Annuity was duly paid with the Consent of the said Countess all the Life time of the said late Earl; but the Countess after the said Earl's Death sought to avoid the said Annuity, pretending a precedent Lease made by the said Earl, 4 Jac. [1606-7] for many Years yet to come to certain Persons in Trust for the said Countess of the said Manor and Lands out of which the said Rent issues; and because the Premises charged with the said Rent lay intermixt, that the Plaintiff could make no Distress for Recovery, the Plaintiffs are remediless at Law.

For avoiding which Lease the Plaintiff produced a Fine levied by the said late Earl, and the now Earl in Mich. Term, 13 Jac. [1615] of the said Manor and Lands of Walden; and though no Indenture [62] could be produced to lead the Use of the said Fine, yet they all alledged, that the said Fine was to the Use of the said Countess for her Jointure, and that she enjoyed the same by Virtue of the said latter Conveyance, and not by

the said Lease, and so the said Rent-Charge ought not to be impeach'd; and it did not appear that the said Lessees for the Countess ever made Entry or Claim by Virtue of the said Lease since the Fine.

This Court at the first Hearing, upon this Matter declared, That the said Lease and Fine were both considerable, it being then objected, that howsoever it were, the Plaintiff ought not to be reliev'd in Equity, for that there was no Consideration for the said Rent Charge which might move a Court of Equity to relieve the Plaintiff any further than the Law would relieve him.

The Lord Keeper took Time to peruse all the Pleading in this Cause before he would deliver his Judgment.

Then the Plaintiff petitioned the King's most excellent Majesty, who referred the Consideration thereof to the Lord Privy Seal and some others of the Lords of the Privy Council, before whom the matter was debated at large; but no End being made by them, the Plaintiff [63] petitioned the Lord Keeper, informing him of the said Reference, and that it appeared to the Referees, that the Countess had an Indenture made by the late Earl to lead the Uses of the said Fine, and that the said Lords Referees were of Opinion, that the said Indenture being material should be produced by the Countess, which the Lord Keeper ordered to be brought into Court, which the Countess still refused to do; so the Lord Keeper and Lord Privy Seal now hearing the Cause upon the Merits thereof, and having maturely advised thereof are clear of Opinion, That albeit no Cause were proved, yet in Respect the Plaintiff's Suit is upon a Trust, they may and ought to be relieved, for that the Suit is not to make up or amend any Validity of the Deed in Point of Law, the Deed being valid and good enough; but the Suit is to have the Trust performed, for which the Plaintiff cannot sue at Law, and to be relieved against the confounding of Metes and Bounds, so that one Manor is not known from the other, which is usually relieved in this Court: But as touching the said Lease their Lordships declared, That if it could not be impeached, the Plaintiff could not be relieved. Their Lordships conceived, that unless some Entry or Claim were made to [64] avoid the said Fine in 13 Jac. [1615] the said Lease in 4 Jac. [1606-7] is thereby bound up in Law, and cannot be set on Foot to avoid the Plaintiff's Rent-Charge, so that the Plaintiff ought to be relieved in Equity, both against the said Rent-Charge and Arrears. But their Lordships further declared, that if the Countess bring in the said Lease and Deed, and can thereby avoid the Fine, then that may alter the Case; but if she cannot avoid the Fine, then it must be decreed as aforesaid.

And their Lordships ordered the Countess should leave, with the Register of the Court, the Points on which she will insist for avoiding the said Fine, or upholding the said Lease against the said Fine, and both Parties to prepare for that Purpose; and their Lordships declared, That if a Decree shall pass against the Countess, and she not yield Obedience thereto, then all the Manor of Walden shall be subject to a Sequestration for the Satisfying of the said Decree.

That the said Deed and Lease being produced, and the Defendant's Points to avoid the Fine being as followeth (viz.), in these Words.

The Countess, having Lands of good Value of her own Inheritance and dowable of the Earl's Lands, join'd in a Fine at the Earl's Request of her own Land and [65] Part of his Land; in Lien whereof the Earl made a Lease of Divers Lands in Com. Essex to Roger Pennel for divers Years yet in Being, in Trust for the Countess, and after granted the said Rent Charge unto Sir John Townsend of Part of the said Lands leased. The Earl died, this Rent is neither in Law nor Equity, as the said Countess conceiveth, to be laid on the said Lease-Lands during the Lease.

The Earl during his Life, and the Countess since his Death, enjoyed the Lands so leased by Permission of the said Pennel as Tenant at Will to him; in which Case no Fine levied by the Earl can debar Pennel, and not like to Saffyne's Case, where the Tenant is put out of Possession, and then a Fine levied, in which Case he is tied to claim, but not here.

Also (though it needed not) Pennel within the five Years made Entry and Claim.

The Earl being seized of some Lands in Possession, and of the Lands leased to Pennel in Reversion, levied a Fine of both. This Fine works distributively for Part in Possession, Part in Reversion, and doth not turn the Estate of Pennel into a Right, and consequently doth not enforce him to any Entry to avoid the Fine.

[66] The Countess within five Years after the Fine in the Behalf of the Lessee, made Entry and Claim, and did the like within five Years after the Earl's Death.

And the Countess being heard upon the said Points, none of them could be proved, nor could prove that Pennel ever sealed a Counterpart of the said Lease, or ever accepted of the said Lease, or ever so much as knew that the said Lease was made unto him, or that Pennel ever had Possession of such Part of the Premises as were out of Lease, or that he or any for him made any Entry into the same, nor that he received or claimed, by Virtue of any Lease or Estate made to himself, any Rents of such Lands contained in the said Lease, as were demised to Under Tenants, but such as he received, he received as Servant to the Earl.

So upon the whole Matter their Lordships declared the Points insisted on by the said Countess to avoid the said Fine, and support the said Lease, were not made out, and are of Opinion that the said Lease was a sleeping Lease, and that no Fruit or Use was made thereof, either before the said Fine or after, and is bound up in Law by the said Fine and Proclamation and Non-claim of Pennel, and cannot be set on Foot to avoid the Plaintiff's Rent-Charge, but the Possession, which [67] the Countess had of the said Manor since the Death of the said Earl, and now hath, is by and under the said Fine, and the Indenture leading the Use thereof, directed by the Indenture of Uses now produced, by which the same are limited to the said Countess for Life in Remainder after the said Earl for her Jointure; and therefore the Plaintiff ought in Equity to be relieved, both for the said Annuity and Arrears, and decreed the same accordingly.

RIGAULT *contra* CLOBERY.

9 Car. 1, fo. 730 [1633-34].

A Prisoner in Execution shall have so many Day-Writs as are needful to attend Commissioners.

This Cause being Matter of Account was referred to Commissioners to determine, which they could not do without the Plaintiff's Attendance; it was prayed, that his Lordship would grant the Plaintiff Liberty to attend the said Commissioners.

His Lordship considered, that he cannot grant any other than Day-Writs. It being resolved by the Judges, that granting Liberty to Prisoners in Execution by other Writs is against the Law; but his Lordship is content he shall from Time to Time have such and so many Day-Writs, as shall be needful for his Attendance on the Commissioners, without paying any fees either for making or sealing of them.

[68] PLOMER *con.* DOMINAM PLOMER.

9 Car. 1, f. 457 [1633-34].

On Payment of £100 the Defendant's Daughter snatcheth away £20, the Plaintiff shall not be chargeable with it, till recovered against the Daughter, and an Injunction for the Plaintiff accordingly.

The Plaintiff bringing £100 to pay to the Defendant, one Margaret Smith, the Defendant's Daughter, snatched £20 out of the £100 and went away therewith; the Defendant would enforce the Plaintiff to pay the said £20, pretending so much due to her by the Plaintiff.

This Court saw no Cause to charge the Plaintiff therewith, and for that the said Defendant Margaret Smith liveth apart from her Husband, and hath so done for many Years, and will not answer the Plaintiff's Bill, this Court would not charge her Husband with the said £20 in regard of their living apart, but that the said Margaret Smith ought to answer the same; and ordered, that the Defendant Lady Plomer should not take Advantage against the Plaintiff for the same; but expect till the Plaintiff can recover the same from the said Margaret, and the Plaintiff is to prosecute the said Margaret with Process of Contempt for her Answer, and granted the Plaintiff an Injunction against the Defendant.

[69] LAKE *contra* PHILIPS.

9 Car. 1, fo. 135 [1633-34].

Plea of Privilege over-ruled.

The Defendants have pleaded the Privilege of the Court of Exchequer, and that they ought not in Respect thereof to be drawn to answer the Plaintiff's Bill in this Court, albeit the constant Precedents of this Court were to the contrary.

This Court order'd the Defendants to shew cause why the Plea should not be over-ruled.

The Defendants produced a Precedent in 16 or 17 Eliz. [1573-75] Nott *contra* Hutton, and the Lord Keeper declared he had heretofore seen that Precedent, but had also seen very many Precedents in this Court to the contrary; but however it were in Point of Precedent, yet the Defendant's Plea being insufficiently pleaded, therefore and for that neither by Law nor by any Precedent any more than only one Plea is to be admitted to the Jurisdiction of a Court; therefore in this Case the Plea being insufficiently pleaded the Defendant ought to answer; besides, this Suit at the Exhibiting of the Bill was a joint Suit against Sir Nicholas Fortescue, who for ought appearing, had no Privilege in the Exchequer; and though Sir Nicholas Fortescue being dead, yet when the Court was at the first duly [70] and lawfully possessed of the Plea, his Death ought not to give any more Privilege to the other Defendants to draw the Cause from this Court, than they should have had at the Beginning, or while he lived; and therefore his Lordship doth adjudge the Defendant's Plea to be insufficient, and order'd the Defendants to make a direct Answer to the Plaintiff's Bill in this Court.

KENNEDY *con.* DOMINAM VANLORE.

9 Car. 1, f. 193 [1633-34].

Of Decrees repugnant, &c.

This Case is upon a Plea and Demurrer (*viz.*), That the Plaintiff by his first Bill pretending, that Sir Jo. Kennedy his Brother had transferred his Right in Equity, touching the Lands in Question, to him, and prayed Relief in Equity against Ferrers, Gosson and Johnson, who sold the said Lands by Virtue of the Decree of this Court, and against Sir Peter Vanlore, who purchased the said Lands, which Bill in Octob. 19 Jac. [1621] was dismissed: After which, Sir Jo. Kennedy being dead, and the Plaintiff insisted himself to be relieved, both by the said Deed and as Heir and Administrator to his said Brother, did 21 Jac. [1623-24] exhibit his Bill against the said Sir Peter Vanlore in his Life-time to be relieved for the said Lands, or the [71] Overplus of the Value thereof: To which Bill the said Sir Peter put in his Plea and Demurrer, setting forth the several Orders and Decrees touching the same, and the Purchase and Consideration by him paid, being £10,000 for a Reversion depending upon the Life of the Lady Ewer, which Plea and Demurrer was reported insufficient by a Master of this Court; yet at arguing the same afterwards in this Court the said Plea and Demurrer was 25 Feb. 22 Jac. [1625] adjudged sufficient, and the Bill dismissed, and Dismission signed and inrolled; after which the said Sir Peter by Deed 3 Car. [1627-28] conveyed the said Lands to the Defendant, the Lady Vanlore his Wife, during her Widowhood, and after to his Children and Grandchildren, many of them Infants, and after died. After which the Plaintiff exhibited another Bill against the said Lady Vanlore, and Sir Edward Powel for the aforesaid Lands, and also two Bills, and fifty Acres of Meadow, which the Plaintiff insists was not in Sir Peter Vanlore's Purchase made from Ferrers, Gosson and Johnson, and also for £2000 which the Plaintiff insists that the said Sir Peter did not pay of his Purchase-Money, which is still in Sir Peter's Hands. To which Bill the said Defendants pleaded and demurred as aforesaid, and the Master again reported the same insufficient, [72] yet the Court again adjudged the same sufficient, and dismissed the Bill.

Since which the Plaintiff exhibited a new Bill against the Defendants, and the Children and Grandchildren of the said Sir Peter for the said Lands, Mills, Meadow, and the £2000. To which they pleaded as before; and the Master reported the same insufficient, and thereupon the Cause was debated and heard at large; and the first Day of June an Order was made reciting the whole Substance and Progress of all the Business and Proceedings in this Court touching the said Lands at Tunbridge, as well in the Time of the now Lord Keeper, as in the Times of his Lordship's Predecessors, the Lord Ellesmere, Lord Verulam, and the Lord Bishop of Lincoln, by which it was then ordered, That the Plaintiff should by the first Day of the last Term produce Precedents where this Court hath heretofore given Relief for Matters in Equity, mentioned in Orders before any judicial Order and Decree made for Recovery thereof; and also to shew whether the Decree mentioned in the said Order were signed and inrolled, and shew what matter he could for maintaining this Bill.

The main Points now insisted on by the Plaintiff to maintain his Bill were, That Sir

Peter Vanlore was no Party to [73] the Suit between Sir Jo. Kennedy and the Feoffee, and that Sir Peter came in and purchased *pendente lite*, and that the Lands were not sold at a full Value as they were then worth at the Time of the Sale, and that the said Lord Ellesmere was not acquainted with the Purchasers according to the Intention of the former Orders; and that the Decree whereupon the said Sale was grounded was after revers'd; and that upon a Hearing before the late Lord Chancellor Bacon, being then assisted by the Lord Chief Justice of the Common Pleas, and Mr. Justice Dodderidge, the Court was of Opinion, that Sir Peter should have his Money again, but not the whole Benefit of his Bargain; and therefore it was then decreed, that Sir John Kennedy should pay as well the said £10,000 Purchase Money, as also so much as Sir Peter paid to the said Lady Ewer for the Possession, with Interest within a Year following, or else the Lands were decreed to the said Vanlore, which Decree not being drawn up and inrolled, a Commission was ordered to issue to survey the said Lands, and Sir Peter to be paid what he was out of Purse with Interest, either by some Part of the Lands or Money. And the Plaintiff also insisted that the said Lands were [74] worth £1200 per Annum, and that Sir Peter paid but £10,000 for the same, and many other Reasons were offered by the Plaintiff for Maintenance of the said Bill. But his Lordship having heard the matter debated at large, and advisedly considered of the Orders which were made in the Times of his Predecessors, doth find that because the Lord Ellesmere, who decreed the Lands to be sold, did by his Order provide, that his Lordship should be made acquainted with the Sale and Purchasers, that the Lands might not be sold at an under Value, and because there is no Notice made appear, therefore it is alledged, that the Purchasers came in *pendente lite*, whereas by Order of 4 Dec. 13 Jac. [1615] that because the Order for Sale of the Lands was not an absolute Order and Decree, the Purchasers would not deal, and then the Lord Ellesmere made the said Order an absolute Decree, and thereupon the said Lands were sold to the said Sir Peter, upon which his Lordship conceiveth, that the Lord Ellesmere took Notice of the Sale and Purchasers. And this Court finds, that the Lord Bacon undertook the Cause as an Arbitrator only, and awarded Sir Jo. Kennedy to pay Sir Peter £17,000 or else Sir Peter to enjoy the said Lands; which Arbitrament not taking by Sir John Kennedy the Matter [75] was heard in open Court again, and the Lord Bacon being assisted with the Judges aforesaid, it was decreed, that Sir Jo. Kennedy should pay to Sir Peter Vanlore his Money with Interest in a Year, or else the Estate of Sir Peter was thereby decreed; which Decree Sir Jo. Kennedy did not draw up nor inrol, and the said Sir Peter conceived he had no Cause to do it, and this Court finds by the Order of 23 Jan. 17 Jac. [1619] by which Sir Peter was to take a Proportion of Land for his Money, upon a Survey to be taken, was made by the said Lord Bacon alone without Consultation had with the Judges, who assisted his Lordship formerly, and was repugnant to the Decree made by the Court, assisted as aforesaid, without a Bill of Review: And so this Court sees no Cause why the said latter Order should be any ways binding.

This Court therefore in Regard of the Decrees and Dismissions aforesaid, and in Regard the Defendants claim under Sir Pet. Vanlore, and have had so long Possession, and he claimed as a Purchaser for valuable Considerations by the Decrees of this Court, and his Estate established by so Many Decrees as aforesaid: And for that, the Mills, and fifty Acres of Meadow which the Plaintiff claims, pretending they are comprised in the general Words of the original Conveyance under which [76] the Plaintiff claimeth, it sufficiently appears, that the same were not comprised in the said Plaintiff's Conveyance; but were conveyed upon a second Purchase thereof, made by Sir Peter of the Lady Hunsdon for valuable Considerations, and for the main Purchase, the same was but a Reversion depending upon a Contingency; and if the Lady Ewer had lived, as by Course of Nature she might, the said Vanlore had had a very near Bargain; and besides, this Court doth conceive that it stands with the Rule of Justice, that if Lands be bought in Reversion expectant upon Death, and the Tenant for Life die, a Purchaser by the Decree of this Court, after such Proceedings, as aforesaid, shall not then be drawn to take his Money again with Interest notwithstanding the Pretence of *pendente lite*; and that this Suit is not well brought: And as for the £2000, if it were not paid by Sir Peter to the said Ferrers, &c., it is barred by the Statute of Limitations.

MARSH *contra* KIRBY.

10 Car. 1, fo. 253 [1634-35].

A Child not born at the Testator's Death shall have the Profits of Lands by the Devise.

That Julius Marsh deceased by his Will devised the Rents, Issues and Profits of all his Messuages during his Interest therein to his Wife for Life, and if she died before the Expiration of his [77] said Interest, then the same to come amongst all his Children equally, and that his Wife should not sell. And the said Testator conceiving his Wife to be with Child, devised to the Child, she then went with, a Lease of two Houses, and ordered a Moiety of the Profits thereof to be put out by the Overseers of his Will as a Stock for the Benefit of such Child, and the other Moiety for her Maintenance till Age or Marriage. And by his Will farther declared that if all his Children should die before Marriage or Age of twenty one Years, then the Premises devised to his Children should remain to Brothers and Sisters Children; and that four of the Testator's Children died before Marriage or the Age of twenty-one Years. And Alice who was not born at the Time of the Testator's Death is only living.

This Court on reading the Will doth conceive that the collateral Line have nothing to do with the Estate of the Testator during the Life of the said Alice the Daughter, and dismissed the Plaintiff's Bill.

LAKE *contra* LAKE.

10 Car. 1, fo. 246 [1634-35].

Double Portion.

This Case is touching a double Portion. This Court conceived the £500 was included in the Will, though charged by Deed on Lands.

[78] COLES *contra* EMERSON.

10 Car. 1, fo. 170 [1634-35].

Bond.

The Bill is against a Bond of £60 entred into in Anno 1612, to pay £30 at nine Days End, which was never sued till now, although the Defendant was always necessitous and a Prisoner, and the Plaintiff a Man of Worth.

This Court conceived the said Money to be satisfied, it not being demanded in twenty-two Years, and Decreed the Bond to be delivered up to be cancelled.

CARPENTER *contra* TUCKER.

10 Car. 1, fo. 228 [1634-35].

Bond.

This Case is touching a Bond of £100 entred into 9 Jac. to Charles Tucker deceased, which is twenty two Years since, which Bond was left in the hands of one Orpwood, as a void Bond, the Money thereby payable being long since satisfied, as the Plaintiff insists; forasmuch as the said Bond is of such Antiquity, and the Defendant Tucker's Father, the Obligee, lived till about seven or eight Years past, and never demanded the Money, nor had any Interest therefore, and the Bond is but lately come to the Defendant Tucker's Hands, who is his Father's Executor.

This Court doth conceive that the said Bond hath been satisfied, and ought not [79] either in Equity or good Conscience, after so long Time, to be put in Suit against the Plaintiff, and decreed the same to be cancelled, and if Judgment entred thereon, the same to be vacated.

DOMINA SAVIL *contra* SAVIL.

10 Car. 1, fo. 45 [1634-35].

Custom of York, as to the personal Estate of one dying within that Province.

The Bill is to discover the personal Estate of Sir Henry Savil deceased, late Husband of the Plaintiff Dame Mary, and to have her Moiety of the same, according to the Custom of the Province of York. It is observed, that when any one living or dying within the said Province, hath a Wife and no Child at his Death, being possessed of a personal

Estate of Goods, they are to be equally divided into two Parts, the one Part whereof to the Party dying without Issue, and the other Part to his Wife, over and above her Jewels and wearing Apparel; and the Plaintiff also prayeth Relief against an Assignment of certain mortgaged Lands, unduly gotten from her Husband a little before his Death.

The Lord Keeper, after deliberate Hearing of the Matter and Proofs, took Time to advise touching the Custom, and heard the Counsel several Times, and having taken all the Particulars of the Cause into Consideration; and finding the Demands to [80] be great on both Sides, and the Parties wholly submitting the same to his Lordship, his Lordship decreed that the said Defendant John Savil shall pay to the Plaintiff the Sum of £900 in full Satisfaction of all Demands upon the said Bill. *Vide* a late Statute 4 William and Mary, this Custom altered.

REVET *contra* ROWE.

10 Car. 1, fo. 405 [1634–35].

Construction of Wills.

The Suit is to be relieved touching the Evidences of certain Houses and Lands in Tottenham and Felixtown, the Moiety of the Rents and Profits of a House in St. Bartholomew's, and the Sum of £1300, and the Profits thereof, and other Things.

The Case is, That Sir John Hayward being seised in Fee of certain Houses and Lands in Tottenham, settled the same on his Daughter Mary and the Heirs of her Body, and for Default of such Issue, the Remainder to him the said Sir John John Hayward; that the said Mary his Daughter married with the Defendant Sir Nicholas Rowe, and had Issue by him Mary her Daughter, and died, which said Mary the Granddaughter to Sir John Hayward died without Issue, and so the said Lands in Tottenham do belong to the Defendant Sir Nicholas Rowe (as Tenant by the [81] Courtesy of England) and the said Sir Jo. Hayward being seised of the Reversion of the said Lands and Houses in Tottenham in Fee to him and his Heirs, by Will devised the same (if his Grandchild died without Issue) to his Wife during her Life, in Case she should be alive after the Curtesy determined; and that after her Decease, or if he should not then be living, then to the Plaintiff being his only Sister's eldest Son, and to the Heirs of his Body; and devised his Lands in Felixtown in Com. Essex, both Fee and Copyhold, to his Wife for Life, and after to the said Mary his Grandchild and the Heirs of her Body; but if she should die without Heirs of her Body, then the same to the Plaintiff, and to the Heirs of his Body, and surrendered the said Copyhold to the Use of his Will; and the said Sir Jo. Hayward, being possessed of a Lease of a House in Great St. Bartholomews, devised the same to his said Grandchild Mary, in Case she should be then living at the Time of his Decease; otherwise he gave the same to the Defendant Hanchet, whom he made sole Executor, with Proviso in Case his Grandchild should be living at the Time of the said Sir John's Decease, that then his Executor should account to the said Grandchild for the Profits and Rents of the said House, as to one Moiety of the same, at the Age [82] of twenty-one Years or Marriage, and the said Hanchet to retain the other Moiety to himself; and the said Sir Jo. having a Mortgage of £1300 upon some Lands in Kentish Town, desired in his Will that his Executor should purchase the same out of the Residue of his Estate, and then did give the same to his said Grandchild and the Heirs of her Body, and thereby also desired his Executor to apply the Profits thereof to the Performance of his Will, and the Benefit of his said Grandchild, and account to her for the same at the Age of twenty-one or Marriage, retaining £20 per Annum, for his Pains therein; and if his said Grandchild Mary died without Heirs of her Body, then he devised the same to the Plaintiff and the Heirs of his Body, and the Account thereof to be made to him the said Plaintiff or his Heirs; but in Case the said Purchase should not be made, then his Executor should take the said £1300 and apply the same for Benefit of the said Grandchild, and be accountable to her for it at the Age of twenty-one or Marriage, reckoning himself twenty Marks per Ann. for his Pains, and if she died before Marriage, then he devised the said Money and Profits to such Uses as in his Will, and gave all his Books, and a Moiety of the Residue of his Goods and Chattels and Debts to his said Grandchild, in Case she [83] should be married, and the other Moiety to the Plaintiff, and soon after the said Sir Jo. Hayward died, and the said Hanchet his Executor possessed himself of the said £1300 as also of the Books and other personal Estate of Sir John's. Since which Time the said Mary the Grandchild died before her Marriage or twenty-one Years of Age, by Reason

whereof, and of the said Will the Plaintiff claimeth the Deeds and Writings of Tottenham and Felixtown, as also the Moiety of the Rents and Profits of the House in St. Bartholomews, which ought to have been accounted for to the said Grandchild, and also the £1300 on the Mortgage and the Profits thereof, as also the Books and Moiety of the Residue of the other Goods, Chattels and Debts.

This Court, assisted with Judges on Perusal and due Consideration had of the said Will, are clear of Opinion, that £1300 and the Profits thereof since the Death of the said Grandchild, as also the Books and Residue of the Goods, Chattels and Debts of the said Sir Jo. Hayward do in Right and Equity, according to the said Will, belong to the Plaintiff, and that the Lease of the House of St. Bartholomews belongs to the Defendant Hanchet the Executor; and decreed accordingly.

[84] NOTT *contra* SMITHIES.

10 Car. 1, fo. 402 [1634–35].

Rationabili parte. Custom of London good against a Deed of Trust to the Use of the last Will.

The Suit is to have proportionable Part of a Lease, and the Profits thereof according to the Custom of the City of London, the which the Testator Edward Sewster the Plaintiff's Father by his Will hath directed the Defendants Smithies his Executors to convey the same to the Defendants George and Edward Sewster his Sons.

This Court, on reading the Deed made to the said Executor, whereby it appeared, it was in Trust to the Use of the last Will of the said Testator, declared that the said Deed of Trust made to the said Executor is contrary to, and against the Custom of London, and that the Plaintiff Eliz. being Daughter, ought according to the Custom to have her Part of the said Lease and Profits thereof.

SCOTT *contra* WRAY.

10 Car. 1, fo. 348 [1634–35].

Award defective made good.

The Parties in this Cause did refer the Differences between them to Arbitrators, who made their Award, by which Award it was awarded, That Roger Whittey should have such and such Lands; and it was provided by the said Award, that if any Doubts arose, the [85] Arbitrators to interpret and expound the same. That the Defendant Wray found a Defect in the said Award, (viz.) That the said Roger Whittey should have the said Lands, and not that the said Roger Whittey and his heirs should have the said Lands; so it was insisted that the said Roger had but an Estate for Life; whereupon three of the four Arbitrators only living, by a Writing under their hands and Seals, did declare they meant the Lands to the said Roger and his Heirs for ever, and that the Word (Heirs) was left out by a Mistake; that the said Roger being in Possession of the said Lands conveyed the same to the Plaintiff Scott and his Heirs.

The Defendant claiming by the old Deed of Intail seeks to eject the Plaintiff out of the Premises.

This Court, upon the Perusal of the said Award and Explanation thereof, and of the Depositions of two of the said Arbitrators, who are all that are living, who depose that it was intended that the said Roger and his Heirs for ever should have the Land, considering that the Award was long since made and executed on both Parts; And his Lordship calling to his Assistance Mr. Justice Crook and Mr. Justice Crawley, two Reverend Judges, took their Opinion touching the [86] Point in Question for decreeing the said Award and Explanation thereupon; the Arbitrament being voluntary and without the Direction of this Court, but executed on both sides, are all clear of Opinion, That this Court ought in Point of Justice and Equity, to ratify and confirm the same by Decree accordingly, and that the Plaintiff Scott and his Heirs do enjoy the said Lands against the Defendants, and all claiming, &c. according to the said Award and Explanation as aforesaid.

BYAT *contra* PICKERING.

10 Car. 1, fo. 767 [1634-35].

Jurisdiction of Cambridge maintain'd.

This Court declared the Privilege of the University of Cambridge ought to be maintained, and not to be infringed by this Court.

BATES *con.* MICKLETHAWIT.

[10 Car. 1, fo. 869 [1634-35].

Will.

That Dr. Bates by his Will appointed that his Estate being £2500 be divided into two Parts, and bequeathed one Half thereof to the Plaintiff, and the other to the Plaintiff's Son an Infant, out of which Estate £700 was in Bonds taken in the said Infant's Name.

[87] The Question is, Whether the said Money in the Infant's Name, as aforesaid, shall be accounted Part of the Testator's personal Estate disposed by his Will.

This Court is of opinion, That it is Part of the personal Estate, and to be divided as aforesaid.

ARUNDEL *con.* TREVILLIAN.

10 Car. 1, fo. 402 [1634-35].

Bond to procure a Marriage decreed to be cancelled.

That the Plaintiff did enter into a Bond or Bill of £100 to the Defendant, formerly promised by the Plaintiff to the Defendant for effecting a Marriage between the Plaintiff and Eliz. his now Wife, which was effected accordingly.

But this Court utterly disliking the Consideration, whereupon the Bill was given, the same being of dangerous Consequence in Precedents, upon reading Precedents, wherein this Court had given Relief in the like Cases against Bonds of that Nature, and taking Notice of other Precedents of the like Nature, thought it not fit to give any Countenance unto Specialties entred into upon such Contracts, and decreed the said Bill to be cancelled.

[88] GEOFFREY *con.* THORN.

10 Car. 1, fo. 590 [1634-35].

An old Bond and never sued, decreed to be cancelled.

A Bond of £300 Penalty without a Condition, entred into by the Plaintiff to the Defendant, to save the Defendant harmless against a Bond of £200 the said Bond being twenty-three Years old, and not sued in that Time, decreed to be delivered up to be cancelled.

BLACKWEL *con.* REDMAN.

10 Car. 1, fo. 609 [1634-35].

Frauds in Gaming, &c.

That the Plaintiff being a Linen Draper was by the Defendant drawn to play at Dice at the House of the Defendant Axtel, and that the Defendant Buller having won about £50 of the Plaintiff, which was done by false Dice, brought thither by the Defendant Redman, the Defendant Redman did lend to the Plaintiff several Sums of Money, amounting in all to forty Pounds, which the said Buller likewise won from the Plaintiff: The Defendant Redman insists, that he did dissuade the Plaintiff from playing after he had lost the said £50, and was unwilling to lend him any Money; yet the Plaintiff importun'd him, who after that gave a Bill under his Hand for the Payment thereof in a few Days, and [89] yet afterwards got the said Bill away from the Defendant, and that the same Money lent to the Plaintiff was Money paid by the said Buller unto the Plaintiff for a Debt due unto him from Buller. Yet it appearing, that the said several Sums so lent to the Plaintiff by the Defendant Redman was but the same Money which the said Buller had formerly so won of the Plaintiff, and lent divers Times over by the said Redman for the said Buller, and all gotten again by the said Buller; and it did not appear that the said Buller was really indebted to the

said Redman in any Sum. nor that he did ever recover or had Satisfaction for the said £40 from Redman.

This Court was of opinion, that the said Monies were unduly gotten from the Plaintiff, who can have no Remedy at Law for the same against Buller, he being beyond Seas: And this Court decreed a perpetual Injunction against Redman's Proceedings for the £40, and that the Plaintiff shall be discharged from the said Action for the £40 and of the said £40.

[90] DOM. ARUNDEL *con.* ARUNDEL.

10 Car. 1, f. 668 [1634-35].

A Witness examined for the Plaintiff, and was to be cross-examin'd for the Defendant, but before he could be cross-examin'd died, yet this Court ordered his Depositions to stand.

CALDWEL *con.* WHEAT.

10 Car. 1, f. 319, 328, 400 [1634-35].

Execution by an Executor upon a Judgment recovered in the Testator's Life-time without suing a *Scire fac.*

That the Plaintiff became bound to one Critchlow in a Recognizance of £600 for the Payment of £300, upon which the said Critchlow took forth a *Levari facias* directed to the Sheriff of Middlesex to levy the said Debt upon the Lands and Goods of the said Plaintiff; whereupon the Sheriff return'd they had no Lands nor Goods, and after Critchlow died, and the Defendants being Executors, without suing forth any *Scire fac.* upon the said Judgment, took forth Execution directed to the Sheriffs of London, and the Plaintiff was taken in Execution in London, and is a Prisoner in the Fleet upon the same: therefore the said Execution being illegally gotten, and the Plaintiff wrongfully imprisoned.

[91] It was pray'd that a *Supersedeas* may be awarded to the Warden of the Fleet for the Inlarging of the Plaintiff.

This Court referred it to the Judges for their Opinion, what in Case of this Nature this Court may do in Law touching the Granting of a *Supersedeas* to the Warden of the Fleet for enlarging the Plaintiff.

The Judges are of Opinion, that the Execution taken forth by the Defendant against the Plaintiff upon the Recognizance doth appear to be erroneous by the Record, in Regard no *Scire facias* has been taken forth by the Defendant; and therefore according to the Proceedings of other Courts of Justice a *Supersedeas* may be granted to discharge the said Execution, which, according to the said Judges Opinion, this Court granted accordingly for Discharge of the said Execution.

VILLA DE MARKET RAISEN *contra* BROWNLOW.

11 Car. 1, fo. 482 [1635-36].

Decree on charitable Uses to a Town. The Town may lay the whole Money upon one that is liable to Payment, and he shall have Remedy to apportion each Party's Payment which are also liable.

That a Decree upon the Statute of Charitable Uses being made for the Town of Raisen, and the Defendant possessing some Part of the Lands which is liable to the Payment of the Money decreed: the Defendant insists to pay but his Proportion of the Money, there being [92] several other Persons that have Lands in their Occupations chargeable with the said Charitable Use, yet the Plaintiff lays the whole Decree upon the Defendant's Lands.

This Court declared, that a Decree being made on the Behalf of the said Town, the Town may lay the Whole upon any one they shall find liable to the payment thereof: and that the Defendant must pay the whole Money decreed; which when done, a Commission shall issue to examine in whose Possession any of the Lands liable and chargeable with the Money decreed, and the Commissioners to apportion each Party's Payment with such proportionable Part of the Charges the Defendant hath been put to.

ALISBURY *con.* TROUGHTON.

11 Car. 1, fo. 23, 37, 46 [1635-36].

Discharged from Arrests being done as he came to put in his Answer.

The Defendant was arrested at the Plaintiff's Suit as he came about putting in his Answer, and imprisoned, and after several other Actions charged upon him, were all discharged, it being done in Breach of the Privilege of this Court.

[93] BIDLAKE *con.* DOM. ARUNDEL.

11 Car. 1, f. 349 [1635-36].

Payment of Purchase-Money presumed.

That Matthew Arundel seized of the Rectory of Lowdiswel, 10 Eliz. [1567-68] demised the same to Philip Sture Grandfather of the Plaintiff, and Richard Sture the Plaintiff's Father for their Lives, Remainder to Grace Sture, afterwards Wife to William Newton, for her life, at the Rent of £14 per Annum, and 34 Eliz. for £600 the said Arundel absolutely sold all the said Premises to the said Richard Sture and his Heirs, with a Warranty against him and his Heirs; and 31 Jan. 34 Eliz. [1692] the said Arundel entred into a Recognizance of £1000 for quiet Enjoyment; and afterwards Richard Sture received the Rents and was the reputed Owner thereof, and the Inheritance descended to Philip Sture his Son, but the freehold rested in the said William Newton in Right of Grace his Wife, and they entred and paid the Rent for divers Years to the said Philip until he died, and after his Death the Rent was paid to the Plaintiff till the said Grace died; upon whose Death the Defendant, the Lord Arundel, entred into the Premises, on the Pretence of an Entail on Sir Matthew Arundel and his Heirs Males by the Gift of Queen Mary, the [94] Reversion remaining in the Crown, and thereby would avoid the said Conveyance, by which Means the said Recognizance became forfeited, the said Rent of £14 not being paid since the Payment of £600, and Sir Matthew Arundel having sold divers Lands subject to the said Recognizance, made Leases in Trust to secure against the said Recognizance, and yet notwithstanding the said Intail the Defendant offers to pay what Money she can prove due to her, or can make appear was duly paid by the said Richard Sture to the Defendant's Father, as this Court shall adjudge, without insisting upon whether Assets descended to him from his father or no; but to confirm the Plaintiff's Estate in the Premises, the Defendant refused, having made a Lease of the Premises for three Lives, and so it is not in his Power.

This Court declared, the said £600 was paid above forty Years since, and the same is expressed in the Indenture, and after so long Time it is not to be expected that precise Proof should be made of the Payment thereof; but it is to be presumed it was a good Payment. This Court farther declaring, that as this Case now stands, this Court cannot order the said Premises to be settled with the Plaintiff, nor the Value thereof; neither can the Court go [95] beyond the Penalty of the said Recognizance.

But this Court took Time to consider farther on the Case, and now again declared the Case to be very hard on the Plaintiff's Part; yet beyond the Penalty of the Recognizance this Court could not go, but wished the Plaintiff to take a competent Sum, which the Plaintiff consenting to, his Lordship's Decree for a final End of this Cause was, that the Defendant should pay the Plaintiff £850 in full Discharge of the Recognizance, and of the Plaintiff's Claim to the Premises.

FELTHAM *cont.* DAVY.

11 Car. 1, fo. 519 [1635-36].

Proof.

This Court is of Opinion, that the Plaintiff having made no Proof of the Agreement in Question, that the Defendant's Answer must be taken to be true, and so dismissed the Bill.

POPE *cont.* DAY.

11 Car. 1, fo. 38, 40 [1635-36].

Bond of Covenants sued against the Lessor, the Lessor is reliev'd in Equity.

The Plaintiff lets the Defendant a Lease at £3 per Annum Rent, and to enter upon Default of Payment of the Rent in twenty Days, the Plaintiff gives a Bond for the Defendant's quiet Enjoyment of the Premises, and performing of the Covenants; the Defendant fails in the [96] Payment of his Rent: the Plaintiff enters, and the Defendant sues the Bond and gets Judgment, and takes the Plaintiff's Surety in Execution, who pays the Defendant £21.

This Court ordered the Defendant to repay the said £21 to the Plaintiff.

POPHAM *cont.* LANCASTER.

12 Car. 1, f. 477 [1636-37].

Chancery decrees a moderate Fine certain between the Lord and his Tenant.

The Defendants being Tenants of the Manor of Newby in the County of Westmorland held of the Plaintiff, complain that the Steward of the said Manor sets too high a Rate on their Lands and Tenements, and insists, that their Fines ought to be assessed according to the ancient Rent after such Proportion as had been used, as the Lord and Tenants could agree, and submit to this honourable Court for their Fines.

This Court finding there hath been a Variation of the Fines, so as the same were not certain, and upon Perusal of Precedents by the Defendants produced, and especially the Case between Middleton and Jackson, 5 Car. 1, before-mentioned, decreed, that an improv'd Year's Value in a moderate Way shall be given and accepted from the Tenant to the Lord for a Fine.

[See *Middleton v. Jackson*, 1629-30, 1 Chan. Rep. 33; *Fraser v. Mason*, 1883, 11 Q. B. D. 579.]

[97] PORTER *contra* EMERY.

12 Car. 1, fo. 475 [1636-37].

That Thomas Brett, 7 Jac. [1609-10] being seised in Fee-Tail of the Farm called Phelow, mortgaged the same to Tho. Emery, Father of the Defendant for £300, 9 Feb. 8 Jac. [1611] the said Premises being then in Lease to one Sacked; the said Brett granted the Premises to Edward Emery and his Heirs, Brother of the said Thomas, in Trust for the said Thomas, and the said Brett did thereby covenant at all Times then after, to make further Assurance unto the said Edward Emery his Heirs and Assigns, which Assurance was made with Intent that the said Edward should immediately after re-convey the said Premises to the said Brett and his Heirs, upon Condition, that if the said Brett or his Heirs or Assigns should not pay the said £300 and Interest at the Time prefixed, then the said Edward might re-enter, and that the 10th of Feb. being the next Day after the said Edward sealed a Re-conveyance unto the said Brett with a Covenant therein, That if the said Brett or his Heirs or Assigns did pay the said £300 and Interest, according to the said Condition, that then the said Edward should quit the Premises. And in Easter Term following Brett suffered a Recovery, and the said [98] Brett after the said Conveyances so made and re-conveyed, received the Rents; and about 13 Jac. Brett died, and by Will bequeathed the Premises to the Plaintiff and his Heirs, and desired the said Thomas Emery to release the said Mortgage, the Plaintiff paying him what Money was due; and the said Edward Emery also died, and his Estate descended unto the said Thomas Emery, who also died, and the Defendant claimeth the Premises, as Son and Heir of the said Thomas his Father, (and purchased the Interest also of the Heir of the said Brett).

Now the question being how the Recovery suffered as aforesaid did work, whether only to the first Conveyance made to the said Edward Emery, or whether to the Conveyance and Re-conveyance made to Tho. Brett;

This Court with the Assistance of the Judges declared, That in Law and Equity the said Recovery did work and inure to the Uses in the said Re-conveyance, and that the Benefit of the said Redemption belonged to the Plaintiff, and decreed the same accordingly.

[99] HARTWELL *contra* FORD.

11 Car. 1, fo. 341 [1635-36].

Will expounded.

This Case is touching a Term of Years of the Premises in Question, which the Plaintiff claimeth as Executor to Charity Ford : forasmuch as there ariseth a great Question upon the Will of Lionel Ford, Whether the Plaintiff as Executor to Charity Ford, who made her Will, and died at the Age of eighteen Years, hath Right to the Premises by Virtue of the said Will ? Or whether the same belongs to the Defendant Locket, who married Mary, the Heir of Will. Ford the eldest, which said Defendant took Administration of the Goods of Will. Ford the younger, Brother to the said Charity unadministred ? Or whether the same doth belong to the Sister's Children of the said Lionel Ford, or to some other ? For that the said Lionel having given by his Will the said Lease and Profits to the said Charity his Daughter, for a Term in the said Will expressed, he gave the Residue and Remainder of the said Lease, after the said Term given to the said Charity, to his Son William, his Executors and Assigns.

Now the Words of the Will upon which the question ariseth are these, viz. And if it happen my Daughter Charity to die before that she shall have accomplished [100] the Years of a lawful Age, then the whole Profits of the Premises to remain and be wholly to William my Son : and if my Son William die before the like lawful Age, then all the Profits of the said Premises to remain to Charity my Daughter surviving : and if the said Charity my Daughter, and William my Son die before the like lawful Age, as aforesaid, having no Issue of their Bodies lawfully hereafter to be begotten, then all the whole Term of the said Lease with the Profits, &c. I give and devise to all my Sisters Children, to be equally divided and distributed amongst them.

Which said Will his Lordship and the Judges having consider'd of, and debated the Case, the Question arising in the Case being, Whether the said Charity, who died at eighteen Years of Age, was to be deemed of full Age, according to the Words of the Will and Meaning of the Testator ? His Lordship and the Judges are of Opinion, That a lawful Age in general Words (unless it be in a particular Case, as Guardian in Socage) must be construed and taken twenty-one Years ; and therefore are all of Opinion, That the said remaining Term, according to the Construction of the Will, belongs neither to the Plaintiff nor Defendant, but to all the Sisters Children of the said Lionel Ford.

[101] AYNSWORTH *cont.* POLLARD.

11 Car. 1, f. 413 [1635-36].

Executors in Trust.

That Thomas Hall deceased, having only one Child the Plaintiff, made his Will, and three Executors in Trust, for the Use of the Defendant Mary Pollard, whom he intended to have married ; and by his Will, after Debts and Legacies, gave the Residue of his Estate to his Executors, in Trust for the said Mary Pollard : That two of the Executors declared by their Answer, That the Trust was for the said Mary Pollard, but the third Executor declared, He conceived the Trust was for the Plaintiff, and that the said Hall declared no Trust in him for the said Mary Pollard.

That it being doubtful to which of them this Trust is, it was referred to a Judge, who certified.

That he conceives, That in Extremity there is no Trust proved according to the Will, but it appearing that the said Mary Pollard was a lewd Woman, and had abused the said Hall,

This Court, in Respect the Trust was not proved according to the Letter of the Will, think it not fit to relieve the said Mary Pollard on her Bill, for the Surplus of the said Hall's Estate, this Court much disliking that the Estate of the said [102] Hall should be given away from his own Child to the said Mary Pollard, who hath and had an Husband living at the Time of the said Will, and dismissed Pollard's Bill.

This Court, with the said Judge, conceiving, That after Debts, Legacies, and Executors Charges paid, the Over-plus of the Estate should go and accrue to the Plaintiff Aynsworth, the said Hall's only Child, and decreed accordingly.

BALDWIN *cont.* PROCTER, &c.

12 Car. 1, f. 222 [1636-37].

Recognizance entred into, conditioned to pay Annuity vacated.

The Plaintiff Baldwin's Suit is to be reliev'd against the Defendant upon a Statute of Recognizance of £2000 entred into by John Colby, the Defendant Colby's Father deceased, unto Sir Francis Baldwin deceased, conditioned to pay an Annuity of £140 per Annum, and another of £60 per Annum unto the said Sir Francis Baldwin and his Lady, during their Lives, which Recognizance the Plaintiff, as Administrator of Sir Francis Baldwin, hath extended upon Lands descended unto the said Defendant Colby for Arrears of Annuity, and also to have the Decree of this Court for Confirmation of the said Extent.

This Court would not relieve the [103] Plaintiff, but dismissed the Bill; and the Defendant Colby's Bill being to be relieved against the said Extent, and to have the said Statute or Recognizance and Defeazance to be delivered up to be cancelled.

It appearing to this Court, That the said Recognizance was entred into 7 Jac. [1609-10] for Payment of the Money out of the Lands which were sold by Colby the Father, for £3150, and that Sir Francis and his Lady joined in a Fine with him in 12 Jac. [1614-15] and at the same Time Colby the Father purchased Lands in Yorkshire in the Name of the said Sir Francis, and the Interest thereof continued in him till within four Months of John Colby the Father's Death, to whom the said Sir Francis did then convey the same; and in all Probability he would not have conveyed, if the Recognizance had not been discharged, or if the said Yorkshire Lands had continued in him as a Security for the Payment of the said Annuities; and it did not now appear, that after Colby the Father's Death any Part of the said Annuities were paid to the said Sir Francis, or after Sir Francis's Death to his Lady, and Sir Francis never extended the said Statute in all that Time; and tho' it appeared that the said Annuities were often demanded of the Relict of Colby [104] the Father and she desired to be forborn, which the Plaintiff Baldwin insists was yielded unto, in Respect the said Relict was Daughter-in-law to the Lady Baldwin; yet it also appeared, that when the said Yorkshire Lands were extended by a Statute Puisne to the Recognizance in Question, and the said Mary the Relict was instigated by the said Lady to set on Foot the Statute in Question, to save the Lands from the Puisne Extent, the said Mary the Relict refused, affirming the same was satisfied by her Husband: upon all which this Court was fully satisfied that the said Statute or Recognizance being so ancient, and no Payment proved of the Annuities since the said Re-assurance of the said Yorkshire Lands, from Sir Francis to Colby, and the Recognizance in all this Time never set on Foot until now, by an Administrator *de bonis non*, and that the same was proffered to be delivered up for a small Sum, and for the Rest of the Reasons as aforesaid, the same ought in all Equity to be discharged.

This Court decreed that the Defendant Baldwin do vacate the same.

[105] HALES *cont.* HALES.

12 Car. 1, fo. 578 [1636-37].

Relief against an old Mortgage, no Demand being made nor Interest paid in Forty Years.

The Suit is to be relieved against an ancient Mortgage, which hath slept sixty Years, the Plaintiff being a Purchaser of the Premises from Sir Edward Moor, who enjoyed the same about fifty-seven Years: But the Defendant Pett hath set on Foot an old sleeping Mortgage, pretending to be made by the said Sir Edw. Moor to John Pett, Father of the Defendant Thomas Pett, and his Heirs, of the Premises in 20 Eliz. [1577-78] for Security of £800. Now it appearing that the said Pett, Father of the Defendant Thomas Pett, died forty Years since, and in all that Time there was never any Interest paid, or any Demand at all upon the said Mortgage until of late; and the Defendant had confessed, as the Plaintiff did prove, that all the Mortgage-Money was paid, and that about five Years since the Defendant offer'd for a small Matter to release his Claim in the Premises unto Lettice Moor the Heir general of the said Sir Edward Moor, and in Respect the Plaintiff and those, whom he claims under, have enjoyed the Premises for sixty Years last past;

This Court decreed, the Plaintiff and his Heirs shall hold the Premises in Question against the Defendant, and all under [106] him, and that a Vacat be entred upon the Inrollment of the said Mortgage.

DENNIS *cont.* NOURSE.

12 Car. 1, fo. 475 [1636-37].

Statute entred into 37 Eliz. [1594-95] vacated.

A Statute entred into of £180 in 37 Eliz. [1594-95] to the Defendant's Father, for a Debt not yet satisfied; the Comisee held Lands of the Conisor divers Years, and for other Reasons,

This Court is clear of Opinion, that the said Debt, if any ever were due upon the said Statute, was fully satisfied; and therefore and in Regard of the said Statute's Antiquity, that a Vacat be made thereof and it discharg'd.

COLE *contra* PEYSON.

12 Car. 1, fo. 485 [1636-37].

Injunction to restrain Waste, &c.

The Bill is to restrain the Defendants, who are Tenants for Life, from felling of Timber Trees and plowing up ancient Meadow and Pasture Ground. The Defendants demurred, for that in the Lease the Timber Trees are not excepted in particular Words, and crave the Judgment of the Court, if the Timber Trees do not pass in the Grant as Part of the said Freehold.

This Court, in regard the Defendants have but an Estate for their Lives, and in Respect the Defendants have cut good [107] Timber Trees, and cleaved them for Fuel, granted the Injunction to continue against Felling of Timber and plowing ancient Pasture.

TRYON *contra* MITCHEL.

12 Car. 1, fo. 228 [1636-37].

The Defendant entred into a Bond to the Plaintiff, which the Defendant insists is paid by Perception of Profits of Strelly Park taken by Virtue of an Extent for the King upon the said Bond. It now appearing to the Court, that after the said Bond entred into, and long before the said Extent, the Defendant gave the Plaintiff a Judgment for his said Debt: Therefore this Court now declared, that in Point of Law the said Extent was void, because the Bond did *transire in rem judicatum*. And yet nevertheless, if the said Defendant would have prov'd that any Profits had been taken by the said Extent, this Court would have reliev'd the Defendant for the same; but failing of such Proof, this Court order'd the Defendant to pay the £100 on the said Bond with Damages.

[108] SMITH *contra* SMITH.

12 Car. 1, fo. 99 [1636-37].

This Court declared, that they would help a Defect in a Surrender.

HAYN *contra* NELSON.

12 Car. 1, fo. 220 [1636-37].

Interest for Orphanage-Money.

The Defendant, for any Monies which he hath put out belonging to the Plaintiff as her Orphanage-Money, shall account and pay Interest after such Rate as is allowed for Orphanage-Money by the Court of Orphans, and no more.

SOUTHCOT *cont.* SOUTHCOT.

12 Car. 1, f. 198 [1636-37].

[Injunction to] stay Suit on an old Deed of Annuity which was newly started up, after forty years sleeping.

That Thomas Southcot, the Plaintiff's Grandfather, being seised of Lands, and marrying Thomasin, the Couzen and Heir of Sir Peter Carew, who upon that Marriage

did convey the Premises, after his and his Lady's Death, to the Use of the said Tho. Southcot and his Heirs; and having by her three Sons, George, the Plaintiff's Father, Thomas and Peter, and the said Thomasin died, after whose Death, Thomas, the Plaintiff's Grandfather, married Eliz. Fitz-Williams, by whom he had seven Sons whereof the Defendant was one; after which Thomas, [109] the Grandfather, for Provision for his younger Children granted the Annuity in Question unto the Defendant, being his second Son by the second Venter; after which Tho. the Grandfather, settled all the Premises aforesaid (except the Manor of Moon-Sattery) on the Defendant; and the other Sons by the said Eliz. to the Disherison of the Plaintiff's Father, who was the eldest Son of the said Thomas, who conveyed the said Moon-Sattery, charged with £300 per Ann. to the said Eliz. unto the Defendant George, and after the Death of Thomas, the Grandfather, finding himself grieved by the Disherison, commenced Suit in the Court of Wards, which was referred and settled, Releases were sealed on both Sides, and there was no mention of the said Annuity; and it was not intended by Thomas, the Grandfather, that he should have any Benefit of the said Annuity when he had conveyed all or the greatest Part of his Lands away from the Plaintiff's Father to him, and the same having so rested and never questioned in all this Time from 33 El. [1590-91] till now of late; and the Point of the Annuity is in Reference from his Majesty to four of the Lords of the Council; wherefore, and for that the said Deed of Annuity is an old sleeping Deed newly started up after forty Years, there [110] is no Cause to compel the Plaintiff to bring in the said Annuity, and granted an Injunction for the Staying of the Suit at Law for the said Annuity.

LAKE *con.* PHILIPS & LAKE.

12 Car. 1, f. 418 [1636-37].

Trust.

Lands are by Deed of Trust expressly mentioned to be conveyed to the Plaintiff, but the Defendant produced Proofs, that it was intended the Plaintiff should not have Power to alienate, which this Court would not regard in respect that the Proof was contrary to the said Deed of Trust, and that it carried no Probability, the Feoffees being enjoined by the said Deed to convey to the Plaintiff, which goeth beyond all Testimony, and decreed the Premises to be conveyed to the Plaintiff.

BRACKEN *con.* BENTLEY.

12 Car. 1, f. 388 [1636-37].

Reversion of Goods after a Life given to J. S. the Possessor for Life decreed to give Security, to deliver the Goods or Value after her Death. ³⁰

Goods and a Library to the Defendant for Life, and after to the Defendant's Daughter and her Heirs for ever, the Plaintiff married the Daughter, who is since dead, so as the Plaintiff as Administrator seeks to compel the Defendant to give Security to deliver the Goods [111] to the Plaintiff after the Defendant's Death, or the Value thereof.

This Court decreed the same accordingly, and a Commission is awarded to the Master to examine upon Oath such Witnesses as shall be produced before him.

IRELAND *con.* PAIN.

13 Car. 1, f. 21 [1637-38].

Remainder of a term limited to Baron and Feme, and to the Children of their Bodies together, it is no Entail in Law.

That Eliz. Godden being possessed of a Lease of 100 Years, by her Deed, dated 7 Aug. 2 Car. 1 [1626], in Consideration of a Marriage between John Ireland, the Plaintiff's Father, and Joan Godden, Daughter of the said Eliz. did assign all her remaining Term in the Premises to Thomas Ireland, the Plaintiff's Guardian, and Walter Noble in Trust (viz.) the one Moiety of the said Premises to the Use of the said Eliz. Godden for so many years of the Term as she should live, and the other Moiety to the Use of John Ireland and Joan Godden for so many Years of the Term as the said Eliz. Godden should live, and after the Decease of the said Eliz. the whole Premises to come to John Ireland and Joan Godden, and to the Children of their Bodies to be begotten,

for all the Residue of the said term of 100 Years, and that shortly after the Sealing of the said last Deed, John Ireland and Joan Godden intermarried, and had Issue [112] the Plaintiff, and that the said John Ireland afterwards died, and the Defendant afterwards intermarried with the Defendant Pain, and afterwards died, having no other Issue than the Plaintiff, who ought to enjoy the said Lease for the remaining Term. This Court upon Consideration of the Assignment and the uses therein, and with the Assistance of the Judges did now declare, that they were all of Opinion, that there was no Entail in Law of the said Lease, neither had the Plaintiff any joint Estate with her Mother therein, and so dismiss'd the Plaintiff's Bill.

ROBSART *contra* TURTON.

13 Car. 1, fo. 94, 195, 247, 357 [1637-38].

Deed of Revocation not pursuing the Power.

The Plaintiffs seek relief for Portions given them by the Will of Arthur Robsart. This Court, before they would make any Decree, directed that the Validity of the Revocation of the Deed of 15 Eliz. [1572-73] should be tried whether a Revocation or not, which on a special Verdict was found no Revocation: But the Defendant produced a Deed of 24 Eliz. [1581-82] made by the said Arthur Robsart, but without any Seal thereunto, purporting a Covenant for him and his Heirs, to stand seised after his Death of a Moiety [113] of the Premises to the Use of the said Dorothy, his Son's Wife for her Life, and supposed to be made before his Revocation, which Deed of 24 Eliz. [1581-82] was to be produced to the Plaintiff, who having seen it, insisted it work'd no Alteration in the case as to the Point of Revocation.

This Court thereupon referred the Consideration of the said Deed to three Judges, and that if they certified that the said Deed made no Alteration as to the said Revocation, then no trial should be had on that Deed.

The said Judges certified, that Arthur Robsart by the Deed of the 15th Eliz. [1572-73] did limit to himself but an Estate for Life, with a Remainder to Robert Robsart the Son in Tail, with divers Remainders over; but by the Proviso left to himself a Power to alter the Estates then settled, if he should afterwards grant any Estate in Fee-simple or Fee-tail of those Lands, or any Part thereof; and that afterwards, according to his Power, the said Arthur conveyed an Estate in Fee-simple by making a Lease, and Grant of the Reversion in Fee, under which the Plaintiff claims, which was the Case already adjudged upon a special Verdict, before which Time this Deed of 24 Eliz. [1581-82] was made by the said Arthur, and not [114] mentioned in the former Suit; but the said Judges were of Opinion, That the said Deed 24 Eliz. [1581-82] intervening, makes no Alteration of the Case to interrupt the Power of Revocation, for that it is but a Covenant of Arthur's for him and his Heirs, to stand seised of one Moiety of the Lands, to the Use of the Wife of the said Robert for her Life for her Jointure, and meddles not at all with the Estate of Inheritance then in Fee-simple or Fee-tail; and so being not pursuant to the Power, is of no Force to that Purpose which the Defendant would extend it to make an Interruption of the Power of Revocation.

This Court decreed two Parts of the said three Parts to the Plaintiff according to the Judges Certificate.

WROUGHTON *con.* HUBBART.

13 Car. 1, f. 219 [1637-38].

That Sir Giles Wroughton the Plaintiff, being seised of the Manor of Broodlinton, sold the same to Glanvil for £8000, which £8000 was to be disposed of, (viz.) £2000 to pay Sir Giles's Debts, £3000 put to Interest for the Benefit of Sir Giles and his Lady, during their lives, to secure £240 per Annum to them for their Lives, and £500 a-piece to be paid to the Plaintiffs, [115] Katherine and Gresham at their Marriage, and the £240 per Annum to abate for so much as the Interest of the Portions came to from the Time of Payment; and the other £3000 to be at the Disposition of the said Mr. Wroughton the Testator, and the Sum of £3000 a-piece was accordingly paid to the said Mr. Thomas Wroughton; and it was agreed, that if the said Sir Giles and his Lady die before the Plaintiffs Katherine and Gresham were married, then they to have £40 per Annum for Maintenance a-piece until their Marriage, and then the £500 a-piece to be paid them, and the Lady Wroughton is since dead, and the said Thomas Wroughton in March 12 Car. 1 [1636-37], made his Will, and gave the Plaintiffs Katherine

and Gresham £500 a-piece, and made the Defendant Executor, and died : and ever since the Sale and Agreement aforesaid, Sir Giles received the £240 per Annum for the Interest of the £3000, and since Mr. Wroughton's Death for one half, until June last, the Defendant hath refused to pay the same, under Pretence of the Testator's Debts and Want of Assets : and therefore the Plaintiffs for the £240 per Annum secured by the £3000 the Security being in the said Thomas Wroughton's Name, and to have the £500 a-piece, have exhibited their Bill.

[116] The Defendants insist, that the Testator died greatly indebted to several by Statutes and other Specialties, and the Testator's Estate besides this £3000 will not satisfy his Debts, and the Creditors have a Suit depending against the Defendant for their Debts ; and Mary and Eliz. two of the Testator's Children, have a Bill in this Court for £400 which they claim out of the Testator's Estate as Money given them by Mrs. Brown their Mother's Aunt.

Now the main Point insisted on by the Plaintiff was, that according to the original Agreement touching the £3000 to be put out at Interest for Sir Giles and his Lady, ought to remain intire, and not to be touch'd or impeach'd by any of the Creditors.

FERMIER *con.* MAUND.

13 Car. 1, f. 339 [1637-38].

Ancient Pasture not to be plowed, tho' it may have been formerly plowed.

This Court would not give Way to the Plowing up of ancient Pasture, tho' it was insisted on, that the Nature of the Ground was for Tillage, and had been formerly plowed.

[117] DOMINA HATTON *con.* JAY.

13 Car. 1, f. 306 [1637-38].

An ancient Statute after forty Years set on Foot, and why.

That in Regard of the Antiquity of the Statute of £500 wherein the Lord Cromwel was bound to John Jay the Defendant's Father, was set on foot by the said Defendant, as Administrator to his said Father, forty Years after the Entring therein, all the Proceedings were stayed till Cause shewn.

The Defendant insists, that the Defendant's Father forbore Prosecution, for that Sir Edward Cook, who purchased divers of the Lands liable thereto, did from Time to Time promise to satisfy the said Debt, and the Defendant since his Father's Death, which is eighteen Years since, hath often demanded of Sir Edward Cook the said Debt which he promised to discharge, but failing, the Defendant ten Years since gave the Statute to an Attorney to take out Execution thereon, and till about two Years past could not get the same out of his Hands ; and it appearing by Letters from the Lord Cromwel, all dated in the same Month the Statute bears Date, that he importuned the Defendant's Father to lend the Money on the Statute.

This Court ordered the Plaintiffs to bring their Bill to stay Proceedings on the Statute.

[118] PALMER *con.* KEYNELL

13 Car. 1, f. 643 [1637-38].

Bond given before Marriage, that the Wife should dispose of £500 which she did, and decreed accordingly, notwithstanding the Bond was cancelled by consent of the Wife ; and the Husband gave a Note that she should dispose of it, (if he were acquainted with it).

The Case is, That before the Marriage between the Defendant and Agnes, his late Wife, Grandmother of the Plaintiffs, the defendant agreed that the said Agnes should after Marriage, by Will or otherwise, dispose of £500, and for Performance the Defendant gave a Bond for £1000 that the said Agnes before her death appointed the said £500 to be disposed of amongst the Plaintiffs her Grandchildren ; but the said Defendant procured his said Wife Agnes to consent, that the said Bond should be cancelled ; to be relieved notwithstanding was the Plaintiff's Suit. And a Decree was pronounced, that the said £500 should be divided according to the said Agreement of Agnes with Interest, which decree was allowed by the Master of the Rolls ; but the Lord Keeper refused to sign the same upon some Point in Law then seeming doubtful to his Lordship ;

which Point being now debated, which at the first hearing was not insisted on, the Substance thereof being, That upon releasing the said Bond, the said Defendant did sign a note of Writing, That notwithstanding the said Note was released, yet the said Defendant would permit and suffer his said Wife to dispose of the said £500, so as he might first be [119] acquainted therewith, which Note the Defendant would avoid upon these Words, (viz.) So as he might be first acquainted with it, which the Defendant supposes to tie his Agreement to a Condition.

But this Court, upon reading the said Note, is satisfied that the same ought not to receive that Construction, but to be binding to the Defendant, and confirmed the first Decree.

MILLS contra MILLS.

13 Car. 1, f. 409, 606 [1637-38].

This Case is touching two Leases, one of sixty, and the other of 1000 Years of Lands purchased by Roger Mills, Father of the Defendant Roger Mills, in the Name of John Mills, and the Defendant Roger his Sons, which the said Roger claims by Survivorship (John being dead) the Inheritance thereof being in the said Roger, and after descended and came to John.

That by the Order f. 409, it appears that Roger Mills the Plaintiff Eliz. Mills's Grandfather (she being Daughter of Jo. Mills eldest Son of the said Roger) having Issue two Sons as aforesaid, (viz.) John his eldest, and Roger his youngest, conveyed the Lands to John his eldest Son and the Heirs Males of his Body, and for want of such Issue, to the Heirs Females of the said John.

[120] This Court, as touching the two Leases of sixty and 1000 Years, upon reading the Deed of Uses, is of Opinion, and declared that the Defendant Roger the Son had no power to redeem the Lands settled on the Heirs Females of the said John, by Payment of the £500 in the Proviso of the said Deed of Uses mentioned, he having neither Wife nor Son; and if he had such Power, yet the Non-payment of the £500 within the Time limited, he having Notice thereof, made the Estate of the Heir Female absolute, and therefore the said Lease ought to wait on the Inheritance, and decreed accordingly.

MORGAN contra SEYMOUR.

13 Car. 1, f. 438 [1637-38].

One Surety forced the other Surety to contribute to the Payment of the Money, and the Bond assign'd over.

The Plaintiff with Sir Edward Seymour the Defendant being bound with Sir William St. Johns for the proper Debt of the said St. Johns, to the Defendant Rowland in a Bond of £200 for the Payment of £100, and the said Rowland sued the Plaintiff only on the said Bond, the Plaintiff seeks to have the said Seymour contribute and pay his part of the said Debt and Damages, the said St. Johns being insolvent.

This Court was of Opinion, that the said Seymour ought to contribute and [121] pay one Moiety to the said Rowland, and decreed Rowland to assign over the said Bond to the Plaintiff, and Seymour to help themselves against the said St. Johns for the said Debt.

NORWOOD con. NORWOOD.

13 Car. 1, f. 560 [1637-38].

Marriage-Portion to be paid so as she married with Assent.

The Plaintiff's Bill is for £400 Portion left her, to be paid to her at the Age of twenty-one Years, or Day of Marriage, so as she married with the Assent of the Trustees and her Mother and eldest Brother.

The Defendant insists, that the Plaintiff is about marrying without the Assent aforesaid, and refuses Payment of the said Portion, and offered divers Reasons against the Payment.

But this Court declared it just and reasonable, that the said £400 with Damages should be paid to the Plaintiff.

VINTNER *con.* PIX.

13 Car. 1, f. 443, 505 [1637-38].

£200 given in the Marginal Note of a Will to a Daughter (if she behave herself dutifully to her Mother) she marries without her Consent, yet the £200 decreed to her.

That Richard Pix by Will, of which he made the Defendant his Executor, gives to his two Daughters Elinor and Alice £200 a-piece to be paid at their Ages of twenty-one Years, or Days of Marriage, and the Testator gave the said Elinor and Alice £200 more, by a Marginal Note [122] in his Will, with this Clause (if they behave themselves dutifully to their Mother) and the said Alice died, and the said Elinor is her Administratrix, and Elinor marries the Plaintiff without Consent or Liking of the said Defendant her Mother.

This Court declared, that the £200 positively given by the said Will, the Defendant ought to pay the same to the Plaintiff; but as touching the £200 given to the said Elinor and Alice by the Marginal Note in the Will upon their dutiful Behaviour to the Defendant, she having married herself without the Consent of her Mother as aforesaid, referred that Point to the Judges.

The Judges certified, that the £200 in the Marginal Note mention'd, as well as the £200 in the Body of the Will, do belong to the Plaintiff Elinor, her Marriage notwithstanding, and that the first Letters of Administration of the Estate of Alice sued out by the Plaintiff, Administratrix of Alice, are yet in force; the Letters of Administration granted to the Defendant being subsequent to the Plaintiff's Letters of Administration.

[123] MARSTON *con.* MARSTON.

14 Car. 1, f. 676, 725 [1638-39].

Fine mistaken, the Land lying in two Parishes.

The Plaintiff as Heir in Tail makes Title to Lands, and the Defendant makes Title for her Life for her Jointure by Deed and Fine, which Fine is mistaken, for that the Lands do lie in two Parishes within the City of Coventry, (viz.) Part in Trinity Parish, and the other Parcel in St. Michael's Parish, and that the Fine is only of the Lands in Trinity Parish; but it not appearing that any of the Lands in the Deed of Jointure and Fine, which did both agree in Names and Quantities, do lie out of the said Trinity Parish, nor any Thing else appearing to invalidate the said Jointure.

His Lordship dismiss'd the Bill, and confirmed the Master of the Rolls and the Judges Order.

MAUNDY *con.* MAUNDY.

14 Car. 1, f. 1247 [1638-39].

Will, inofficious.

The Question in this Case being touching the Validity of the Will of Thomas Maundy, late Husband to the Defendant Joan, by which Will the Lands of the said Thomas are settled on the said Joan and her Issue, out of the Name and Blood of the said Thomas her Husband, [124] which Will the Plaintiff insists was contrived by the Defendant Joan contrary to the Intent of the Testator, and against certain Notes written by him in his Life-time, whereby he had settled the Inheritance of the said Lands on the Plaintiff and his Heirs after the Death of the said Joan; and the Plaintiff proves that the Testator intended to prefer him being of his Name and Blood, and drew Notes for his Will, whereby he gave the Lands to Joan for Life, and after to the Plaintiff and his Heirs; but the Testator left the Perfecting of his Will to the Defendant Ayleworth an Attorney, who prevailed with the Testator to let the Will be as he should pen it.

This Court, (it appearing the said Joan declaring to several that she had the Lands but for Life, and this Court conceiving the Testator to be but weak in Regard he left it to the Discretion of the said Attorney) declared, and is of Opinion, that the said Will was a very inofficious Will seeking to prefer Strangers before Name and Blood.

[125] HARRISON *con.* LUCAS.

15 Car. 1, f. 236 [1639-40].

Plea of the Statute of Limitations over-ruled.

The Statute of Limitations pleaded and over-ruled, and this Court with the Judges were of Opinion that the Plaintiff had no Remedy at Law, but made a Decree for the Plaintiff.

GORGE *con.* CHANSEY.

15 Car. 1, f. 227 [1639-40].

Trust.

The Bill sets forth, that whereas the Lady Dorcas Chansey, Grandmother to the Plaintiff, being possessed of the Sum of £200 in Oct. 1631, delivered the said £200 to one Gibs on Trust to be put out at Interest, to the End she may receive the Interest for her Life, and after the same to remain to the Plaintiff's Use, and the Principal to be to the Plaintiff's Use for ever, which was put out accordingly in the Name of Toby Chansey, the Defendant aforesaid, for the Purpose aforesaid, and the Bonds were delivered to the said Toby Chansey, who received the Interest during his Life; and about a Month before her Death, she gave the said Bonds, and Monies due by the same, to the Plaintiff according to her former Declaration; and the said Toby Chansey being only trusted as aforesaid, but minding to gain the said Money for himself [126] released the said Bonds; and the said Lady Chansey being dead, the Defendant Toby refuseth to pay the said Money and Interest to the Plaintiff, and insists that Sir William Chansey, his father, did by Deed in 1634, give Power to the said Lady Dorcas Chansey, his Wife, to dispose of all her Estate, which she had then in Possession, or at any Time should be possessed of, unto him this Defendant Toby Chansey, and not otherwise; and thereupon the said Lady continued them in the Defendant's Name till her Death. That in 1635, the said Gibs caused the said Lady Chansey to make her Will, whereby she gave her Estate to the Plaintiff's Mother, and made her Executrix, but afterwards revoked that Will, and gave her Estate to the said Toby Chansey.

And the Defendant insisting, that there being a Separation between the said Lady and her Husband Sir William Chansey, the said Sir William agreed to allow her £170 per Ann. as Alimony for her Maintenance, and that she did save and get the said £200 in Question out of the said Alimony, and being a Feme Covert had now Power to dispose thereof by Will or otherwise, at her Death, without the Assent of her Husband, having authorized her to dispose thereof by Will to the Defendant Toby her Son; but forasmuch as she had [127] by her Will taken upon her to dispose the same otherwise, such Gift and Will ought by Law to be void.

This Court was clear of Opinion, and so declared, that for Things in Action or upon a Trust, a Feme Covert might by Will dispose of the same without the Assent of her Husband; and therefore, and in Regard it appeared, that the said Lady did declare, that the said £200 should be and go after her Decease to the Use and Benefit, and towards the Benefit, and for a Portion for the said Plaintiff her Grandchild, and that the same for that Purpose was put forth in the Defendant Toby's Name in Trust:

This Court was fully satisfied, that the said £200 with Damages and Costs ought to go and be paid to the Plaintiff, according to the Declaration of the said Lady.

ISHAM *con.* COLE.

15 Car. 1, f. 329 [1639-40].

Chancery will not relieve Mortgages after a long Elapse of Time, tho' the Mortgagee confesseth he was satisfied, as was proved by one Witness.

That Edward Hill for £130 surrendered Lands to the Use of the said Edward Hill and his Wife for their Lives, Remainder to the Plaintiff and her Heirs and Assigns for ever, to which the Defendants do intitle themselves and detain the same from the Plaintiff.

The Defendants insist, that the said Ed. Hill for £207 in July 3 Jac. [1605] demised the [128] Premises to one Will. Sparry for ninety-nine Years, and Sparry 15 Jac. for valuable Considerations granted the same to John Sparry, and he in 3 Car. 1 [1627-28]

assigned the same to Anthony Cole the Defendant, and the said Defendant Cole confesses, that in the Deed from Hill to Will. Sparry, there is a Proviso of Redemption; and although it appeared by Articles, that there was a good Consideration of Money besides natural Affection which induced the said Edw. Hill to surrender the Premises to the Plaintiff's Use; and it being proved by one Witness that the said Will. Sparry about twenty-four Years since told him he was fully satisfied and paid all his Debts due from the said Edw. Hill, which moved the Court to conceive that the Plaintiff had good Cause of Relief; yet in Regard it is thirty three Years since the Mortgage from Hill to the said William Sparry, this Court doth hold it a dangerous Precedent to relieve Mortgages after so long an Eklapse of Time; but this Court proposed, in Respect of the Badges of Equity, which this Cause beareth on the Plaintiff's Part, to do something for the Plaintiff, which the Defendant consented to do.

[129] WYARD *contra* WORSE.

15 Car. 1, f. 328 [1639-40].

£200 secured by an Annuity, by Way of Mortgage. Mortgagee entails the Annuity, Remainder over by Will, and dies. Mortgagor pays the £200 to the Executor. The Executor shall pay the £200 to the Devisee, and not keep it, and pay the Interest, as the Annuity was limited.

That Eliz. Wyard the Plaintiff's Mother lent one Wellington £200 for Security whereof with Interest, made to several Trustees an Annuity of £20 per Annum out of Lands, for the Use of the said Eliz. provided, that if the said Wellington at any Time re-paid the said £200 then the Annuity to cease; which Rent was paid to the said Eliz. accordingly, who afterwards by her Will bequeathed the said Annuity to the Plaintiff and the Heirs of his Body, with Remainders over subject to the said Proviso, and made the Defendant Executor, who many Years received the said Annuity, and paid the same to the Plaintiff. But the said Wellington being dead, his Son and Heir paid the said £200 to the Defendant, and discharged the said Annuity, and since the Defendant hath paid the Interest of the £200 to the Plaintiff, but refuseth to pay the £20 to the Plaintiff, lest he might be after questioned for the same after the Plaintiff's Decease, by the Heirs of the Plaintiff's Body, or by those in Remainder, if the Plaintiff should die without Issue; whereas in Case the said Annuity had not been redeemed, the same had been only at the [130] Plaintiff's Dispose, and so ought now the £200 which cannot be entail'd by the Laws of this Realm, which this Court referring to a Master who certified the Truth to be as aforesaid: This Court decreed the £200 to be paid to the Plaintiff, and for Payment thereof this Court doth discharge the Defendant.

NAYLOR *contra* BALDWIN.

15 Car. 1, f. 430 [1639-40].

Bill to relieve Creditors.

The several Points insisted on in this Cause are, viz. That Richard Baldwin the Defendant being seized in Fee of several Lands and Tenements, in July 1630, made a voluntary Conveyance, whereby he sold the Premises to Abraham Hays and his Heirs in Trust, to the Use of his Son Thomas Baldwin, Remainder to another Son Richard, Remainder to Katherine his Daughter and her Heirs for ever, with a Proviso, that the yearly Rents and Profits of the Premises should be paid to Anne his wife, for the Maintenance of his Children, and the raising of their Portions, and after a full third Part to be for a Jointure for his said Wife; after which Deed made, and before Enrolment thereof, a Lease of the said Premises was made by Richard Baldwin to the Defendant Tirril, for the securing £400 lent by [131] Tirril to the said Baldwin, with a Clause of Redemption at the End of three Years; and to confirm the said Lease, Baldwin and his Wife acknowledged a Fine to the said Tirril; and the said Hays afterwards conveyed the Premises to Rothwel and his Heirs, another Defendant, subject to the said Trust. And Baldwin in August, 7 Car. 1, became indebted to the Plaintiff Naylor in £240 Bond for Wares, which he sued to Judgment: And the said Baldwin, 7 Car. 1 [1631-32], was indebted to the Plaintiff Noell in a Recognizance of £240 for Plate and Jewels; and to the Plaintiff Bourne in £100 on Bond, which is sued to Judgment. That conceiving Baldwin had good Power to let Leases, and that he was seized in Fee

of the Premises, 7 Car. 1 [1631-32], let a parcel of the Premises to one Goodwin, for the Consideration of £40 for forty-one Years, at 40s. per Annum Rent to build; and the Defendant Parsons taking the Lease to be good, bought the same of Goodwin for £69, and now finding his Lease to be insufficient dares not go on with his Building; and both the Sons being dead, and the Daughter of Baldwin married to the Defendant Higgins Baldwin, they received the Rents, so the Creditors not being satisfied their Money have exhibited their Bill for relief.

[132] The Plaintiff insists, that the said Deed of Settlement is fraudulent, and made to deceive Creditors.

This Court ordered the said Deed to be set aside, and that Tirril shall not stand upon the Forfeiture of his Lease, otherwise than to help him to his just Debt and Damages, together with the £39, 10s. which was also lent upon Security of that Lease, provided it appear upon Taking an Account, that the same was agreed to be secured by the said Lease; otherwise this Court will not give Way to the Hedging in of other Debts. And as for the Debts due by Wares which were put upon the said Defendant Baldwin, and of which he could not make Half the Money: This Court not favouring Contracts of that Kind ordered the Master to make Allowance as he saw Cause; and as for Mrs. Baldwin's Dower, unless she have barr'd herself totally by levying the Fine, this Court makes no Order therein at present, but declared, That if she levied the Fine only to secure the Lease, no Debt could bar her, except Tirril's Debt on the Lease; and this Court ordered the Lease to stand good.

[133] VINTNER *contra* PIX.

15 Car. 1, fo. 18, 219 [1639-40].

Several Legacies, the first is due, and the other is not due till afterward, the Executor may not pay the whole Legacy to the first, if there be not Assets to pay the Rest.

The Defendant an Executor, having paid a Legatee her Portion of £400, the Master in his Report thinks it against Law, that an Executor should pay some Legacies, and leave the Rest of the Legatees unpaid, but every one should lose in Proportion.

The Defendant Executor insists, that the Legacies were not all due at one Time, but some sooner, and some later, as the Children were in Age one before the other; and the eldest Daughter had a Preferment offer'd her, and so no Reason that she should lose the Occasion for Want of her Portion, which this Executor by the Will was constrained to pay her.

This Court would be satisfied what the Law is, when several Legacies are given, the first being due, and the rest not till in Time after, whether the Executor may pay the first, if there be not Assets to pay the Rest? This Court referred this Matter to the Judges of the Prerogative Court.

The Judges certified, and were of Opinion, That by Law the Executor may not pay the first the whole Legacy, if there be not sufficient to pay the Rest.

[134] This Court reading the Will and the Proviso in it, for supplying of the Legacies out of the Real Estate, if the Personal will not suffice, doth conceive it equitable and just, that the Executor ought to have carved equally, and given each one his rateable Part: And therefore it must lie upon the Executor to make the Rest of the Legacies good in a proportionable Way, and the Executors and Legatees to make themselves whole out of the Real Estate, the Proviso appointing it.

In Regard the Legacies are to be made up out of the growing Receipts, and not upon and out of a plentiful Estate; and that the Executor by his Forwardness in paying Legacies must now bear it out of his own Purse; this Court sees no Cause to allow the Legatees Damages for the same.

MAGDALEN COLLEGE OXON *con.* CROOK.

15 Car. 1, fo. 229 [1639-40].

Soil and Timber-Trees (tho' Woods and Timber-Trees are excepted) pass to a charitable Use by a Devise of the Fee.

Sir Simon Bennet devised all the Coppices and Wood Grounds, and all and singular the Premises, and all Woods and Under-Woods (except Timber-Trees) to his Wife for Life, and after her Death limited the same with the Timber-Trees to Trustees, that

they for two Years [135] should pay the Profits of the Premises to the Plaintiff, and they to bestow the same in Building the College, and after limited the Reversion and Fee-simple of the Premises to the Plaintiff and their Successors for ever (the said Woods, Under-Woods, and Timber-Trees excepted). Now the Question is, as the Exception is made of the Woods, Under-Woods and Timber-Trees, whether the Soil is not excepted also from the Plaintiff.

This Court is clear of Opinion, that the intent of Sir Simon was, That the Whole, as well the Soil as the said Woods, Under-Woods and Timber-Trees, do pass by the said Will.

POPHAM *con.* COM. DESMOND.

15 Car. 1, f. 220 [1639-40].

That the Plaintiff was sole Daughter and Heir of Sir Sebastian Harvey, and Administratrix of Sir James Harvey, her Grandfather, of the Goods unadministred by the said Sir Sebastian Harvey; and that Sir Thomas Gresham, 21 Eliz. [1578-79] for Money borrowed, entred into a Statute of £2000 for Payment of £1000 to Sir James Harvey, and that Sir Thomas Gresham conveyed the said Premises to his Wife and her Heirs, and by his Will declared she should pay all [136] his Debts; and that 23 Eliz. an Act of Parliament was made, that his Wife should be charged with all his Debts, and if she paid not the same, then Commissioners were to sell so much of the Premises as would pay the same; and the Lady Gresham, 39 Eliz. [1596-97] died, and the Premises descended to Sir William Read, and on 19 Jac. [1621-22] he died, and the Premises descended to the Defendant, who refuses to pay the said Debt; so the Suit is to have the said Premises sold for Payment of the said Debt and Damages according to the Act. And it appeared, that this Bill was exhibited in Pursuance of a Certificate made by the two Lord Chief Justices and Lord Chief Baron, upon the Plaintiff's Petition to the Lords Commissioners for the Sale of the Premises, in which Certificate the said Judges thought fit, and declared that the Plaintiffs should take their Course by Bill in this Court, or otherwise, that it may appear, whether the Money mentioned in the De-feazance of the said Statute, was then due and unpaid, or no, and whether there was Cause to sell the said Manors and Lands, it being the forty-sixth Year after the said Money ought to have been paid, and Whether any Demand had been made thereof, or no.

[137] Now for that there is no Mention of the Debt in the Inventory, in the Pre-rogative Court by Sir Sebastian Harvey of the Goods of Sir James Harvey, his Father, to whom the said Debt was first due, and for that it appeared, that as there was originally a clear Debt not to be denied; there was also a greater quantity of Lands subject to the same if it had not been paid; and for that the same debt grew due above fifty Years past, and the Plaintiff hath not made unto this Court any such Proof of any Demand or Pursuit of or for Recovery of the said Debt, whereby this Court might declare any Opinion that the said Debt is unsatisfied, or however the said Manors and Lands, or any Part thereof ought to be sold for the Payment thereof, or that any Relief ought to be given to the Plaintiff for the same, especially after so many Descents to several Heirs and Purchasers thereof by others, all of them as well Heirs as Purchasers, Strangers to the Payment of the Debts of the said Sir Tho. Gresham.

This Court dismissed the Plaintiff's Bill.

[138] ASKWITH *con.* CHAMBERLAIN.

15 Car. 1, fo. 309 [1639-40].

Debtor made Executor, yet his Debt to be Assets and not extinct.

A Debtor made Executor shall not extinguish his Debt, but the same to be taken as Part of the Testator's Personal Estate.

BOOTH *con.* PECKOVER.

15 Car. 1, f. 404 [1639-40].

The King's Award decreed.

The Bill is to have an Award made by the King decreed, the Defendant demurred, and insisted the Matter ought to be tried at Law.

This Court declared his Majesty is the Royal Fountain from whence all Streams flow. *Quære.*

HARDING *con.* COM. SUFFOLK.

15 Car. 1, f. 553 [1639-40].

Two Manors known by the Name of W. one of small, the other of greater Value, and an Annuity of £200 per Annum is granted out of the Manor of W. it is a good Averment that the greater Manor should be liable to the Rent-Charge.

The late Earl of Suffolk granted an Annuity of £200 per. Ann. out of the Manor of Walden, but the Defendant refuses to pay the said Annuity pretending there is no Manor known by the Name of Walden *tantum*, but only a Farm of £80 per. Ann.

Now for that the Defendant chiefly endeavoured to prove that the Manor of Walden, *alias* Chippen Walden and Brook Walden are two distinct Manors, and [139] that there is no Manor of Walden *tantum*, and if any, it is Walden, *alias* Chippen Walden, and the same only liable to the Annuity, the Value thereof being but £80 per Ann.

And the Plaintiff proved that the great Manor of Walden, which the Defendant calls Brook Walden, was the Manor meant to be subject to the said Annuity.

This Court with the Assistance of the Judges declared, and are of Opinion, that if there be two Manors known by the Name of Walden called Walden, and sometimes distinguished with an *Alias*, and the one of them of small Value, and the other of a much greater, that it is a good Averment in Law that the greater Manor should be liable to the Rent-Charge.

GODDARD *con.* GODDARD.

15 Car. 1, f. 248 [1639-40].

A Decree for settling Differences not reversed after sixteen Years, tho' there might be Error to ground a Bill of Review.

Bill of Review to reverse a Decree 22 Jac. [1624-25] the Plaintiff for Error says, the Cause was referred to four Commissioners, and but three certified; and also that the Lease, which the Plaintiff now insists on, was not then in Issue, and the Plaintiff never consented to the Certificate.

This Court upon reading the Proofs, it appeared by Depositions of two [140] Witnesses, that there was an Agreement for settling the Differences, and in Regard the Decree was so long since, and nothing done against the same in all this Time being sixteen Years, this Court would not reverse the Decree.

BOURMAN *con.* WILD.

15 Car. 1, f. 253, 266 [1639-40].

Jurisdiction of Cinque Ports.

This Court over-rul'd the Jurisdiction of the Cinque Ports.

CHURCH *con.* ROFER.

15 Car. 1, f. 436 [1639-40].

Award made by three Persons nominated by two Arbitrators by Assent, decreed good in Equity.

The Plaintiff and Defendant referr'd the Differences in question to the Arbitration of Mr. Hades and Mr. Lovelace, who made an Agreement or Award therein; as to the Lease of the Farm in Question to be surrender'd to the Defendant upon Terms; but the Plaintiff did insist upon Allowance for Improvements of the said Farm, which Matters the said Hades and Lovelace not being so able to judge of, they nominated five other Persons, whereof four or three of them were to settle the Matter of Improvements, which the Plaintiff and Defendant assented unto, and bound themselves to stand to their Award; that the Plaintiff perform'd his Part of the said Award [141] made by Hades and Lovelace, and that three of the five said Arbitrators made their Award, and awarded £120 to be paid by the Defendant to the Plaintiff for his Improvements, and for the Surrendering of his said Lease; but the same not being delivered to the Defendant punctually, whereby the Plaintiff might take Remedy thereby in Point of Law; and although the Defendant insisted, that the same was an extrajudicial Award, and void in Law, yet for that the same was but part of the Award made by Mr. Hades and Mr. Lovelace, and the Defendant had Benefit thereby, and gained Possession of the said

Farm and otherwise. And this Court conceived, that the Award made by three of the said five Arbitrators nominated by the said Hades and Lovelace, was made in Pursuance of the Award of Hades and Lovelace, and in Consummation thereof, and was, and ought in Equity to be deemed as an entire Award with theirs, which was in Part executed, and after the Plaintiff hath lost his Lease and paid his Rent, and is left remediless for his Money intended him.

This Court is clear of Opinion, that the Award made by the said three Arbitrators ought in all Equity to be performed by both Parties, and decreed accordingly.

[142]. BISHOP *con.* BISHOP.

15 Car. 1, f. 59 [1639-40].

The Bill is to have an Award decreed and performed. It was voluntarily referred to Mr. Justice Crook by the Parties, Plaintiff and Defendant, to end the Difference between them, who made his Award, and the Bill also chargeth the Defendant to make a Discovery of the Breach of the said Award.

The Defendant insists, that the said Award was merely voluntary and extrajudicial, and made without the Directions of this Court, and that both Parties did rely upon their Bonds mutually given for the Performance of the said Award: And as to the Bond entred into for the Performance of the Award, and the pretended Breach thereof, the Defendant insists it is put in Suit by the Plaintiff at Law, and that the Defendant is not bound by Law to answer upon Oath any such Matter against himself as may be any Evidence to bring him within the Penalty of the said Bond. Now as concerning the said Award, forasmuch as the Plaintiff hath performed the same, his Lordship declared it was a proper Suit in this Court to compel the Defendant to perform it on his Part, although the said Award were not made originally by any Direction of this Court.

[143] The Defendant insisted, that the Part of the said Award was chiefly insisted upon in the said Bill, which did bar the Defendant, being Tenant in Tail, from that Power which the Law gives him.

The Bill charging, that Sir Thomas Bishop, Father of the Plaintiff and Defendant, was seised to him and his Heirs Males, with the Fee expectant of divers Lands in Henfield, and the Plaintiff conceiving he had been seised of the Lands in Henfield, conveyed the same to the Defendant and his Heirs Males of his Body, having the Fee in himself, and there being a Deed of Gift made of the Testator's Goods at Henfield unto the Defendant in Trust for the Testator's Wife, the Mother of the Plaintiff and Defendant, and after her Decease, in Trust for the Defendant.

That Difference arising about the said Estate Tail, Mr. Justice Crook awarded the Defendant to enjoy a former Estate-Tail settled upon him and the Heirs Males of his Body by the said Testator, and the Plaintiff to confirm the said Estate-Tail at the Charge of the Defendant, and that the Defendant should do no Act to debar or discontinue the said Estate-Tail, or the Remainder of the Plaintiff without the Plaintiff's Consent, except it be for a Jointure for his Wife.

[144] His Lordship, to this Part of the Award, declared it was absolutely against the constant Course of this Court to decree a Perpetuity, or give any Relief in that Case, and as to that Point held the Defendant's Demurrer to be good; but as to the Performing the said Award, this Court ordered the Defendant to answer, and over-rule the Demurrer.

And as touching the Bond for the Performance of the Award, his Lordship saw no Colour that the Defendant should discover any Thing against himself whereby to charge himself with the Penalty of the Bond.

BALES *con.* PROCTER.

15 Car. 1, f. 719 [1639-40].

After Purchases and Fines, and above thirty Years quiet Possession, without Payments or Suit, the Annuities not relievable here.

The Bill is to be relieved for Messuages, which the Plaintiff insists are descended unto him in Tail, whereof the Plaintiff's Father, 18 Eliz. [1575-76] suffered a Recovery to one Garnet and John Bales and their Heirs, and covenanted to levy a Fine the same Year in Consideration of £20 to be paid to him; and also to be reliev'd for two Annuities of £6 per Annum to be granted out of the said Premises by the said Recoverors during

his Life, which the Plaintiff insists was not paid, and so the Premises ought to descend to him in Tail.

[145] The Defendant insists, that they are Purchasers for valuable Consideration, and plead and demur, for that a Recovery will bar an Estate-Tail without a Fine, so as the only Point of Equity in the Plaintiff's Bill is for Non-payment of the said £20 and the two £6 per Ann. Annuities, supposed to be in 18 Eliz. which the Defendant Procter being a Purchaser at the first Hand hopes he shall not be now compelled to prove Payment of, being sixty-five Years since the Annuities were due, and thirty-one Years since the Death of the Plaintiff's Father, who all his Life-time never complained of it, and in 12 Jac. [1614-15] a Fine was levied by Fairclough against Bull and others then in Possession, and another Fine unto the Defendant and his Trustees by one Sambrook, under which Fines the Defendant claims; and in 12 & 13 Car. 1 [1637], the Plaintiff was non-suited on an Ejectment brought, and the Defendant Hansley and his Wife claim under the said Recovery, and a Fine levied in 6 Jac. of the Messuages.

This Court dismissed the Plaintiff's Bill.

NEVIL *con.* BROUGHTON.

16 Car. 1, f. 504 [1640-41].

A general Clause in a Will not to prejudice a particular Devise.

This Court declared that a general Clause in a Will ought not to prejudice a particular Devise.

[146] PEYTON *con.* GREEN.

16 Car. 1, f. 569 [1640-41].

The Defendant's own Oath a good Proof in an Account of twenty Years standing.

This Court ordered, that in Regard the Account in Question is of twenty Years standing, the Defendant shall prove his Account by his own Oath for what he cannot prove by Books and cancelled Bonds; for that after so many Years his own Oath must be accepted as a Proof in this Case.

LEACH *con.* DEAN.

16 Car. 1, f. 577 [1640-41].

Voluntary Conveyance when fraudulent as to Purchases, and yet to what Purpose available.

The Plaintiff's Suit is to be relieved upon Articles of Agreement for the Purchase of Lands from the Defendant Richard Dean, who before the said Articles had by Deed conveyed the Premises to the Defendant Roger Dean his Son.

This Court with the Assistance of the Judges declared, That the said Deed of Uses so made to his Son Roger, as aforesaid, being a voluntary Conveyance, and the said Richard Dean selling the Premises to the Plaintiff for valuable Considerations, the said voluntary Conveyance was a fraud, and that the Tending of the Purchase-Money by the Plaintiff was as good a Performance of the Contract on his Part, as if the Money were paid. And as for [147] the Defendant Roger Dean, it is but just that he should be in the same Case as his Father, as if his Father had never made the Conveyance; and decreed the Articles to be performed; but as to the voluntary Conveyance, the same is not hereby impeached as between the Father and the Son for any Advancement, or any other Thing thereby settled on the said Son, other than making good the said Articles of Agreement aforesaid, but the Trustees to be paid their Debts and Engagements out of the Purchase-Money.

[Not followed, *Townend v. Toker*, 1866, L. R. 1 Ch. 460.]

PICKERING *con.* KEELING AND PICKERING.

16 Car. 1, f. 292 [1640-41].

Annuity granted without a valuable Consideration not relieved here.

That Thomas Pickering deceased, Father of the Defendant Tho. Pickering, and the Defendant Thomas Pickering by Deed 16 Jac. settled Lands to several Uses charged with an Annuity or Rent-Charge of £20 per Annum, to be paid to the Plaintiff; but

the Defendants having gotten seised of the said Lands, and got the said Deed into their Hands, refuse to pay the said Annuity.

The Defendants insist, That the said Deed is void in Law by Reason of a former Deed made 21 Jac. [1623-24] for valuable Considerations, whereby the said Lands were conveyed in fee without any Rent-Charge.

[148] This Court upon reading the said Deed, the plaintiff not proving that the said Annuity was granted upon any valuable Consideration, whereby this Court might be induced to set up and make good the said Deed in Equity : This Court saw no Cause to relieve the Plaintiff herein, but dismissed the Bill.

PRESS *con.* HINCHMAN.

16 Car. 1, f. 325 [1640-41].

The Act of a present Incumbent not to bind a Successor.

The Bill is to have a Lease of the Parsonage of Portland, heretofore made by one Green to one Peers, under whom the Plaintiff claims, made good and confirmed to the Plaintiff according to a Decree made by the Consent of the Defendant Steedly, whilst he was there Incumbent, and the Defendant Hinchman is the now Incumbent, and the Plaintiff would have him bound thereby, and compelled to confirm the same : which this Court on reading the Decree saw no Cause to do. This Court being clear of Opinion, that the Act of a present Incumbent cannot bind his Successor, and so dismiss'd the Plaintiff's Bill.

[149] ST. NICHOLAS *con.* HARRIS.

17 Car. 1, f. 206 [1641-42].

Bond to pay £15 per Ann. during a Life.

The Bill is to be relieved against a Bond of £300 entred into by the Plaintiff Eliz. conditioned, that if she did pay Timothy £15 per Annum, during the Plaintiff's Life, then the said Bond to be void. But the Plaintiff pretended, that the said Bond was for the Performance of an Agreement, which was by the Death of the said Timothy become impossible to be perform'd, and so the Bond ought to be discharged.

Upon reading the Proofs, this Court would not relieve the Plaintiff against the said Bond, and order'd the Plaintiff to pay the £15 per Ann. and Arrears with Damages to Timothy's Executor.

SWAIN *con.* WALL.

17 Car. 1, f. 16, 148, 252, 315 [1641-42].

Three are bound for H. in £300 and agree, that if H. failed, to pay their respective Parts of the Money, two of the Obligors proved insolvent, the third paid the £300, the other Obligor becomes able, he shall be compelled to pay a third Part, not a Moiety.

That the Plaintiff and Defendant and one Jorden 16 Jac. [1618-19] became jointly bound in a Bond of £500 to the City of London for the Payment of £310 in Febr. then next, which £300 was employed by one Shadwel for procuring the Place of Serjeant at Arms, which Place afterwards Shadwel assigned [150] to one Hunt for good Consideration, which Hunt by Direction and Agreement of the said Shadwel and the Plaintiff and Defendant Jorden entred into several Counter-Bonds unto the Plaintiff, and Jorden and Wall, for their Indemnity from the said Bond of £500 entred in to the City of London : and thereupon it was agreed, that if Hunt fail'd to pay the said Debt to the City, then the Plaintiff, and Jorden and Wall should pay their respective Parts of the said Debt to the City, and Hunt died possessed of the said Place insolvent, so as the Plaintiffs Jorden and Wall were only liable to pay the said Debt ; and the City calling in the said Debt, Wall was not able to pay his said Share, and the Plaintiff and Jorden in 1622, took up £300 of one Ducket and Bates, and were bound unto them in several Obligations for Re-payment thereof, and therewith paid the said Debt to the City, and afterwards Jorden became insolvent, so as the Plaintiff, on the Behalf of himself and Jorden and Wall, was forced to pay the said £300 to Ducket and Bates, and all interest : and Wall being afterwards of sufficient Estate to pay his rateable Part of £300 and Interest paid by the Plaintiff as aforesaid : so the Bill is, that the Defendant Wall may pay to the Plaintiff a Moiety of the £300 and Interest, Jorden being insolvent.

[151] The Defendant Wall insisted, that the said Defendant Wall was not bound in the Bonds given to Duckett and Bates, but only in the first Bond, wherein the Plaintiff and Jorden and the Defendant Wall were bound, and by the Agreement they three were to bear their respective Parts of the said £300 in Case Hunt failed; besides the first Bond being delivered up and the Debt paid, the Defendant conceives himself totally freed thereof.

This Court upon hearing the Proofs is satisfied, that the said Defendant Wall ought to pay to the Plaintiff the third Part of the said £300, and did decree the said Defendant to pay £100. And as for the Damages for the same, inasmuch as the Plaintiff both by Bill and Replication doth only desire a rateable Part of the principal Money, and the said Damages by him paid, which was £300 and Damages but for nine Months. This Court saw no Cause to order more, and so order'd the said £100 and Damages only for nine Months; but the Plaintiff insisted, that there are Precedents to enforce the Defendant to pay a Moiety of the said £300 and Damages.

The Court ordered Precedents to be produced for that Purpose.

The Plaintiff produced a Precedent in 5 Car. 1. [1629-30] *inter* Peter Plaintiff, and Rich [152] and Sheppard Defendants, by which the said Defendant Rich, in Respect the other Defendant Sheppard became insolvent, was order'd to pay the Plaintiff Peter Cosverty with the said Rich and Sheppard a Moiety of the Debt and Damages there in Question.

Mr. Justice Hutton was to consider of this Matter.

Mr. Justice Hutton thinks fit the Defendant shall pay the £100 and £7, 10s. for nine Months Damages, and if the Plaintiff hath recovered or received any Thing towards the said £107, 10s. of the Counter-Security before mentioned, he is to allow the same to the Defendant.

This Court confirmed the Judge's Order.

[See notes to *Dering v. Winchelsea (Earl of)*, 2 Wh. & T. L. C. 7th ed. vol. 2, pp. 537, 545, 554.]

PERRYMAN *con.* DINHAM.

17 Car. 1, f. 585 [1641-42].

The Defendant committed to the Fleet for not performing a Decree and a Sequestration, and the Plaintiff put in Possession of the Lands, shall not be discharged till the Lands be assured to the Plaintiff, or Money and Damages satisfied.

The Defendant being committed to the Fleet for not performing a Decree, a Sequestration was granted, and the Plaintiff put into Possession of the Lands: The Defendant insists, that the Plaintiff ought not to have the Lands, the Defendant being in Prison, it being a double Execution.

But the Plaintiff insisted, that as this Case is, where Money is lent upon Security [153] by Lands, the Plaintiff ought to have the Lands till the defendant hath paid the Money and Interest.

This Court, with the Assistance of the Judges, were satisfied that the Plaintiff's Holding the Lands was just and equitable, and that the Plaintiff ought to have the Lands absolutely assured, or else be satisfied the Money and Damages and Costs due to the Plaintiff, before the Defendant be discharged of his Imprisonment, and that in the mean time the Plaintiff do hold the Lands; but if the Defendant will assure the Lands, then he is to be discharged from his Imprisonment.

THOMAS *con.* NORTH.

17 Car. 1, f. 558 [1641-42].

Revocation of a Devise, &c.

That Nicholas Holmes being possessed of the Premises in Question in April 1631, made his Will and devised all his Messuages to the Plaintiff Nicholas Thomas his Godson, and to his Heirs for ever; and the said Nicholas Holmes in December 1633 mortgaged the said Premises to the Defendant North for £200 to be repaid at three Years End, and before the three Years End, the said Holmes fell sick, and declared he would not alter his said Will.

[154] But the Defendant John Holmes claims the Premises as Uncle and next

Heir to the said Testator Holmes, and hath entred on the Premises taking Advantage of the Forfeiture, and brought a Suit into this Court against the Mortgagee, and had a Decree for the Equity of Redemption, and did accordingly redeem the same and disposed thereof.

The Defendant insisting, that in Case such a Will was made, the said Will can be no Bar to the Defendant's said Title as Heir, in Respect the Testator did mortgage the Premises after the Making of the Will, if any were, which was a Revocation thereof, he having but a conditional Estate, and the Plaintiff did not make it appear that there was any other subsequent Will made, or a new Publication of the said former Will after the said Nicholas mortgaged the Premises.

This Court saw no Ground to give the Plaintiff any Relief, and dismiss'd the Plaintiff's Bill.

[155] SMITH *con.* HOPTON.

18 Car. 1, f. 404 [1642-43].

The Heir's Lands relieved, &c.

That Sir Owen Smith did borrow of Humphrey Beddingfield £1707, and for the Security thereof made a Lease of the Lands in Wighton and Walsingham for 100 Years, and also being otherwise indebted, and for the Payment thereof the said Sir Owen, 9 Car. 1, conveyed other Lands to one Saunders, and afterwards in August, 9 Car. 1, reciting the last Deed, conveyed to Trustees several Lands to the Use of Sir Owen for Life, and afterwards to the Use of Sir Thomas Hopton and Arthur Hopton and their Heirs, the said Lands and Premises on Trust to sell the same for the Payment of Debts and Legacies; that the said Sir Owen in 1637, died without Issue, whereby the Reversion in Fee of the leased Premises descended unto Thomas Smith, the Plaintiff's Father, as Uncle and next Heir to the said Sir Owen, and that at the Death of the said Sir Owen, £678 of the £1707 remaining unpaid, the said Thomas Smith and the Plaintiff, to save the Forfeiture, paid the same to the said Beddingfield; and the Plaintiff, as Heir to the said Sir Owen and his Surety, was forced to pay divers of his Debts, and [156] the Plaintiff's Father died, and the Plaintiff is both their Heir and Executor, who was, at the Request of the said Sir Owen Smith, bound as Surety for him in several Obligations; and the Plaintiff's Suit is first to compel the Defendant the Lady Smith, being Executrix of the said Sir Owen Smith, who hath possessed her self of his Personal Estate, to reimburse the Plaintiff the said £672 paid by the said Thomas Smith the said Plaintiff's Father, and the Plaintiff out of the Personal Estate of the said Sir Owen, it being a Debt mentioned in the Deed aforesaid.

And the Plaintiff insisted, that in Case there be a Personal Estate sufficient to satisfy Debts, the same ought not to lie upon the heir, whom though this Court will not discharge against the Creditors, yet this Court hath often reliev'd against the Executor and Administrator for a Re-imbursing of such Debts as he should so pay, so far as the Personal Estate will extend; and the Plaintiff insists to have the £672 if not out of the Personal Estate, then out of the Sale of the said Lands appointed to be sold as aforesaid; and also to have Satisfaction for the Debts for which the Plaintiff was bound for the said Sir Ow. Smith.

[157] This Court ordered the Plaintiff to produce Precedents where Relief hath been given to an Heir against an Executor or Administrator touching the said £672.

The Defendant confessing the Charge of the Bill to be true, this Court was of Opinion, that the Defendant the Lady Smith, being privy to the Trust aforesaid, is liable to satisfy the Debts of the said Sir Owen so far as the Land, which she purchased of the said Owen Smith, will extend.

WRIGHT *con.* MOOR.

21 Car. 1, f. 485 [1645-46].

A Bond voluntarily entred into without Consideration appearing, but presumed,
not relievable here after Judgment.

This Court declared they could not relieve the Plaintiff against a Bond freely and voluntarily entred into without Compulsion or Restraint, though no Consideration or Fraud was used for it; and this Court looked upon it as entred into upon some Considera-

tion, there having been Dealings between the Plaintiff and Defendant in Trade, and would not relieve the Plaintiff against the Judgment had thereon, but dismissed the Bill.

[158] WISEMAN *con.* ROPER.

21 Car. 1, f. 268, 464 [1645-46].

Covenant to perform Articles for the Settling Lands of which the Covenantor had no Possession, but only a Possibility of Descent, after a Descent, decreed to be settled accordingly.

That the Defendant Roper by Articles between him and Sir Thomas Wiseman, the Plaintiff's Father, reciting, That whereas there was a Marriage lately had between the Plaintiff, Nephew of the Defendant Roper, and Anne his Wife, without the Privity, Consent or good Liking of the said Thomas Wiseman, did as well in Consideration of the Defendant's natural Love and Affection to the Plaintiff, as for the Regaining of the good Will and Affection of the said Sir Thomas to the Plaintiff and his Wife, they did covenant with the said Sir Thomas Wiseman to convey within one Month after the Death of Sir Anthony Roper, the Defendant's Brother, unto the Plaintiff and Anne his Wife, or the Survivor of them and the Heirs of the Plaintiff, the Manor of Haber with the Appurtenances reserving an Estate to the Defendant for his Life; and that in Case the said Manor, which was then the Inheritance of the said Sir Anthony Roper, should be alienated by Sir Anthony, so that the same should not descend unto the Defendant, then the Defendant would assure other Lands of that Value, and if no Lands of that [159] Value should descend to the Defendant from the said Sir Anthony, then the Defendant would secure £4000 to be paid immediately after the Defendant's Death to the Plaintiff, or Anne his then Wife, or the heirs of the Plaintiff, and gave a Statute of £5000 for the Performance of the Premises. That the said Sir Anthony in 1641, died, and the Manor of Haber descended to the Defendant, but charg'd with great Debts; so the Plaintiff's Bill is to compel the Defendant to perform the said Articles according to the aforesaid Covenants.

The Defendant insists, that the Articles are voluntarily entred into on no Consideration, but only to procure a Reconciliation between the Plaintiff and his Father, and that the same was a Covenant of one not in Possession, not having any Estate therein at that time to settle Lands in Case they should descend unto him, whereof at the Time of the Covenant he had no Power whereby he might charge the same, but a bare Possibility in Case the said Sir Anthony Roper did not alien them.

This Court nevertheless was of Opinion, that the Consideration was good and sufficient; but it being Matter of great Weight and Consequence, whether this Court shall give Relief to compel a [160] Performance of a Covenant of this Nature, entred when the Covenantor had no Power over the Lands to be settled, for which the Defendant insists there is no Precedent to be shewed.

This Court ordered Precedents to be searched for.

That divers Precedents on both Sides were produced and read in Court, which this Court took Time to advise of, and then would give their Resolution thereon, which having done, they declared and were of Opinion, that the Bill being to have the Performance of an Agreement made by the Defendant himself, which appearing to be a legal and good Agreement, This Court do find warranted by the Precedents and constant Practice of this Court, where such Agreements have been made, upon which the Party can only recover Damages at Law for this Court to decree the Thing in specie, wherein this Court doth not bind the Interest of the Lands, but enforce the Party to perform his own Agreement, and decreed the Defendant to perform the said Articles, and convey accordingly.

[161] UNDERWOOD *con.* SWAIN.

1649, f. 177.

Will on Condition.

The Case is, That Philip Swain being seized in Fee of the Lands in Question, by Will devised the same to John Swain of Langston his Kinsman and his Heirs, in Consideration that he should pay all his Debts and Legacies, by which Will the said Philip appointed his Legacies to be paid within two Months after the Death of Sibil his Wife,

who had an Estate in the Premises for her Life, and lived about twelve Years after the Death of the said Philip, and in the mean Time married the Plaintiff Underwood, who having an Estate in Right of his said Wife for her Life, purchased the Reversion thereof after the Death of the said John Swain of Langston, of John Swain the Son and Heir of the said John Swain of Langston, the Devisee of the said Philip Swain, and afterwards the said Plaintiff Underwood paid the Debts of the said Philip and all the Legacies, except two five Pounds to two of the Legatees, and for Non-payment whereof the Defendant John Swain entred on the Premises as Heir at Law, the Condition being broken. But before the said Entry the Plaintiff Underwood sold the Premises to Toby Pain, and the said Toby [162] Pain devised the Premises to the now Plaintiffs Thomas and John Pain, and died, pending this Suit, which the now Plaintiff revived.

This Case was reduced to this short Question, viz. Whether a Court of Equity can control the Law, or give Relief against an Entry made by the Heir for the Breach of a Condition.

This Court upon View of Precedents in Cases of like Nature was clear of Opinion to give Relief to the Plaintiffs notwithstanding the said Forfeiture, and decreed the Plaintiffs and their Heirs to enjoy the Premises against the Defendants and their Heirs.

THIN *con.* THIN.

1650, f. 290.

The Omission of these Words in a Settlement (stand and be seised) relieved.

The Bill is to have Lands settled according to a Marriage-Agreement, and to supply a Defect in a Conveyance of 15 Car. 1 [1639-40], made pursuant to the said Agreement, the Deed being since miscarried and lost, which Deed contained a Revocation of Uses limited in former Deeds, in which Deed of 15 Car. [1639-40] these Words, viz. (shall stand and be seised) are not mentioned, for Want whereof the Defendant at a Trial at Law in Ejectment got a Verdict.

The Plaintiff insisted, that if by the Defect in the said Deed the Estate [163] intended to the Plaintiff should be avoided, then the said former Settlements would be wholly revoked, and the Plaintiff left altogether unprovided for, contrary to his Father's Intentions and the Agreement aforesaid.

This Court upon Perusal of Precedents, and advising with the Judges (the Case being of Weight) are fully satisfied, that the said Deed was not voluntary or unduly obtained, but pursuant and in Order to the Marriage-Agreement, and was made on just and good Considerations of Marriage, although it be not so express'd in the Deed, and of natural Affection and Settlement of an Estate on his Posterity, and no fraud therein.

And this Court is of Opinion, that it cannot stand with Equity on Justice, that the said Conveyance made with Intent to advance the Plaintiff's Marriage should destroy the former legal Settlements, whereby he stood provided for, and leave him totally destitute, and no Ways provided for through Want of those Words (shall stand and be seised) in the said Deed which if wanting, might be probably omitted by the Negligence or Slip of the Clerk that ingrossed it, and therefore this Court is of Opinion, that the Plaintiff ought to be relieved in Equity, and decreed the Plaintiff and the [164] Heirs of his Body according to the Limitation of the said Deed shall, notwithstanding the Omission of the aforesaid Words (shall stand and be seised) in the said Deed, and notwithstanding any Act done by the Defendant, enjoy against the Defendant, his heirs, &c., as well as if the said Words had been perfectly in the said Deed, and the said Defect, not happened therein: and the said Defendant, his Heirs, &c. to take no Advantage of the said Omission.

DOMINA ASHTON *con.* ASHTON.

1650, f. 534.

Alimony decreed.

The Plaintiff's Suit is to be relieved against the Defendant, her husband, for Alimony, which upon several long Hearings and all Considerations imaginable taken in this

Cause, being a Case of great Consequence and between Persons of Quality, the Defendant refusing to comply with the Court's Mediation.

This Court decreed the Defendant to pay to the Plaintiff £300 per Ann. so long as they lived a-part.

ORLIBAR *con.* BROMSAL.

1651, f. 189.

Surplusage of an Estate decreed to the Heir, not to the Executor. This is now settled *contra*.

The Surplusage of an Estate after Debts, Legacies and Portions paid, ordered by this Court not to go to the Executor, but to the Heir.

[165] DUTCHESS OF HAMILTON *con.* COUNTESS OF DIRLTON AND LORD CRANBORNE.

1654, f. 1330.

Mortgage in Trust.

That James Earl of Dirlton, being seized in Fee of the Manor of Wauborough and Gilford Park, mortgaged the same on the 24th of May, 1649, to Finch Prestwood, and Pratt and their Heirs for £2500 redeemable on the Re-payment thereof with Interest, whereas the said Money was never borrowed by the said Earl, but the said Conveyance was in Trust for the said Earl, and to such to whom he should dispose the Premises. But in the same Month of May, the said Earl borrowed of the Defendant Weston £2500, and on the 7th of May, 1649, conveyed the Manor of Wauborough and Ridglads and other Lands unto the Defendant Weston and his Heirs, redeemable on the Re-payment thereof with Interest. And for Non payment the Premises became forfeited in the said Earl of Dirlton's Life-time, who having such Title, Trust and Equity of Redemption in the said Premises by Deed 24 April, 1650, granted to the Countess of Dirlton the said Premises for her Life, and by another Deed 27 April, 1650, declaring his Mind touching the Inheritance and [166] Trust thereof, did grant to the Plaintiff and his Heirs all the Manor of Wauborough, Gilford Park, and the Premises from and after the Death of the Plaintiff's Mother, the said Countess of Dirlton, and after the said Earl died possessed of the said Premises, leaving the Plaintiff and Defendant the Lady Cranborne, his Daughters and Co-heirs; and the Plaintiff by Virtue of the said Grant and the Declaration of the said Earl, being intituled to the Trust of the said Premises, conveyed to the said Finch, Prestwood and Pratt, after the Death of the said Countess of Dirlton her Mother as aforesaid, seeks to have the same conveyed to her by the said Trustees, and also the said Manor of Wauborough, and the Premises mortgaged to the said Weston, subject to the Equity of Redemption.

The Defendants, the Trustees, confess the Trust aforesaid, and the Defendant the Lady Cranborne insists that the said Earl had no Power to make the said Deed, neither can the same convey the Trust and Equity of Redemption, nor could be so intended, the Intention of the said Earl appearing otherwise in a Codicil of the Earl's Will dated the 16th of April, 1650, and if he had not made the Conveyances of the Premises to the Defendant, but been himself legally seised [167] of the Premises when he made the said Deed to the Plaintiff, it would not have been good in Law, and therefore ought not to be construed in Equity to be good to pass the said Trust and Equity of Redemption, and that the said Earl formerly often declared that his Land should equally descend to his two Daughters, which was proved by Sir John Scott: But on reading the Deed 27 April, 1650, and the Declaration of the said Earl at the Making thereof, that the Plaintiff should have all the said Premises as aforesaid, for that he sufficiently provided for the said Defendant before.

This Court being assisted with the Judges was satisfied, that it was the clear Intention of the said Earl, that the Plaintiff should have all the said Premises, and that by the said Deed and Declaration the Plaintiff is intituled unto the Trust and Equity of Redemption aforesaid, and decreed the Trustees to convey the same accordingly to the Plaintiff and her Heirs, and that the Defendant Weston and his Heirs after the Mortgage satisfied shall convey the Reversion after the Countess of Dirlton's Death to the Plaintiff and her Heirs, and decreed that the said Dutchess and her Heirs shall enjoy all the said Premises against the Defendant the Lady [168] Cranborne and the said Trustees, paying the Proportion of the said Mortgage-Money aforesaid.

AMBY *con.* GOWER.

1655, f. 796.

Devise that Executors shall sell Lands, &c. they do not sell, decreed that the Heir shall join in the Sale for Payment of Debts.

The Bill is, that the Plaintiffs being Creditors, and Executors to Creditors of Robert Walker, to have Lands sold according to the Will of the said Robert Walker for Satisfaction of their Debts.

The Words of the said Will being : My Will and Mind is, and I do hereby authorize that my Executors shall sell my Woodlands and Woods thereupon growing, called Barnes, to any Person or Persons whatsoever, and their Heirs and Assigns for ever, for the best Value, with convenient Speed as may be, and with the Money to pay all my just and due Debts.

The Question being, whether the Executor of the said Robert Walker having not sold the said Lands according to the Direction of the said Will, the heirs of the said Robert shall be decreed to sell the same.

This Court, with the Assistance of the Judges and reading of Precedents, declared that they were of Opinion, that the Plaintiffs ought to be reliev'd, and that the [169] said Lands and Woods thereon growing ought to be disposed of and sold, and that the Heirs of the said Robert join in the Sale thereof for the Payment of the Debts, and decreed accordingly.

SMITH *con.* VALENCE.

1655, f. 1489.

Mortgagee purchaseth the Lands mortgaged, the Plaintiff who had Title of Redemption shall declare whether he will redeem or not, before the Validity of the Mortgage shall be tried at Law.

The Defendant being a Mortgagee of the Premises, afterwards purchased the same for valuable Consideration, and the Plaintiff having the Title of Redemption would before he redeem have the Validity of the said Mortgage tried at Law.

But the Defendant insists that the Plaintiff may pay him his Principal, Interest and Costs, or otherwise be at Liberty to recover the Premises ; and the Plaintiffs desiring he may not redeem till the Validity of the said Mortgage appear at Law, which the Defendants opposed, alledging, the Plaintiff ought then first to declare, whether he will redeem or not, it being against the Rules of Justice for the Plaintiff to have the Equity of Redemption from the Defendant after he had endeavoured to avoid his Title.

This Court, on reading Precedents on the Plaintiff's Part, was of Opinion, that the Defendant being Purchaser for valuable Consideration, the Plaintiff ought [170] now to declare he will redeem the mortgaged Premises before he endeavoured to avoid his Title, and that if he will redeem he ought to pay the Defendant all his principal Money due thereon, with Damages and Costs, and the Plaintiff refusing, this Court dismiss'd the Plaintiff's Bill.

COX *con.* BROWN.

1656, f. 558.

Lease forfeited by Alienation without Licence by Executor, reliev'd, it being sold for Payment of Debts.

The Bill is to be relieved against the Forfeiture of a Lease, in which there is a Covenant, that if the Lessee should let the Premises for any longer than three Years, except to the Wife or Children of the said Lessee, without Licence of the Lessor or his Assigns first had, then the said Lease to be void.

That the Defendants have entred upon the Premises on Pretence that the Executors of the Lessor did alien the same to the Plaintiff without Licence, and have ousted the Plaintiff who purchased the same.

This Court on reading Precedents, forasmuch as the said Executors sold the Lease for Payment of Debts to which the same was liable, and if she had not been Executrix there had been no Forfeiture : This Court decreed the Plaintiff to be relieved against the said Forfeiture.

[171] WELDEN *con.* RALLISON.

1656. f. 1088.

Judgments and Statutes bought and laid upon Lands mortgaged and a long Time forfeited set aside, they being after an old Decree for Redemption.

That William Welden for £600 lent, conveyed and mortgaged Lands to Lewis James and his Heirs in 18 Jac. [1620–21] on Condition of Redemption, and acknowledged a Statute of £1000 to the said James for Performance of Covenants in the Mortgage-Deed, which Mortgage being forfeited, the said Welden in 1632, exhibited his Bill against the said James for Redemption, and in 1639, obtained a Decree which is signed and inrolled; but before the Performance of the Decree, James, who since the Forfeiture had incumbered the Premises, and the said Welden died, and the Heirs of Welden had Orders for to have the Benefit of the Decree against the Co-heirs of the said James, and in 1646, the Heir of Welden exhibited his Bill for Redemption, and had a Decree to confirm the first Decree and then died, and the now Plaintiff Welden, his Brother and Heir, had Orders to have the Fruit of the said Decrees, and Welden appointed the Premises to be made to the Plaintiff Goldston.

But the Defendant Rallison to undermine the Decree in 1649, bought of the Executors of one Alexander two Bonds [172] of £200 a-piece, entred into by the said James in 1629, and also one Bond of £100 in 1642, and three Bonds entred into by the said James in 1637, for £300 which were assigned to Rallison in 1648, and bought also a Statute of £300 in 1629, and an Extent for £300, which extent was not made till 1649, upon all which Bonds and Statutes the said Rallison hath extended the Premises, which the Plaintiff insists is all *pendente lite*.

The Defendant Rallison insists, he is a Purchaser for valuable Consideration of the said Incumbrances and a Stranger, and not a Party nor privy to the former Suits, and a real Creditor for £635, and after so long a Forfeiture he ought not to be bound by the said Decrees.

This Court declared that the Judgments recovered on the said Bonds ought not to attach the said mortgaged Premises, they being after the first Decree, and decreed them and the Extents thereon to be set aside. And all Leases, made by James at Rack and improved Rent, are to be allowed and stand good, otherwise not.

[173] WHITEHORN *con.* EDWARDS.

1656. f. 335.

Trust.

The Bill is to compel the Defendant to perform a Trust, and to redeem the Premises; The Defendant denies the Trust, and insists that the Premises were conveyed to him absolutely for valuable Considerations, and that the Plaintiff hath denied the same to be a Trust in several Answers.

This Court nevertheless decreed the Defendant to come to an Account with the Plaintiff touching the Premises.

GOODWIN *con.* GOODWIN.

1658. f. 922.

Two voluntary Conveyances, one set up against the other.

The Question being between two voluntary Deeds, the Defendant claiming by the first and executed, and the Plaintiff claims by the latter.

This Court ordered the Plaintiff to produce Precedents where a former voluntary Conveyance hath been by this Court set aside, as this Case is, that a subsequent Conveyance, which is also voluntary, may take Place.

This Court dismiss'd the Plaintiff's Bill.

[174] COOPER *con.* TRAGONWEL.

1659. f. 134, 178.

Witnesses examin'd to support an Entail.

The Bill is to have Liberty to examine Witnesses to support an Entail in this Court: The Defendant pleaded, and this Court would see Precedents, whether the Defendant

should answer the Plaintiff's Bill so far as to enable the Plaintiff to examine Witnesses to the Purpose aforesaid.

This Court ordered the Plaintiff to reply to the Defendant's Plea, and to examine to whatsoever Matter the said Defendant hath put in Issue to his Plea.

APPRICE *con.* FLOWER.

12 Car. 2, f. 485 [1660-61].

Settlement of a Lease.

This is on a Case stated, viz. That John Flower the Elder, being possessed by several Leases and Assignments for several Terms of Years of the Premises, made his Will, and Eleanor his Wife Executrix, who proved the same, and made her Will, and Jeffery Son of the said John and Eleanor her Executor; and the said Jeffery made his Will, [176] and the Plaintiff Eleanor and the Defendant John Flower his only children his Executors, and died, and by his said Will bequeathed unto them all his Personal Estate, to be divided between them, and the said John Flower the Elder, by Deed 4 Aug. 38 Eliz. [1596] in Consideration of a Marriage between the said Jeffery and Mary Compton, assigned the Premises and Terms therein unto Anthony Self and others, to the Use of the said John Flower the Elder for Life, and the Trustees, whereof the said Anthony Self was the Survivor, their Executors and Assigns should after the said John's Decease stand possessed of the North Part of the Premises to the Use of the said Eleanor Flower for her Life, and after to Jeffery for Life, and after to his eldest Son of the Body of Mary Compton for Life, and after to the second Son of the said Jeffery and Mary, and after to the next Son for Life, and so from Son to Son of the said Jeffery, the one after the other for Life, until the End of the said Terms; and if the said Jeffery should die without any Son, or Issue Male of his Body, either by the said Mary, or otherwise, or if all his Sons should die before the End of the said Terms, then he limits the same to John Flower, son of the said John the Elder, and John his Son; and that the said [177] Trustees should stand possessed of the Residue of the Premises after the Death of the said John Flower the Elder, to the Use of the said Jeffery for Life, and after to the said Mary for Life, and after to the eldest Son of the said Jeffery and Mary for Life, and after to the next Heir Male of Jeffery and Mary for Life, and so from one Heir Male to the other Heir Male of the said Jeffery, one after the other for Life, until the end of the said Terms; and if the said Jeffery should die without any Son, or Issue Male by the said Mary, or other Wife, or if all his Sons should die before the End of the said Terms, then to the Use of his, the said Jeffery's and Mary's Daughter and Daughters; and for Default thereof, to the Use of the Executors and Assigns of the said Jeffery; and the said Jeffery survived John the Elder, and Eleanor his Wife, and the said John Flower his Brother and Nephew, and also Mary Compton, and after married Ellen Bowman, by whom he had Issue the Plaintiff Eleanor and the Defendant Thomas his only Children, and the Defendant Thomas Flower entred upon the Premises in 1650, and hath enjoyed them ever since.

[178] This Court, with the Assistance of the Judges, having advisedly considered of the Case, are clearly of Opinion, that the Remainders or Limitations of the Trust of the said Term to the first and other Son of the said Jeffery before they were in Being, and also the subsequent Limitations and Remainders were utterly void, and tended to raise and create a Perpetuity contrary to the Rules of Law, and the whole Trusts of the said Terms vested in the said Jeffery, either as Executor of the said John the Elder that created the same, or immediately in Respect of the said void Remainders or Limitations; and also that the Trust of the said whole Estate and Terms doth belong to the Plaintiff Eleanor, and the Defendant Thomas Flower, Executors of the said Jeffery, equally to be divided between them, and decreed the Lands according to the said Trust to go accordingly.

VENABLES *con.* FOYLE.

12 Car. 2, f. 670 [1660-61].

Writ of Assistance to put the Plaintiff in Possession.

The Plaintiff moves for a Writ of Assistance to be put into possession, according to a Decree and Injunction which had been served, but disobeyed.

[179] The Defendant insists, that the Plaintiff ought to prosecute the Defendant with all Process of Contempt to enforce the Defendant to yield Obedience to the Decree before any Injunction or Writ of Assistance can regularly be awarded for Possession, by the Rules of this Court, and that there hath been no other Process than an Attachment issued against the Defendant for Breach of the Injunction or Non-performance of the Decree, it was referred to the Six Clerks.

The Six Clerks certified, that they do find that by a Rule in the Lord Bacon's Time all Process of Contempt ought to issue against the Person to a Serjeant at Arms before an Injunction should issue for the Possession; and that they had seen Precedents in Queen Elizabeth's Time, and the Beginning of King James, agreeing with the said Rule, but they did not conceive that the said Rule did bind the Prerogative of this Court, but that if the Court saw just Cause upon Motion, upon an Attachment only, to grant an Injunction, and that there are divers Precedents to that Purpose, and that by the late Rules the Course hath been upon Affidavit of Personal Service of the Decree and an Attachment upon Motion to grant an Injunction, and upon Contempt thereof [180] a Commission was granted to put and keep the Party in Possession.

This Court upon reading Precedents in the Lord Coventry's Time, and of Affidavits, whereby it appears that Possession hath been demanded, and refused to be delivered according to the Injunction which was served and disobeyed, ordered that a Commission or a Writ of Assistance be awarded, to put and keep the Plaintiff or his Agents in Possession, *nisi causa*.

The Defendant insisted, that though he be prosecuted to a Serjeant at Arms, that by the Course of the Court after a Serjeant at Arms an Injunction for Possession must be first granted and served, and the Party in Contempt for not obeying thereof, before a Writ of Assistance is to issue, especially against Tenants of the Premises who were not Parties to the Suit, and that there is no injunction for Possession, since the Serjeant at Arms; but in the End this Court discharged the Writ of Assistance and Injunction formerly granted as irregular, and the Plaintiff to issue out all Process of Contempt in Course to a Serjeant at Arms before an Injunction to issue.

[181] TILLY *con.* EGERTON.

12 Car. 2, f. 170 [1660-61].

See Vol. 3, pa. 63, S. C. Mortgage.

That Nicholas Tilly the Plaintiff's Brother being seised in fee of Lands by Deed in 1642, mortgaged the Premises to John Egerton in Fee for £150 with Interest, payable in 1643, and £6 upon that Day annually, till 1649, and the 28th of March, 1649, for the Payment of £108, by Nicholas Tilly, his Executors, Administrators or Assigns; that afterwards in the Presence of John Egerton the Plaintiff purchased the Fee-simple of the Premises of Nicholas Tilly, and paid him Part of the Purchase-Money in Hand, and gave him Security for the Residue. And in 1652 the Plaintiff agreed with the said John Egerton for the Redemption and the Purchase of the Premises of him, and in Satisfaction thereof the Plaintiff was to pay him £6 for ten Years, from Lady-Day then next, and £120 at the ten Years End, and at the ten Years End the Premises to be conveyed to the Plaintiff, and the Deeds to be delivered up, and upon the said Agreement the Deed of Mortgage and other Writings were by Consent to be delivered up to one Collier to draw the Agreement, and before the Agreement was drawn, the said John Egerton in 1653 died, [182] leaving Vincent Egerton his Brother and Heir, and the Defendant Julian his Relict, and Julian took Administration; and that after John Egerton's Death, the said Vincent and Julian contested who should have the £6 per Annum; Vincent claiming it as Heir, and Julian as Administratrix, and each threaten'd the Plaintiff to recover the same from him again: so that ever since John Egerton's Death the Plaintiff is in Arrear of it; that Vincent died, leaving the Defendant William his Son and Heir, between whom and Julian the same Dispute grew, so that to whom the £6 per Annum and Arrears this Court should adjudge it to belong, and the growing payments, and the £120 at the ten Years End, and the Premises then to be conveyed, is the Bill.

The Defendant insists, that Julian exhibited her Bill against the said Vincent Egerton and Nicholas Tilly, to have the Mortgage-Money paid to her as Administratrix to John Egerton, but failed therein. The Defendant Julian claims the Mortgage-

Money by the Plaintiff's Agreement with John Egerton as his Administratrix to enable her to pay his Debts, he not leaving Assets sufficient.

This Court, with the Assistance of the Judges, decreed the Plaintiff shall have Redemption of the Mortgaged Premises : [183] and forasmuch as the Defect of Assets of the Mortgagee was not proved. This Court was of Opinion, That the Heir of the Mortgagee ought to have the Money to be paid for the Redemption of the Premises, and decreed the Arrears of the £6 per Annum, and the growing Payments for the ten Years, and the £120 at the ten Years End shall be paid by the Plaintiff to the Defendant William Egerton.

But note : The Point is now settled, That in all Cases the Mortgage-Money is to be paid to the Executor or Administrator. See Max. Eq. p. 21, and 3 Chan. R. 20, 21.

WILLIAMS *con.* DUTTON.

12 Car. 2, f. 109 [1660-61].

Jurisdiction of Chester.

This Court with the Assistance of the Judges allow'd the Jurisdiction of the County Palatine of Chester.

WITCHCOT *con.* SOUCH.

12 Car. 2, f. 112 [1660-61].

The Time of Sale of Lands by Trustees elapsed, yet decreed to proceed in the Sale.

The Time for the Sale of Lands by Trustees being elapsed, so that the Trustees have no Power to execute the Trust ; this Court with the Assistance of the Judges, were of Opinion, that by the Elapse of Time, no Advantage ought to be taken, but decreed the Trustees to proceed with the Sale notwithstanding.

[184] MICKLETHWAIT *con.* BOATMAN.

12 Car. 2, f. 179 [1660-61].

Interest for Rents and Profits.

This Court would not allow Interest for Rents and Profits.

SAUNDERS *con.* HORD.

12 Car. 2, f. 332 [1660-61].

Demur to a Bill for Redemption of a Mortgage, because of the Antiquity, and plead the Stat. 21 Jac. good.

The Plaintiff seeks a Redemption of a Mortgage as Heir and Administrator of the Mortgagor ; the Defendant demurs for that he ought not to be troubled or questioned for any Matters in the Bill, in Regard of the Antiquity of the Transactions, they being not privy or Parties, the Matters being acted in 38 Eliz. [1595-96] and pleaded that the Plaintiff hath not made any Entry in twenty Years, and is barred by the Statute 21 Jac. the Plaintiff claiming as Heir to his said Father, and pleaded also a Fine and Recovery suffer'd by the said Father in 3 and 15 Jac. [1605-6 and 1617-18]. This Court allow'd both the Plea and Demurrer.

POLLARD *con.* DOM. GREENVIL.

12 Car. 2, f. 429 [1660-61].

Power to lease, &c.

That one George Cuttiford in 1631, became bound in a Bond of £200 for Payment of £104 which Money was [185] imployed for the Use of the Defendant Dame Greenvil during her Widowhood, and she in December 1673, in Pursuance of a Power reserved to her by the Deed of Settlement of her Estate before her Marriage with Sir Richard Greenvil to make Leases for three Lives or twenty-one Years of any Part of her said Estate, she in Consideration of several Debts, as also of the said Bond of £200 demised to the said Cuttiford, his Executors, &c. the Premises for twenty-one Years, to commence from and after the 25th of March then next ensuing, for saving harmless the said Cuttiford, his Heirs, &c. from the said Bond.

The Defendant Dame Greenvil insisted, That the Power reserved to her was only

to make a Lease or Leases in Possession, and the Lease made by her to Cuttiford was to commence from a Time to come, so that the same was void in Law, and that if the Lease were good, yet she received the Profits during Coverture, and so not accountable for them.

This Court was assisted with the Judges, and it appearing that the Debt now in Question was taken up and imployed for the Use of the Defendant Dame Greenvil, who created the Trust for the Payment of her Debts, and she, by Virtue of the Power reserved to her before Marriage, received the Profits of the Premises; [186] and altho' the Lease granted to Cuttiford may not in Strictness of Law be a good Lease, yet this Court was satisfied that the same doth amount to a good Declaration of her Power in Equity to make a Lease for twenty-one Years in Being, and that her Reception of the Profits was under that Power, and subject to the Trust, and decreed that the said Debt in Question be paid to the Plaintiff, and in Respect the principal Debt and Damages doth surmount the Penalty of the Bond, it was also decreed that the Defendant should pay £200.

LAPWORTH *con.* SMITH.

12 Car. 2, f. 11, 471, 738, 883 [1660-61].

Redemption by the Heir. *N. B.*—This is now otherwise settled.

This Court decreed the Heir to have the Redemption of the Premises, and not the Administrator (*Q. ante*, 164).

RUSSEL *con.* BODVIL.

12 Car. 2, f. 38 [1660-61].

Alimony.

The Plaintiff moves for a Commission to the Sheriff to put the Plaintiff and his Sequestrators in Possession.

The Defendants insist, that the Commission desired is to execute Orders for Alimony, for which there is now no Jurisdiction in this Court, and there is now no Law in Being to support any such Decree; and if there were, there is no [187] Decree signed and inrolled; and a Sequestration, Injunction, and Commission are not grantable but on a Decree signed and inrolled, and are not to extend to an Agent of a Sequestrator, nor the Commission to the Sheriff is awardable before one first to the Justices.

This Court being assisted with the Judges on this Point, whether the Act for judicial Proceedings did revive and maintain the Decree made for Alimony in this Cause, or not,

His Lordship, after hearing of the learn'd Arguments on both Sides, declared, That inasmuch as the Decree made in this Cause doth depend on his Lordship's Judgment, his Lordship referred it to several of the Judges upon the Arguments.

The Plaintiff moved for a Writ of Assistance to put the Plaintiff's Sequestrators in Possession of the Lands decreed, the said Decree being certified to be a good Decree.

His Lordship declared, That he doth conceive the Decree to be in Force, and leaves the Plaintiff to proceed thereupon as upon other Decrees.

The Defendant sued out all Process to a Serjeant at Arms, whereon a Sequestration issued, and Injunction to Commissioners.

[188] This Court ordered a Commission to the Sheriff to put the Plaintiff's Sequestrators into Possession.

UNDERHILL *con.* WHITCHOT.

12 Car. 2, f. 460 [1660-61].

Injunction for Possession.

The Defendant being in Contempt for not performing a Decree to an Attachment, an Injunction for Possession was awarded.

PLUMPTON *con.* PLUMPTON.

12 Car. 2, f. 186 [1660-61].

£200 devised to two of the Children of J. S. begotten or hereafter to be begotten, one was born at the Time of the said Will, she shall have £100.

That Henry Plumpton the Plaintiff's late Grandfather deceased, being seised in Fee of Lands and of a Personal Estate in 1638, made his Will, and his eldest Son Andrew

Plumpton, the Defendant, Executor, whereby he devised to two of the Children of Henry Plumpton, his younger Son (the Plaintiff's Father), either already begotten, or which hereafter shall be lawfully begotten on the Body of Christian his then Wife, £100 a piece to each of them to be paid unto them at their several Ages of twenty-one or Days of Marriage, which should first happen, and after died; and at the Time of the said Will the Plaintiff was the eldest Daughter of the said Henry Plumpton the younger in the Will named, and is of the Age of [189] twenty-one, and so is intitled to have the said £100 and Damages as aforesaid.

The Defendant insists, That the said Legacy belongs to the Plaintiff's younger Sisters, who were born since the Testator's Death, and insists, that if the Testator had intended £100, Part of the said £200 Legacy to the Plaintiff, he would have named her in the Will, in Regard she was the Daughter of the said Henry and Christian, and born before the making of the said Will, and therefore supposeth the Intent of the Testator was to leave the Disposing thereof to the said Defendant, to the End he might dispose thereof at his Discretion to such of the Children of the said Henry and Christian his Wife, as were most deserving, and that by the Words of the said Will, the Children, that were afterwards begotten between Henry and Christian, should be equally concerned with the Plaintiff, who hath a Brother and Sister since born of the said Christian, who may claim the same of this Defendant, they having as much Right and Interest in the same as the Plaintiff; and the Defendant conceived he is equally obliged to pay them the said Legacy.

This Court declared, that the Plaintiff is a Person, by the Will capable to take and demand the said Legacy of £100, and decreed the said £100, Part of the [190] said £200 Legacy, so given by the said Will as aforesaid, to be paid by the Defendant to the Plaintiff, the Plaintiff being of Age and in a Capacity to claim the same; and this Court further declared the said £100 Legacy doth wholly belong to the Plaintiff by the said Will, and that by the Words of the said Will none of the other Children of the said Henry and Christian can claim the said Legacy of £100 so given to the said Plaintiff.

PHILIPS *con.* HELE.

12 Car. 2, f. 182 [1660-61].

Wills—Construction.

That John Philips being seised in Fee-simple of the Premises, did by Deed in December 1654, for £60, mortgage the same to Elizabeth Knowling with a Proviso, that if the said John Philips, his Heirs or Assigns, should pay to her, her Executors or Assigns in three Years after the said Deed, the said £60 with Interest, then the Deed to be void; And in Dec. 1655 the said John Philips in Respect of the Disobedience of his Daughter Joan the Defendant, and for the Continuance of his Lands in his own Name and Blood, did by Will devise the said Premises to the Plaintiff in these Words (*viz.*), All the Rest of my Goods, Chattels, and Lands I give and bequeath to Ralph Philips the younger, to discharge all Things [191] charged in my Will, whom I make my whole and sole Executor; which Will was published in the Presence of the Defendant Joan; so the Plaintiff as Devisee of the said John Philips of the said Lands, exhibited this Bill for the Redemption of the Premises.

But the Defendant Will. Hele in Right of the said Joan his Wife, claiming the Inheritance of the Premises and the Equity of Redemption as heir of the said John Philips, and a Verdict at Law being found for the Plaintiff on a *Devisavit vel non devisavit*.

The Defendant insists, That the Right of the Premises and of the Redemption was in the Heir at Law notwithstanding the Devise was only in Case of Defect of a Personal Estate to satisfy all the Testator's Debts and Legacies, because the Devise doth not import a Fee-simple Estate, but only for Life of the Devisee.

This Court ordered a Case to be made and to be referred to Baron Turner, who certified and declared his Opinion, That according to the Devise, the Lands ought to continue with the Plaintiff and his Heirs both in Law and Equity, and that without any kind of Trust whatsoever, and that the Plaintiff hath Right to redeem the Mortgage, and not the Heir, which this Court decreed accordingly.

[192] BINGHAM *con.* HUSSEY.

12 Car. 2, f. 170 [1660-61].

Two Deeds of Settlement, the latter contrary to the former, the first decreed to stand against a Fine levied to the Use of the last.

Thomas Hussey settles by Deed 22 Car. 1 [1646-47] on Delaline Hussey his Son, in Consideration of £600 Portion with the Wife of Delaline, and covenanted to levy a Fine; and afterwards in 1655, the Defendant procured him to make another Settlement contrary to the former, and left out the Limitation to the Heirs Males, and levied a Fine thereof.

This Court upon the Proofs of the first Agreement decreed the latter Deed and Fine to be void and set aside, and the Premises to be enjoyed according to the first Deed, as if a Fine had been levied.

DOM. HOWARD *con.* CO. SUFFOLK.

12 Car. 2, f. 372 [1660-61].

That the Earl of Suffolk being by Decree to pay the Lady Howard the Arrears of an Annuity, and having some furniture and other Moveables at Bruges in Flanders, commenced Suits in those Parts, and arrested and seised the same there, which is expressly against the Laws, Rights, Usages and Customs of England; which Suits and Process by means of a Letter from the King of England were transmitted thence hither to [193] be determined here, and the Proceedings in Flanders appeared to be grounded only on the Decree here.

That Court taking the Matter into Consideration, declared and pronounced, that by the Laws, Rights and Course of Justice in England, the said Decree made against the Earl of Suffolk, notwithstanding any Contempt thereof, doth not charge or bind his Goods or Moveables, but his Person only; nor could they be attached or seised by the Decree, and discharged the Arrest and Seizure, and ordered this his Judgment to be put into Latin, and exemplified under the Great Seal of England.

CORNEL *con.* SYKES.

12 Car. 2, f. 465 [1660-61].

Redemption of a Mortgage decreed to the Heir after Forfeiture and Sale for a long Time past, by Reason of Impediment during the Coverture of his Mother.

That Alice Cornel the Plaintiff's Mother, whose Heir the Plaintiff is, being seised to her and her Heirs, according to the Custom of the Manor, of Copyhold Lands, she and her Husband and Paul Cornel in the Year 1635 mortgaged the Premises by Surrender to Dr. Mountford for £30, and for Non-payment thereof the Premises were forfeited, and the said Dr. Mountford took Possession and disposed of the Premises to Joan his Wife for Life, the Reversion to the Defendant Mary and her Heirs, and the said [194] Alice Cornel lately died, her Husband being living, and leaving the Plaintiff her Son and Heir, she not being able to redeem during her Coverture, and since the Premises are conveyed to one Holland, so the Bill is for the Plaintiff to redeem.

The Defendant insisted, that the Plaintiff ought not to redeem, being so long since, and that the said Defendant Mary had conveyed away the Premises to the Defendant Holland.

This Court being satisfied, that in Regard of the Impediment in the Plaintiff's Mother to redeem, during her Coverture, the Plaintiff ought to redeem, and decreed accordingly.

EMERSON *con.* DALLISON.

12 Car. 2, f. 30 [1660].

Costs taxed for a scandalous Bill to be paid by the Plaintiff, and £5 by the Counsellor whose Hand was to it.

The Plaintiff having inserted into his Bill Scandal against the Defendant Mr. Raworth, which was referred to a Master to tax Costs for such Scandal, and the said Master taxed £100 Costs for the Defendant Mr. Raworth in Respect thereof.

His Lordship with the Judges declared, that the said Scandal was very great, yet nevertheless ordered that the said Costs be reduced to £50, to be paid by the said Plaintiff unto the said Raworth, and also £5 more to be paid by Mr. Welcome [195] whose Hand was set to the Bill, and the Plaintiff insisted, that the Costs were pardoned by the Act of Indemnity; but his Lordship with the Judges were of Opinion, they were not.

[S. C. Dick. 7.]

COLWALL *con.* CHILD.

12 Car. 2, f. 590 [1660–61].

Bill of Review—Award, &c.

This Case is on a Bill of Review. The Bill sets forth, that the former Causes being heard in 1653, the Court proposed a Reference of the Matter to Arbitration, and the Defendant Dr. Child, and the Solicitor for the Testator, William Child, submitted thereunto: whereupon the Court ordered the Differences should be referred to Serjeant Mainard, in Case the Testator then living at Worcester should, in Writing under his Hand and Seal, signify his Consent to be bound by the said Serjeant Mainard's Award, without Appeal, which the Testator did do, if the Award were made within a Fortnight after the End of that Hillary Term, which Reference became fruitless. And in Trin. 1654, the Court again renewed the said Arbitration, provided the Award was made within three Weeks after the End of that Term, which was consented unto by the said Dr. Child, and the Solicitor for the said Testator then present in Court, and ordered accordingly, [196] and an Award made in Pursuance of both the said Orders, and confirmed by a Decree signed and inrolled, which Decree the Plaintiff insists is erroneous, for that the Consent of the Solicitor is not binding in such Case, having no Power from the Party to consent thereunto.

The Defendant Dr. Child insists, that the said Testator's Solicitor attended the Serjeant with Counsel, and took a Copy of the Award as soon as the same was published; and in all the Time before the said Award decreed, the said Solicitor or Counsel never mentioned any Dissent of the said Testator at all.

The Plaintiff insisted, that the said second Reference was intended to report and certify, and finally to end, and that the said Testator's Solicitor was forced into the said Reference, being then accused to be an Incendiary between the Father and Son.

This Court upon these and other Errors reversed the said Decree.

DAVENPORT *con.* LONGUEVILLE.

12 Car. 2, f. 389 [1660–61].

This Cause is on a Case stated (*viz.*), That in 1639 the Defendants Sir Edward Longueville and John Pollard became bound with Sir Peter Temple, and [197] for his Debt to the Plaintiff in a Bond of £500 for the Payment of £250, which Bond the Plaintiff sued, and in 1646, got Judgment against the Defendant Pollard; and in Trin. 1658, got another Judgment against Sir Peter Temple on the same Bond, and in the same Term got a Judgment against the Defendant Sir Edward Longueville, and the Plaintiff extended their Lands; and in 1647, Pollard paid the Plaintiff £100, and in 1652, Sir Edward Longueville being under an Arrest, secured to the Plaintiff £500, and it was then agreed, and the Plaintiff covenanted by Articles between him and the said Sir Edward Longueville, that the said Sir Edward paying the said £500 and the other Damages and Costs sustained by Reason of the said Judgments against Sir Peter Temple and Pollard, and the Execution done thereupon being satisfied that he would assign to the said Sir Edward the said Judgments and Extents thereon: That in November 1652, a Treaty was between the Plaintiff and Sir Peter Temple and Pollard, when the Plaintiff owned he had received the £100 from Pollard, and that the £500 was secured by the said Sir Edward Longueville as aforesaid, and that there was £60 more secured to the Plaintiff in Discharge of the said Judgments; whereupon a Writing relating to Discharge [198] of all the said Judgments was sealed and delivered by the Plaintiff, and afterwards the Plaintiff assigned the said Judgments to the Defendant Thomas Longueville in Trust for the said Sir Edward, and covenants that he neither had or would hinder, stay, impeach, release, discharge, determine, bar or avoid them, or either of them, and enters into a Bond of £500 for the Performance

of the said Covenants; and Longueville brings an Ejectment in the Plaintiff's Name on the Extent had against Pollard's Lands; whereupon Pollard brought an *Audita Querela* against the Plaintiff and declared upon the aforesaid Writing sealed by the Plaintiff, and the Plaintiff pleaded *non est factum*; whereupon a Verdict passed for Pollard, and afterwards put the said £500 Bond in Suit against the Plaintiff: to be relieved against which, and to set aside the said Release of the said Judgments, is the Bill.

This Court thought not fit to relieve the Plaintiff, but dismiss'd the Bill.

The Plaintiff afterwards exhibits his Bill of Review to reverse the said Dismission.

And the Plaintiff insisted for Error, that the Bill is to be relieved against the £500 Bond, which is for the Performance of Covenants, and the Damnification thereupon [199] is considerable, yet the whole Penalty thereof will be recovered against the Plaintiff; whereas by the Course of this Court, the Defendant ought to have no more than he is really damnified, and shall recover upon an Action of Covenant at Law, besides what the said Defendant shall make appear to be damnified, he hath an Equity to be reimbursed for the same out of the Estates of Sir Peter Temple and Pollard, as if such Note by the said Davenport had never been made.

The Defendant insisted, that the Defendant Sir Edward Longueville doth swear, that he is damnified above the Penalty of the said Bond £400 at least, and the Defendant being so damnified, this Court doth not in such Cases direct any Trial, but dismiss'd the Plaintiff's Bill.

This Court conceived the said Decree of Dismission to be just and no Error therein, and decreed the said Dismission do stand confirm'd, and dismiss'd the Bill of Review.

PILE *con.* DOMINAM PILE.

13 Car. 2, f. 61 [1661-62].

£3000 given by a Marriage Settlement, and £3000 given to the same Party by Will, by Circumstances adjudged to be £6000.

The testator giveth £3000 a-piece to Daughters by Marriage-Settlement, and afterwards cuts off the Entail of his Estate, and by his Will gives the [200] same Daughters £3000 a-piece; the Plaintiff, the Heir, insists, that the Marriage-Settlement and Will make but one Settlement, and the £3000 in both is but one £3000.

This Court with the Assistance of the Judges (it appearing by Proof that the Testator declared after the Marriage-Settlement, that he would add to his Daughters Portions) were of Opinion, and declared he cut off the Entail on Purpose to add to the Portions; and that the said £3000 in the Marriage-Settlement, and the said £3000 in the Will made £6000 a-piece, and they could not expound the Deeds and Will otherwise, and so dismiss'd the Plaintiff's Bill.

MOMPESON *con.* DREW.

13 Car. 2, f. 346 [1661-62].

Limitation of a Lease in Tail, the Remainder over void, and the Remainder-man not relieved here.

That Sir Thomas Drew being to renew a Lease with the Dean and Chapter of Exon by his Deed 9 Car. 1 [1633-34], whereunto the former Lessees and Trustees were Parties, covenanted and declared, that the said Trustees and such Persons in whose Name such Estate was or should be received, should stand seised or possessed thereof for the said Sir Thomas and his Lady, during their Lives, and after their Decease to William his Son, and Eliz. his Wife for their Lives, and after to the [201] Heirs Males of the Body of the said William, and for Default thereof, to such Person or Persons as the said Sir Thomas should by Will or any other Writing nominate or appoint: that William died without issue.

This Court declared, that the said Remainder for Default of Heirs Males of William, to such Persons as Sir Thomas should appoint in the said Deed of 9 Car. 1, was a void Remainder in Law, and that there can be no Entail of a Chattel, and the Limitation to the said William, and the Heirs Males of his Body doth vest the intire Trust of the remaining Term, and the Disposition thereof in Equity in and upon him, so that the Premises do in Right belong to his Executrix.

WAKE *con.* CALLEY.

13 Car. 2, f. 395 [1661-62].

Bond of Covenants sued against the Heir.

A Bond of £1600 Penalty entered into 19 Jac. [1621-22] to perform Covenants in an Indenture, the Covenantors to pay £77 per Annum, till £1100 be paid, but the Covenants not being performed, the Plaintiff sues the Bond against the Heir of the Obligor.

This Court declared, that the £1100 and Interest thereupon ought to be paid, and by the Consent of the Parties ordered and decreed, that the £1600 the [202] Penalty of the said Bond be paid by the said Defendant to the Plaintiff in full of all the Principal and Interest, and £40 Costs.

TIBBOTS *con.* HURST.

13 Car. 2, f. 429, 629 [1661-62].

Lands surrendered to the Use of a Will.

That Barnabas Hurst Husband of the Defendant Katherine Sen. died indebted to the Plaintiff in £30 and to others, and intending to pay all his Debts in Nov. 1659, surrendered his Message called the Woolsac, to the Use of his Will, and the same Day made his Will, whereby he devised the said Message to the said Katherine his Wife, and gave to the Defendant Katherine Jun. his Daughter, £30 to be paid within a Year after the other Defendant Katherine her Mother's Marriage, and £20 more at her Mother's Death, and made the said Katherine his Wife his Executrix, and she to pay all Debts which he owed, and died, leaving Katherine Jun. his sole Daughter and Heir, and the Defendant Katherine, the Executrix, intending to preserve the said Message to herself for Life, and afterwards to Katherine Jun. she pretends that she is not liable to pay her Testator's Debts farther than she hath Assets of his Personal Estate, and [203] combining with the other Defendant Katherine Jun. who claims the said Copyhold Premises by Descent, as Heir to her Father at least after her Mother's Death; the Executrix doth refuse to sell the Premises, to pay the Testator's Debts, insisting, that she is not impowered by the Will in express Words; and that both before and after the said Will and Surrender, the Testator declared his Intent was, That his Wife by Sale of the Premises should raise Money for the Payment of his Debts.

The Defendant Katherine Jun. says, That she claims the Premises as Heir to her Father from his Death, and hopes to enjoy the same accordingly, if her Father did not legally dispose thereof.

This Court referred the Case to the Judges, to certify what Estate the said Relict or Infant hath in the said Copyhold Message and Lands (as the Will is), and whether the said Relict may sell the same.

The Judges are of Opinion, That the Defendant Katherine the Elder, by the said Will, hath an Estate of Fee-simple in the Message and Tenement, and may dispose thereof accordingly.

This Court thereupon decreed the Defendant Katherine, the Elder, shall sell for the best Price the said Message for the [204] Payment of the Plaintiff's Debts, and also other the just Debts of the Testator, and the Purchaser to enjoy against her, and the Defendant Katherine Jun. the Infant and her Heirs; the Infant when come of Age shall join in, or confirm the Sale.

WOOD *con.* CALEY.

13 Car. 2, f. 430 [1661-62].

Will.

That William Bourne by his Will gave Anne Wood the Plaintiff's Daughter, and his Grandchild, all his Debts, Credits and Cattle, to be employed for the Infant's best Benefit, and the Executor to sell the same, and with the Money to purchase Lands therewith for the Use of the said Anne and her Heirs, and if she died before sixteen, or without Issue, then her Heir should within one Year after her Decease pay unto the Defendant Caley, and to Dorothy Biwood £10 a-piece, and made Thomas Caley

the Defendant's Father Executor, that the said Anne died without Issue before any Lands were purchased by the Executor, though he had sold, and the Money lying by him, and after that refused to purchase, and the Administration of Anne being granted to the Plaintiff, he was thereby intitled to the Goods of the Testator Bourne, which were given to the [205] said Anne; but the said Executor of Bourne insisted, that they belonged to him as Executor of Bourne, the Infant being dead, and the Money not bestowed in Land.

This Court decreed the Defendant the Executor of Bourne to come to an Account with the Plaintiff for the Testator's Personal Estate, and to pay it to the Plaintiff with Interest.

CRADDOCK *con.* MARSH.

13 Car. 2, f. 346 [1661-62].

Statute of Limitations pleaded.

The Plaintiff moved this Court, that the Statute of Limitations may not be made Use of at Law, in Bar to any Action that shall be brought touching the Matter in Question, in Case the Time limited by the said Statute elapsed since the Plaintiff's Bill was exhibited into this Court, this being the Point in Controversy.

The Defendant insisted, that upon hearing this Cause, upon Precedents produced by the Plaintiff, touching this Point, before Mr. Justice Hide, 28 July 1660, who not being satisfied therewith, declared he saw no cause to give the Plaintiff Relief; and that if any Person shall bring a Bill into this Court, and upon hearing of the Cause the same shall be dismiss'd, it is as much as if he had not [206] brought any Bill at all, and so by Course of the Court, ought not to be reliev'd in this Court. As to this Point,

This Court with the Judges declared and ordered, That since upon the Hearing of this Cause the Court then saw no Cause to relieve the Plaintiff, that the Plaintiff's Bill be dismiss'd out of this Court, and that the said Defendant shall not be debarred from Pleading any Plea to any Action at Law hereafter to be brought by the Plaintiff against the Defendant for the Matters in Question.

CLAPHAM *con.* BOWYER.

13 Car. 2, f. 337 [1661-62].

Mortgage.

A Mortgage not being relieved after twenty Years forfeiture, and the Estate descending to an Heir, and he sells the same, all this pleaded and held good.

SHELLEY *con.* DOM. EARSFIELD.

13 Car. 2, f. 571 [1661-62].

Settlement.

This is on a Case stated, and the Judges Resolutions thereon; the Case is (viz.),

That Sir Thomas Earsfield on the 19th Aug. 1633, being seised in Fee of divers Manors in Kent and Sussex for 5s. paid, sells all his Manors and Lands to Sir Robert [207] Napper, Sir Thomas Middleton, Sir Richard Napper, and Thomas Middleton, Esq.; for six Months.

Sir Thomas Earsfield on the 20 Aug. 1653, releaseth to them and their Heirs to the Uses following.

1. To the Use of Sir Thomas for Life without Impeachment of Waste.
2. To the Heirs of Sir Thomas lawfully begotten, and for Want of such Issue, &c.
3. The Remainder of all (except one Messuage or Tenement in the Occupation of John Hill) to the said Lady Christian Earsfield for Life: as for Hill's Tenement, to the Use of Ashton Earsfield, Brother of the said Sir Thomas, for ninety nine Years, if he lives so long.
4. The Remainder of all the Premises limited to Dame Christian for Life, then to the Use of Ashton Earsfield for ninety nine Years, if he so long live, and after the Determination of the several Estates limited to Ashton Earsfield.
5. To Robert Napper, Sir Thomas Middleton, Sir Richard Napper, and Thomas Middleton, and their Heirs, during the Life of Ashton Earsfield.

6. Remainder to the first Son of Ashton, and the Heirs Males of his Body, and so to every other Son of the said Ashton.

[208] 7. Remainder to the Use of John Earsfield, Son of Sir Thomas Earsfield, late of Hollington, deceased, and the Heirs-Males of his Body, with Remainders over.

Provided nevertheless, that after the Death of the said Sir Thomas and Dame Christian all the said recited Manors and Lands shall stand charged with the Payment of £100 per Annum to Bridget Shelly, &c., during the Life of the said Bridget, and also with the Payment of £50 per Annum to Grace White for her Life; provided that if either of them be not paid in twenty Days, then the said Bridget and Grace to distrain till Payment, and to this farther Use, that if the said Ashton Earsfield should die without Issue Male of his Body, then the said Lands shall stand charged with the Payment of £4000 to the said Bridget Shelley, and her Children, viz. £2000 to the said Bridget to be disposed of as the said Bridget should appoint, and £2000 Residue to such eldest Son of the said Bridget, as shall be living at the Death of the said Ashton Earsfield, without Issue Male of his Body.

The like Proviso of £1000 to the said Grace White and her Children, but if she die without Children, that then the said £1000 to be paid to the eldest Son [209] of the said Bridget which shall be living at Grace's Death, and therefore the said Grace to give Security to repay the said £1000 to the said Bridget's Children, in Case Grace die without Issue.

The said several sums of £4000 and £1000 to be paid within three Years after the Death of the said Ashton, and in the mean Time Bridget and Grace, and their Children to have the ordinary Interest of the said several Sums paid to them out of the said Lands, with a Power of Revocation in the said Deed, to the said Sir Thomas, to alter any of the Uses, or wholly to make void the Deed.

Sir Thomas died in 1653. Ashton Earsfield died 18 June 1654, without Issue Male. Dame Christian died 4 Mar. 1659.

That Sir Thomas had three Sisters, viz. Timothea Brown, Bridget Shelley and Grace White.

William Shelley, the eldest Son of the said Bridget, survived Ashton Earsfield, and made Bridget his Mother his Executrix, and died before Dame Christian.

That Timothy Shelley was the eldest Son of Bridget at the Death of Dame Christian.

That the Defendant John Earsfield within a fortnight after the Death of Dame Christian entred into all the Lands.

[210] The Estate is now let at £662 per Annum, but was formerly reputed worth £800 per Annum; but Abbot's Marsh being near the Sea, is subject to great Charges.

That one third Part of the said Lands is claimed by Ambrose Brown, Son of the said Timothea, who was one of the Sisters and Co-heirs of the said Sir Tho. Earsfield.

The Lands of £662 per Annum are claimed by Elizabeth and Mary Goring, Daughter of Sir Thomas Earsfield, Father of the said Sir Thomas by his first Wife, as Co-heirs of Herbert Earsfield, eldest Son of Sir Thomas the Father.

The Rent of Hill's Farm let at £58 per Annum for ten Years yet to come, is only reserved to Sir Thomas, his Executors, &c., during the Term, and the Word (Heirs) omitted, and the Title thereof questioned by Brown and White, as if the said Farm were not well conveyed to the Defendant John Earsfield.

That the Mansion House called Denn Place, and the Farm Houses were much out of Repair at the Death of the Lady Earsfield, and the Repairs thereof will cost £500.

[211] THE POINTS IN QUESTION ARE,

1. Whether the £5000 be charged on the Estate either in Law or Equity?
2. If it be, then when the Payment of the Interest of the said £5000 must begin, whether from the Death of Ashton Earsfield, or the Lady Earsfield, and how the £5000 must be paid.
3. Whether the Annuities of the said £100 per Annum, and £50 per Annum, appointed to Bridget Shelley and Grace White, shall continue after the payment of the Interest-Money begins for the said £5000?
4. Who shall be at the Charge of the Repairs of the said Mansion and Farm Houses, all being very ruinous at the Death of the said Lady?
5. Who shall be at the charges of the Suits concerning Hill's Farm, which is withheld from the Defendant Earsfield, and concerning Worth let at £166 per Annum claimed by Mr. Goring, and the Rents thereof detained from the said Defendant?

6. How the Interest of the said £5000 shall be paid whilst the Rents of Hill's Farm and Worth are claimed as aforesaid, the same being near one Half of the Lands limited to the Defendant Earsfield?

[212] 7. To whom the £2000 claimed by the Suit as Executrix to William Shelley ought to be paid, whether to the Executrix of the said William Shelley, who was the eldest Son of the said Bridget at the Death of Ashton, or to Timothy Shelley, who was the eldest Son at the Death of the said Lady Earsfield?

The Defendant Earsfield is but sixteen Years old.

The Court, taking these Questions to be of great Weight, ordered the Case to be delivered to the Judges for their Opinions therein, both for Law and Equity.

The Judges, having considered the Case and Points, have certified, viz. We have taken this Case, and the several Questions thereupon, into Consideration, and are of Opinion,

1. That the £5000 is well charged upon the Estate in Equity.

2. That the £5000 ought not to be paid till the Death of the Lady Earsfield, and therefore no Interest is to be paid for it but from her Death, from which Time it becometh due.

3. That the Annuities of £100 and £50 per Annum have no Dependance or Relation to the Payment of the £5000, and therefore ought still to continue to [213] be paid during the respective Lives of the said Bridget and Grace, without any Abatement of the £5000 or of the Interest for the same.

4. That there ought not to be any Allowance or Abatement out of the £5000 or Annuities, or Interest towards the Repairs of the Houses, but the same are to be done at the Charges of the present Owner.

5. That the Defendant Earsfield, who is solely concerned in the Suits, is to bear the Charges of such as he shall commence, or as shall be brought concerning the said Lands.

6. That the whole Interest of the £5000 ought to be paid from the Time that it was due, notwithstanding any Claim made to Part of the Lands upon which it stands charged.

7. That the £2000 appointed to be paid to the eldest Son of Bridget, that should be living at the Death of Ashton without Issue Male, ought to be paid to Bridget as Executrix to William Shelley her eldest Son then Living.

8. That the Limitation in the Deed to the Use of the Heirs of Sir Thomas Earsfield lawfully begotten, and to be begotten; and for Want of such Issue, &c., is a good Limitation to create an [214] Estate-Tail in Sir Thomas Earsfield, and the Heirs of his Body.

FOSTER,
BRIDGMAN and
HALES.

This Court confirmed the Judge's Certificate.

HURDRET *con.* CALLADON.

13 Car. 2, f. 446 [1661-62].

Bill that no Advantage should be taken of the Statute of Limitations dismiss'd.

The Bill is to have an Account from the Defendant of Money and Goods, for which the Defendant insists the Plaintiff hath Remedy at Law.

The Plaintiff insists, that by Reason of the Efflux of Time, the Defendant would plead the Statute of Limitations, which, at the Time of the Bill exhibited into this Court, the Defendant could not do, the Plaintiff being then within the Time of the said Statute, and the Plaintiff cannot go to Law without the Direction of this Court, that the Statute shall not be given in Evidence.

This Court ordered Precedents to be searched for, where the Court hath ordered that no Advantage should be taken of the Statute of Limitations of Personal Actions, in Cases where the Suit had been begun here, and the Time had been effluxed pending the Suit.

[215] This Court upon Precedents, and rehearing the Cause, dismiss'd the Plaintiff's Bill.

NORTON *con.* BONEST.

13 Car. 2, f. 478 [1661-62].

Voluntary Intention shall not discharge a Trust, and a Devise thereof not to be controll'd by it.

The Bill is to be reliev'd for £700 and the Proceed thereof, lent by Thomas Bonest the Testator to Robert Hanscombe, upon a Mortgage of Lands by a Lease of ninety-nine Years, which the said Testator took the Security in the Defendant Thomas Bonest's Name, and afterwards by his Will devised several Legacies, and devised all the rest of his Personal Estate to the Plaintiff whom he made Executor, and that the said Mortgage was taken in the Defendant's Name in Trust for the Testator, and the Plaintiff insists, that the said Bonest ought to assign the Trust to the Plaintiff.

But the Defendant insists, that the Testator intended, that in Case the said Money on the Mortgage were not paid in, in his Life-time, that the said Defendant Bonest should have it, and that the Testator took no Declaration, or other Writing of the Trust from the Defendant, or desired any.

The Master of the Rolls would not relieve the plaintiff, but dismiss'd the Bill. But the Lord Chancellor assisted with [216] the Lord Chief Justice of England declared, That notwithstanding the Intention of the Testator, yet there being no more declared than an Intention, which is voluntary and ambulatory, and never put into Action, and the Estate in Law, which the Defendant claims, being settled upon a Trust, the same Trust is not discharged by any Words of an Intention, but that the Estate remains upon the first Foundation, which was the Trust, which is devisable by the Will, which being made above three Years after the Declaration of any Intention, under which the Defendant claims, and the Testator having by the said Will given the Defendant another Estate, and devised all his Estate, not before given, unto the Plaintiff, and the Defendant not proving that the Testator renewed his Intention after the Will made, therefore this Court is of Opinion, that the Trust is devised to the Plaintiff by the Will, and that there is just Cause to relieve the Plaintiff, and decreed the Defendant to assign the said Trust to the Plaintiff.

[217] MEYNEL & STERLING *con.* COOPER.

13 Car. 2, f. 677, 694 [1661-62].

A Prisoner discharged by Privilege of this Court, and no Escape to be brought against the Sheriffs for setting the Prisoner at Liberty.

That Richard Conquest being arrested and imprisoned at the Suit of one Cooper upon mean Process, and after made an Escape, who upon a fresh Pursuit, being retaken, is in Custody again; but the said Conquest making it appear to this Court, that he had a Cause depending here, and he attending the same was arrested and detained contrary to the ancient Privilege of this Court, whereupon this Court ordered the Bailiff Cohome, who last took him, to be committed to the Fleet for refusing to discharge him; this Court ordered the said Meynel and Sterling, Sheriffs of Middlesex, to discharge the said Conquest out of Custody, the Sheriffs acquainting the Court, the Case is as aforesaid, and that the said Cooper threatens to bring an Action of Escape against the Sheriffs.

This Court again ordered the said Cohome to be committed close Prisoner, and that the Sheriffs should forthwith discharge the said Conquest out of Custody, and that a Writ of Privilege be awarded in that Behalf; whereupon the Sheriffs discharged the said Conquest out [218] of Custody; yet the said Cooper brought his Action against the Sheriffs for the Escape, and will inforce the Sheriffs to pay the Debt, and so consequently invalidate and overthrow the ancient and undoubted Privilege of this Court.

The Court ordered the said Action against the Sheriffs, touching the Arrest, for setting at Liberty the said Conquest, to be discharged, unless the said Cooper shew Cause.

The said Cooper offer'd several Reasons for Cause, but this Court disallowed the same, and confirmed the first Order, and that the said Action be discharged, and all Proceedings at Law, against the Sheriffs be stayed.

But the said Cooper insisted, that his Debt is great, and if the said Conquest be under Protection of this Court, Cooper is like to lose it.

This Court declared Cooper may, notwithstanding the former Orders, proceed against Conquest, in Order to the Satisfaction of his Debt, as he should see Cause.

ROWEL *con.* WALLEY.

13 Car. 2, f. 909 [1661-62].

Mortgage.

The Bill is, That the Plaintiff Hannah being the Widow of Anthony Sharp, Predecessor to her Husband Simon [219] Geering, who left her a considerable Estate, and on their Marriage settled a Messuage and Lands in Kent, called Great Walton, on her for a Jointure, and afterwards the said Simon prevailed with the said Plaintiff Hannah to sell a Lease, whereof she was possessed as Administratrix to the said Anthony Sharp her former Husband, of the Value of £40 per Annum, and also prevailed with her to join in a Mortgage of the aforesaid jointured Land for £300 to Henry Walley Father of the said Defendant; and in Anno 1650, the said Simon and the Plaintiff Hannah for £300 did by Deed bargain and sell to the said Henry Walley the said Jointure Lands to him, his Heirs and Assigns for ever, in which Deed the said Simon covenanted, that he and the Plaintiff Hannah would make better Assurance by Fine; and in the said Deed was a Proviso, That if the said Simon Geering and the Plaintiff Hannah, or either of them, or their Heirs, Executors, &c., did pay to the said Henry Walley, his Executors, &c., £348 at the Time therein mentioned, then the said Fine to enure to the said Simon Geering, and the Plaintiff Hannah, and the longest Liver of them, and after to the right Heirs of the said Simon for ever, and in Michaelmas Term 1650, a Fine was [220] levied, and the Monies not being paid according to the Proviso, and Simon wanting more Money, the said Simon and Hannah by Deed of Confirmation in April 1653, for £146 more, besides the £348, confirmed the said mortgaged Premises to the said Henry Walley and his Heirs on Redemption, but before the Redemption the said Simon Geering died, and the said Hannah ordered the Tenant of the Premises to attorn to Walley till Satisfaction of his Demands, and afterwards the Plaintiff Rowel inter-married with the said Hannah, and afterwards the said Henry Walley by Will devised the said Premises to the Defendant James Walley, and his Heirs: So to redeem the said Premises, and to secure the said Hannah's Jointure, is the Scope of the Bill.

The Defendant James Walley insists, he is willing to assign and convey the Premises as this Court shall direct, without whose Direction he cannot safely do any Act, the other Defendant Tho. Geering, the Son and Heir of the said Simon Geering the Mortgagor, being an Infant.

This Court thereupon, and hearing the Answer of the Defendant Thomas Geering, by his Guardian, whereby the Settlement upon the Plaintiff Hannah is owned to be as aforesaid, was satisfied, [221] that the Estate of the Defendant Walley in the Premises is but a Mortgage, and that the Plaintiff Hannah ought in Equity to enjoy the Premises during her Life, notwithstanding the Fine by her passed as aforesaid; but this Court being tender of the Prejudice of the Infant by a Redemption of the Premises before he came of Age, a Question arose in what Manner a Redemption should be made, and by whom, whether by the said Hannah or the said Infant, and by whom the said Mortgage-Money should be paid.

This Court conceived it most just, that the said Plaintiff Hannah and the said Infant should proportionably pay what was due upon the said Mortgage at the Time of the Death of the said Simon Geering, the Mortgagor, rating the said Estate for Life of her the said Hannah in the Premises at one Third, and the Reversion in Fee of the said Infant at two Thirds from the Time of the said Simon's Death.

BOWEN *con.* EDWARDS.

13 Car. 2, f. 180 [1661-62].

Re-hearing upon the Penalty of treble Costs.

The Plaintiff's Suit is to have a Redemption of Lands, and the Defendant insisting on the Antiquity of the said Mortgage, and that by Reason of [222] long Leases in

Being at the Time of the Mortgage, the Defendant could not receive any Benefit of the Premises till the Leases expired.

The Lord Chancellor at this Hearing, being 17 November 1660, dismiss'd the Bill.

But the Plaintiff praying a Re-hearing on the Merits of this Cause, and offering Precedents where Relief hath been frequently given upon Mortgages more ancient, this Court granted a Re-hearing upon the Penalty of treble Costs, if the Plaintiff is not relieved.

The Case being (viz.), That the Plaintiff being seised in Fee of the Premises, worth £200 per Annum in 1637, mortgaged the same to the Defendant's Father for £250, and the Plaintiff agreed, and accordingly sealed a Deed for the absolute Purchase of the Premises to the Defendant's Father, if the £250 were not paid at the End of seven Years.

The Defendant insists, that the Plaintiff being possessed of the Premises in Reversion, after the Expiration of certain Leases for Years from the Crown, did by Deed with Fine and Recovery thereupon, and dated 24 January 1637, sell the said Premises to the Defendant's Father in Fee, who never in his Life-time received any Profits, the Leases expiring after his Death [223] which came to the Defendant, and he hopes accordingly to enjoy it, being an absolute Estate without any Defeazance.

The Master of the Rolls being assisted with Mr. Justice Hyde, on reading the first Order, and a Bill which was exhibited by the Defendant's Father against the Plaintiff to have the Lands or Money, which makes it appear a Mortgage, and of several Precedents where Relief hath been given in Cases of like Nature, decreed a Redemption paying Principal and Damages.

[See *James v. Kerr*, 1889, 40 Ch. D. 459.]

WHORWOOD *con.* WHORWOOD.

14 Car. 2, f. 1016 [1662-63].

Alimony, &c.

A Bill of Review to reverse a Decree for Alimony.

The Plaintiff insisted for Error, that there is no Foundation whereon to justify the said Decree or Proceedings thereon, for that there is no Confirmation thereof by the Act of Judicial Proceedings, and that there are several Votes in the Commons House of Parliament for that Purpose.

This Court referred it to the Judges on these two Points (viz.), Whether the Decrees for Alimony made in the late Times are confirmed by the said Act, and [224] whether in this Case Bills of Review do lie for the Reversal of the same.

Ten Judges certified in Mich. Term 1662, that Decrees for Alimony made in the Court of Chancery in the late Times, are confirmed by the Act for Confirmation of judicial Proceedings.

And that a Bill of Review doth not lie for Want of Authority in that Court to make Decrees in Cases of Alimony; but it lies for other Defects not remedied or provided for by that Act, and all the Judges of England agreed to the same Opinion though not subscribed.

MEAD *con.* CAVE.

14 Car. 2, f. 915 [1662-63].

Who shall be said to be younger Children to take Benefit of a Devise.

That Charnel Petty, Grandfather of the Plaintiff and Defendants Charnel Mead, by his Will devised Lands to Trustees, that they should out of the Profits thereof pay unto the younger Children of his Daughter Mead, the Plaintiff's Mother, £400 equally to be divided, and the said Plaintiff's Mother had six Children, so that five of them are within the Intent of the Will to have £80 a-piece, but the Defendant Charnel Mead insisting, that the £80 a-piece doth not belong to the Plaintiffs, for that they are elder in Seniority of Years than he [225] the Defendant Charnel Mead, the sixth Child, being a younger Child than any of them, and that he ought to have the said Money; whereas younger Children in this Case are to be taken as distinguished from the Heir at Law, and not from the elder Children in Age, and that it was the Intent of the Testator it should be so, appeareth by this, that the Defendant Charnel Mead was his Father's eldest Son, and was to inherit a fair Estate by Descent from him after his Death.

This Court was clear of Opinion, that the Plaintiffs were within the said Trust, and that the Defendant Charnel Mead ought to be excluded by the Intentions of the Testator, and decreed the Plaintiffs £80 a-piece, and the Defendant Charnel Mead to be totally excluded.

CROPLEY *con.* MARQUISS OF NEWCASTLE.

14 Car. 2, f. 923 [1662-63].

Sale of Lands by Consent.

That Edward Cropley deceased, the Plaintiff's Father and Testator, in 1640, did lend to the Defendant £1200 on Bond: the Plaintiff, as Executor to his said Father, is intitled to the said Bond, and the Defendant being beyond Sea, and having authorized Edward Butler to manage his Affairs and to pay his Debts, and for that Purpose to sell his [226] Estate: and the Defendant importuned the Plaintiff to purchase the Capital Messuage in Clerkenwel, and the Manor of Flabrough now in Question, assuring the Plaintiff it would be a great kindness to the Defendant, the Marquiss, and enable him to pay his Debts, and provide for his Children, and told the Plaintiff that he should have a good Title, for that the Marquiss, before the troublesome Times, had settled the Premises on himself for Life, Remainder to his Brother Sir Charles Cavendish, the said Robert Butler, James Whitehead and John Rolston and their Heirs, upon Trust to sell: but the Plaintiff desired to have the Marquiss his Approbation of the said Sale: whereupon the said Butler told the Plaintiff that the Marquiss since his Departure wrote several Letters to him and Viscount Mansfield, the eldest Son of the said Marquiss, to expedite the Sale, and had by Letters also the Marquiss's Approbation and Allowance of the Plaintiff's Purchase of the Premises, and upon the said Butler's Offer, that the said Cropley, Viscount Mansfield, and Henry, now Viscount Mansfield, the Marquiss's second Son, should join with the Trustees in the Conveyance, was encouraged to proceed in the Purchase of Flabrough, and agreed to give £7400 for the same: and as to the Manner of [227] the Conveyance and Title, the Plaintiff relied on the said Butler, who was unwilling to produce the Deeds of Settlement on the Trustees, lest he should thereby discover the Posture and Condition of the Marquiss's Estate: that by Deed in 1654 inrolled, whereby the said Charles Viscount Mansfield since deceased, and Henry now Viscount Mansfield, then eldest and second Son of the said Marquiss, and all the Trustees were Parties, the said Manor was conveyed to the Plaintiff and his Heirs for ever: and the Plaintiff paid the said £7400, viz. £5600 in ready Money, and £1800 was allowed the Plaintiff for his Debt, and afterwards the said Butler pressed the Plaintiff to buy the House in Clerkenwel, and writ to the Marquiss touching the same: the Marquiss by the Name of John Forrest, which Name he then used, wrote an Answer to Butler and thanked him for what he had done, and ordered him to sell the said House: whereupon the Plaintiff by Deed 30 Jan. 1654 inrolled, for the Consideration of £1400 paid to the said Sons and Trustees had the same Messuage conveyed to Trustees for the Plaintiff and his Heirs: but the said Marquiss being returned again into England, says, he gave no Authority or Consent to the said Sales, and that the Trustees had only [228] the Power to sell the Reversion after his Death, and will not confirm the said Purchases, pretending he hath an Estate for Life in the Premises, which neither his Sons nor the Trustees had Power to sell, and claims the Premises for his Life.

The Defendant, the Marquiss, insists he did not intend his Trustees to sell any other Estate than they were intrusted with, and that the Reversion it self was Bargain great enough for the Money agreed for.

Now the Point in Controversy is, whether the Defendant, the Marquiss, did consent to or allow of the said respective Sales as to his own Estate for Life, reserved to him by the said Indenture tripartite, or whether the Plaintiff's said respective Purchases should only relate to the Reversion in Fee after the Marquiss's Death.

This Court with the Assistance of the Judges, on the Reading a Paper of Advice under the Hands of the Marquiss's learned Counsel in 1649, and Letters from the Marquiss, were all clear of Opinion, that the Defendant, the Marquiss, did consent to the absolute sale of the Inheritance of the Manor of Flabrough and the House in Clerkenwel, and that the Plaintiff is a fair Purchaser thereof for a full Consideration which came and was [229] applied to the Marquiss's Use and Benefit, and the said

Charles Viscount Mansfield having covenanted for enjoying Flabrough against the Marquiss, was a farther Evidence of the Intention of the Parties, and decreed, that the Plaintiff and his heirs shall enjoy the said Manor of Flabrough and the house in Clerkenwel against the Marquiss and all claiming under him, and the Marquiss to make Assurance of his Estate in the Premises to the Plaintiff and his Heirs, &c.

EYRE *con.* JACKSON.

14 Car. 2, f. 751, 875, 910 [1662-63].

Decree reversed. See 3 Chan. Rep. 15.

The Bill is a Bill of Review to reverse a Decree, whereby the now Plaintiffs were decreed to give the now Defendant Satisfaction for his Losses, the now Plaintiffs having plundered the said Defendant in late Times of his Goods, Household-stuff, and of Debt-books, Bonds, and Speeduties, so as he could not make Proofs to ground an Action at Law, and the now Plaintiffs were decreed to pay the now Defendant £400, besides the Goods and Money which the said now Defendant receiv'd back from the Plaintiffs, and the same to be in Satisfaction of the Defendant's Damages, Losses and Costs, and he to prosecute which of the now [230] Plaintiffs he pleases upon the said Decree, and the now Plaintiffs to prosecute each other to pay their Proportions.

The now Plaintiffs insist, that the Decree is erroneous and ought to be reversed, for that it is contrary to the Rules and Practice of this Court to deprive the Courts of Law of the Determination there determinable, or to assess Damages for a Trespass, which ought to be ascertained by a Jury at Law and not otherwise; and the Plaintiffs have paid the said £400 above eight Years before the Bill exhibited to their Prejudice; so the Plaintiffs insist that the Decree ought to be reversed, and they restored to all they have lost and been damnified by the said erroneous Decree.

The Defendant pleaded and demurred, and insisted that the now Plaintiffs were decreed to pay £400, and paid the same, and rested satisfied therewith eight Years; and also pleaded the Act of Oblivion in Bar of the Plaintiffs Demand, which was reserved till the Hearing, and on Hearing the said Decree it was reversed.

But as to the Point of Restitution his Lordship would advise, whether the Act of Oblivion ought to bar the now Plaintiffs from being restor'd to what they have lost by the said Decree.

[231] This Court with the Judges declared, that the now Plaintiffs, notwithstanding the Act of Oblivion, ought to be restored to all they have lost or been damnified by the said Decree, and reversed the Decree, and ordered the Defendant to re-pay the £400 with Damages and Costs.

But the Defendant insisted, that by the Rules of the Common Law, where a Judgment is reversed and Restitution awarded, the Courts of Law give neither Damages nor Costs, and that this Court doth usually guide it self by the Rules at Law.

This Court desired to see Precedents, where Damages and Costs had been given in Cases of this Nature, and finding no Precedents could be produced, this Court would not charge the Defendant with Damages or Costs.

DOMINA CRAMBORNE *con.* DALMAHOY, & DR. HAMILTON'S WIFE.

14 Car. 2, f. 519 [1662-63].

The Bill is to review and reverse a Decree made the 3d of May, 1655, in a Cause wherein Elizabeth Dutchess of Hamilton was Plaintiff against Elizabeth Countess of Dirlton, and the Countess of Cramborne (now Plaintiff), Defendants, to settle the Trust of Giltford Park and other Lands, and the Equity of [232] Redemption of Wauborough and other Lands, all in Com' Surrey, and directing the Reversion of all the Premises after the Death of the said Countess of Dirlton to be conveyed by the Defendants therein named to the said Dutchess, her Heirs and Assigns.

The now Plaintiff insists, that the Decree is erroneous, and ought to be reversed, for that at the Making thereof, there was no Bill or Cause in Court depending; for that the Dutchess of Hamilton, who was Plaintiff in the said Decree, sued as a sole Woman; and after her Bill in 1653, which was before the Decree, she married the now Defendant

Mr. Dalmahoy, whereby the Bill of the Dutchesse and all Proceedings abated and became void, and no Bill of Review was brought, and the said Dutchesse continued married till after the Decree; and for that the Decree was contrary to Law and Justice, it appearing, that the Deed made by the Earl of Dirlton, whereupon the Decree was grounded, was in the Nature of a Feoffment, but never executed by Livery, appeared to be voluntary to disinherit the now Plaintiff, and if it could not operate at Law it ought to have no Force or Countenance in Equity, being made but the Day before he died.

[233] To which Bill the Defendant pleaded and demurred, and insisted, That the Decree ought not to be reversed, or that the Error that the Dutchesse was married is only Matter of Abatement, and not to the Right, and appears not in the Body of the Decree, but is Matter of Fact out of the Decree; and that the Plaintiff hath assigned for Error and not for new Matter, and were it so, she might have had Advantage thereof before the Hearing, and ought not now to be admitted to it, and no Advantage could be taken thereof but by Abatement.

And the other Error assign'd is no Error, but the Cause adjudged upon the Deeds and Proofs of the Earl of Dirlton's Intentions.

This Court, with the Assistance of the Judges, held the Plea and Demurrer good, and dismiss'd the Plaintiff's Bill of Review.

NANNEY *con.* MARTIN.

14 Car. 2, f. 334, 535 [1662-63]; 15 Car. 2, f. 232 [1663-64].

A Decree in Equity like a Judgment for Debt or Damages at Common Law. Judgment had by Baron and Feme in Action brought by them both for Debt due to the Wife before Coverture, Baron dies, the Wife shall have Execution, and not the Executor of the Husband.

The case, That Hugh Nanney deceased and Sarah his Wife exhibited their Bill into this Court against the Defendant John Martin for a Legacy of £300 and other Monies devised unto the Plaintiff Sarah, (before Marriage) by the [234] Will of Martin Cornick (her Father) deceased.

That 2 Decemb. 13 Car. 2 [1661], it was decreed, that the Plaintiff be paid the £300 and other Monies payable by the said John Martin.

This decree was inrolled, and afterwards the Plaintiff, Hugh Nanney, died intestate, Anne Nanney took Administration of the Goods of the said Hugh Nanney, and by Virtue thereof claims the said £300 and other Monies decreed unto the said Hugh Nanney and Sarah his Wife in the Life-time of the said Hugh Nanney.

Whether the money so decreed do belong unto the Administratrix of the said Hugh Nanney, or to the Complainant Sarah, is the Question.

This Court referred it to a Judge to certify.

The Judge gave his Opinion (viz.), First, I conceive that a Decree in Chancery for Money or any other Personal Thing, being a Judgment in Equity, is of the like Nature with, and ought to be governed by the same Rules as a Judgment for Debt or Damages at Common Law, and consequently that the Interest or Benefit of this Decree, and the Money due thereby ought to go and be unto such of the said Parties as should [235] have Right thereto, in Case it were a Judgment for Debt or Damages at Common Law.

Secondly, If a Judgment be had by Husband and Wife (at Common Law) in an Action brought by them both for a Debt due unto the Wife before Marriage, and the Husband dies after the Judgment and before Execution sued, I conceive that the Debt due on this Judgment belongs to the Wife, and she shall sue Execution upon the Judgment, and not the Executor or Administrator of the Husband; all which I humbly submit to the Judgment of this Honourable Court.

ROBERT HIDE.

This Court confirmed the Judge's Certificate.

MARTYN *con.* PERRYMAN.

14 Car. 2, f. 966 [1662-63].

Partition.

This Court decreed a Partition notwithstanding Feme Coverts and Infants, and some Incumbrances were in this Case concerned.

[236] ROBERTS *con.* WYNN.

15 Car. 2, f. 434 [1663-64].

Will.

The Bill is to be relieved against the Will of John Bodvile, Father of the Plaintiff Sarah, pretended to be gotten by Fraud and Practice of the Defendant Wynn, which Will tends to disinherit the Plaintiff Sarah, the said John Bodvile's only surviving Daughter and Heir, of a great Estate in Lands, and to settle the same on the two Defendants, Griffith Wynn Son of the Defendant Tho. Wynn, and Tho. Bodvile Infants.

The Case is, That the said John Bodvile, deceased, upon his Inter marriage with Anne the Daughter of Sir William Russel, and in Consideration of £5000 Portion, settled the Premises on himself and his Heirs Males on the Body of the said Anne, Remainder to his right Heir, and the said John Bodvile died without Issue Male, by Virtue whereof, and of the said Settlement the Premises would have descended to the Plaintiff Sarah, who married the Plaintiff Mr. Roberts, Son of the Lord Roberts, Lord Privy Seal, and who had Issue by the said Sarah two Sons and two Daughters in the Life time of the said John Bodvile, and who was so well satisfied with the said Match, that he did on the Birth of the second [237] Son of the said Plaintiff become Godfather, and named him Charles Bodvile Roberts, and declared he would make him his Heir, with several other Expressions, and declared, that if the Lord Roberts would settle on his Son, the Plaintiff, an Estate, he would so settle his Estate that it should come to his said Daughter Sarah and her Heirs; whereupon the Lord Roberts settled £3000 per Annum upon his Son Mr. Roberts, and his Issue on the Body of the said Sarah; and in the Year 1660, the said Mr. Bodvile made his Will, whereby he gave all his Estate to the said Sarah for Life, Remainder to her Son Charles in Tail, and made the said Plaintiff Sarah Executrix, and declared, that tho' he had since levied Fines of all his Estate, yet he did not in the least thereby intend to revoke the said Will, or disinherit his said Daughter, nor would give one Foot of Land away from his Daughter Sarah, and his Grandson Charles Bodvile; But in Decem. 1662, the Defendant Wynn by Practice got the said Bodvile to make another Will, who at that Time was very infirm, and which was twice published, whereby he settled all his Estate in Trustees for the Use of two Infants (*viz.*) one named Bodvile an [238] obscure Child, and the other was the said Defendant Wynn's Son.

The Defendant insisted, that Bodvile upon Marriage with the Plaintiff Sarah's Mother, had £5000 Portion, and that Bodvile, upon the Settlement made upon the said Marriage, did give nothing upon his Daughter but £5000 in Money, and (that) upon Condition that she married with his Consent, and reserved the Power of his Lands to himself, lest he should have Issue Male by a second Wife, and by this Will gave £5000 to his said Daughter, tho' she did marry without his Consent, but with a Proviso, that she should not question his Will, or disturb or hinder his Executors; and that his said Daughter Sarah, the Plaintiff, married in 1657, but there was no Reconciliation till the Year 1660, but had declared he would never settle his Estate on his Issue Female; and that the said Bodvile had always a great kindness for the Defendant Wynn and his Family, and that Wynn had no hand in making or contriving the said Will.

So that the Effect of the Suit is to have the said Will in 1662, set aside and made void.

This Court with the Assistance of the Judges, and on reading several Precedents on the Plaintiff's Part, declared they did [239] not conceive it of any Consequence or Value, that the Defendants for whom the Estate is settled in the Trustees were Infants, and not privy to the Fraud; for if that should be admitted to bar the Heir from Relief, any third Person might, for the advantage of his Children or Relations, by Practice set up a Will or Deed, and put it out of the Power of the Court to set aside or make void such a Will or Deed; and they were also of Opinion, that the Making of this Will was not an Act of Prudence or Honesty in Mr. Bodvile, but rather of great Injury and Injustice, the same tending to disinherit an Heir and only Child, being innocent and inoffensive, and to introduce Strangers without any Reason of Affinity or Merit; and it appeared Mr. Bodvile always intended to leave his Estate to his Daughter if she married with his Consent; and his Lordship farther declared, that altho' the Marriage of the Plaintiff Sarah, without Mr. Bodvile her Father's Consent, was an high Trespass, insomuch that if his Passion had possessed him from that Hour, and

he would have resolved to have punished it with a total Disinheritance, his Lordship would not have relieved her; nevertheless it now appeared, that he was reconciled before 1660, and well [240] satisfied in the Matter, and that he intended to settle his Estate on the Plaintiff, as by the Will in 1661, and it appear'd, that the Defendant Wynn was the Contriver of this Will, and that Mr. Bodvile's Promising to settle his Estate on his daughter and her Heirs, induced the Lord Roberts to make the Settlement of £3000 per Annum on the Plaintiff Mr. Roberts and his Issue by the said Plaintiff Sarah, which did carry in it a great Circumstance of Equity against the pretended Will, although there was no such formal Agreement executed, which according to the Course of Proceedings could in Equity be Ground enough of itself for a judicial Decree against the said Will.

His Lordship, with the Judges, were of Opinion, that the said Will was obtained by great Fraud and Circumvention of the Defendant Wynn, but by Reason the Precedents did not fully reach to this Case, whereby there might be a Decree without creating a Precedent, which, if any one, his Lordship declared, he would have decreed the Cause, therefore his Lordship and the Judges held it not fit at present to make a Decree finally to determine this Cause, yet declared, that there appeared so much Fraud in the Defendant Wynn in gaining the [241] Will, and so much Equity and Justice in the Plaintiff's Cause, that they would not dismiss the Plaintiff's Bill, or relieve the Defendants upon their Bill: but the Matter being fit to be relieved, and yet not ripe for a Decree, this Court gave the Plaintiff a Year's Time to take such further Course against the said Will as he should be advised, and the Injunction to continue.

The Plaintiff petitioned the House of Lords, who upon several long Debates referred it back to the Lord Chancellor to decree for either Party according to Justice and Equity, although no Precedent should be found for that Purpose.

And his Lordship, with the Judges, upon several Days hearing the Matter, declared they could not relieve the Plaintiff in this Court, and dismiss'd the Plaintiff's Bill without Costs, and dissolved the Injunction.

SIMMONS *con.* CORNELIUS.

15 Car. 2, f. 73 [1663-64].

Demurrer to a Bill for Performance of an Agreement by Reason of inconsiderable Earnest allowed.

The Bill is to have an Agreement in Specie to be performed, the Defendant demurred, for that there was but 20s. paid as Earnest to bind the Bargain, which is but an inconsiderable Execution of the Agreement, and it [242] being not under Hand and Seal, the Court allow'd of the Demurrer.

MINSHAL *con.* MINSHAL.

15 Car. 2 [1663-64].

Injunction to stay Felling of Timber dissolved, for that the Settlement was without Impeachment of Waste.

The Plaintiff got an Injunction to stay Waste, or felling of Timber-Trees from off the Premises.

The Defendant moves to dissolve the Injunction, insisting, that he hath sworn in his Answer, that he hath an Estate of Inheritance in the Premises, and hath for fourteen Years cut down Timber growing upon the said Premises, and sold the same without Interruption, and upon producing the Settlement, which was made by the said Defendant upon the Marriage with his Wife, thereby it appeared, that he had an Estate in the Premises in Question, without Impeachment of Waste.

His Lordship ordered the said Injunction to be absolutely dissolved.

FIELD *con.* CLERK.

15 Car. 2, f. 790 [1663-64].

Obligee makes the Obligor Executor, the Bond not discharged in Equity, being for Security of Arrears of Rent.

The Defendant entred into Bond to the Testator, and after the Testator makes the Defendant his Executor, whereupon the Defendant insists the Bond is thereby discharged in Law.

[243] This Court declared, That tho' the Bond was discharged in Law, yet in Equity the Defendant ought to account for the Arrears of Rent thereby secured.

HUNBY *con.* JOHNSON.

15 Car. 2, f. 293 [1663-64].

The Defendant won of the Plaintiff playing at cards £105, which the Plaintiff upon Account did own to be due to the Defendant, whereupon the Defendant brought his Action of the Case, and declared on *indebitatus assumpsit* for £105, and upon an *in-simul computaverant* for £105, to which the Plaintiff pleaded *non assumpsit*, and upon a Trial a Verdict passed for the Defendant for £105 Damages, and he hath since taken out Judgment and Execution, and therefore in Respect there were only Damages recovered, whereof the Jurors were the proper Judges, and for that the Bill was exhibited after Judgment and Execution, as by the Records and Proceedings duly carried on, according to the Rules of the Court of Common Pleas.

The Defendant demurs, and pleads, and demands Judgment, whether he shall farther Answer that Part of the Plaintiff's Bill as concerns the Verdict and Judgment.

[244] This Court allowed the plea and Demurrer.

DOM. DIGBY *con.* MORGAN.

16 Car. 2, f. 799 [1664-65].

The Lord Digby's Bill being to be relieved for a Messuage in Queenstreet, which was purchased by the Earl of Bristol, and there being then a Lease of ninety-nine Years made of the Premises by one Newton, the said Earl took an Assignment thereof in the names of Philip Digby and Arthur Everard, and the Conveyance of the Fee he took in the Name of the Defendant Broom and Hodges in Trust for the said Earl, and the said Earl by Deed, 23 Feb. 17 Car. 1 [1642], settled the Premises, and therein declared, that his Son John Digby should have the Premises to him and the Heirs of his Body, Remainder to the Plaintiff John Lord Digby, and the Heirs of His Body, Remainder to George, Francis, and every other of the Sons of the now Earl of Bristol in Tail, Remainder to the Daughters of the now Earl in Fee, and that the Estate, which Broom and Hodges had, should be subject to the Trust aforesaid, with Power of Revocation to the said Earl; and in 1651 the said Earl by Will confirmed the said Deed, [245] and soon after died, after whose Death the said John Digby his Son took the Profits; and the said John Digby being dead without Issue of his Body, the Plaintiff, the Lord Digby claims the Premises according to the Trust; but the Defendant Diana Digby taking advantage of John Digby's being beyond Seas, and concealing the Trust, procured the said Philip Digby, and the said Everard to assign their Interest in the Premises to Newman and Hussey, who by the said Diana's Importunity mortgaged the same to one Currance for £560. That afterwards the Defendant Langhorne purchased the said Lease and Inheritance of the Premises of the said Diana for valuable Consideration, paying off the £500 to Currance, who having the said Lease forfeited to him, assigned to Langhorne with the Consent of the said Diana, and then in 1663 procured the said John Digby to suffer a Recovery of the Premises, and declared the Use to the said Langhorne; and the said Langhorne insists, he is a Purchaser without Notice of the Plaintiff's Title; and if any such Entail were as the Plaintiff pretends, the same is cut off in Equity by the Recovery.

But the Plaintiff insists, that the Recovery is void in Law, the said John Digby having no Estate of the Freehold, [246] but a Trust cannot bar the Plaintiff's Equity.

This Court, with Assistance of the Judges, were of Opinion, that the Lease of ninety-nine Years was separate from the Inheritance, and well conveyed by Newman and Hussey, and that the said Lease for so much as was mortgaged to Currance, and by him assigned to Langhorne, might not be impeach'd, and decreed Langhorne to enjoy for the Remainder of the ninety-nine Years as was mortgaged to Currance, and the Bill as touching the Lease to be dismissed.

BREST *con.* OFFLEY.

16 Car. 2, f. 746 [1664-65].

The Testator desires in his Will, his Executor to give the Plaintiff £200, it is a good Legacy.

The Suit is touching a Legacy of £200 given by the Will of John Wynn to the Plaintiff, of which Will he made his Wife the Plaintiff's Sister Executrix, who since hath married the Defendant Offley, his Executrix, but the Defendants refuse to pay the said Legacy.

The Defendant insists, that the testator made such Will, and thereby desired his Executrix, the Defendant, to give the Plaintiff £200, but left it wholly to the said Defendant's own free Will, how, when, and in what Manner to dispose of it to him; and the Defendant [247] insists she ought not to be questioned for the same in this Court, it not being the Intention of the Testator to make the Defendant liable to the Plaintiff's Suit for the same, but do own Assets in Case the Court adjudge the Payment of the said Legacy in any other Manner than is directed by the Will.

This Court is satisfied that the said Legacy of £200 is due and payable from the Defendant to the Plaintiff, and decreed the same to be paid accordingly.

PROCTOR *con.* REYNEL.

16 Car. 2, f. 781 [1664-65].

Sequestration.

A Sequestration was awarded to sequester the Manor of Shampton, and all the Estate Real and Personal of Sir Thomas Reynel to satisfy a Decree, out of which Manor the Defendant, the Lady Reynel had an Annuity, which during the Life of the said Sir Thomas her Husband was sequestred, but Sir Thomas being dead, insists, that the Sequestration ought to be taken off.

The Plaintiff insists, that the Sequestration is particularly to sequester the said Manor, and all the Estate Real and Personal of the said Sir Thomas Reynel, and the said Annuity was the Estate of Sir Thomas in Right of his Wife, and cannot be accounted a separate Maintenance.

[248] The Defendant insists, that her Father settled the Annuity on her for Life as a Maintenance for her in Lieu of Jointure, and gave her no other Portion.

His Lordship declared, that this Court cannot continue the said Sequestration upon the said Estate, the said Sir Tho. being dead, for whose Offence the same was sequestred, and discharged the Sequestration of the said Manor as concerning the said Annuity.

SEWEL *con.* FREESTON.

16 Car. 2, f. 795 [1664-65].

Demurrer to a Bill exhibited after Verdict, Judgment and Writ of Error allowed.

The Bill is to be relieved against a Verdict for £200 upon an *Indebitatus Assumpsit*, whereupon Judgment is obtain'd, and a Writ of Error brought by the Plaintiff.

The Defendant pleaded the Matter properly examinable before the Judges in the Court where the Action depends, and not in this Court, especially upon a Bill exhibited after a Verdict, Judgment and Writ of Error.

This Court on Perusal of Precedents conceived the Matter of the Bill to be of ill Consequence, and allowed the Demurrer to the Bill.

[249] FLEMING *con.* TAYLOR.

16 Car. 2, f. 228 [1664-65].

Settlement by Lease first in Mortgage, and then for Payment of Debts.

That John Fleming the Plaintiff's Father by Deed in 1643, for the Securing of £1000 with Interest, demised the Lands in Question by Lease to Samuel Ferrers, to be void on Payment of the said £1000 and Interest, and after in Trust for the Payment of all his Debts, if he left not sufficient Personal Estate to do the same, and after the

Profits of the Premises to go towards Maintenance of the Plaintiff, and upon Payment of his Debts as aforesaid, the Mortgage to be void, and that John Fleming dying in 1643, being sole Executor of Giles Fleming his Father, and had Assets to pay his said Father's Debts, the Defendant Taylor claims a Debt of £500 owing to Samuel Ferrers by the said Giles Fleming on the Foot of an Account made up betwixt the said Samuel Ferrers and John Fleming over and besides the said £1000, the said Taylor being intitled to the said £500 by Virtue of an Assignment of the Commissioners of Bankrupt of the Estate of the said Ferrers, and is now in Possession of the said Lands in Question ; and the only Question being, Whether the said £500 owing to Ferrers by the said Giles Fleming, who left [250] Assets enough to pay his Debts shall be charged on the said Lease, or the Mortgage aforesaid, made by the said John Fleming, as if it were the said John Fleming's particular Debt.

This Court declared the said Lease shall be liable to the Debts of John Fleming, as he was Executor of Giles Fleming his Father.

KINGSMIL *con.* OGLE.

16 Car. 2, f. 560 [1664-65].

Construction of a Will.

That Sir William Kingsmil by Will in Writing devised as follows (*viz.*), First, All my Lands and Tenements I give and bequeath unto my only Son William Kingsmil (the now Plaintiff) and his Heirs for ever ; and my Will is, That my Executrix shall from Time to Time during his Minority receive the Rents, Issues and Profits thereof, to be disposed and employed of by her towards his and his Sisters Breedings, and Payment of Portions and Legacies devised, and gave to his Daughter Bridget £3000 and to Anne £1500, to be raised out of the Profits of the Real and Personal Estate with all convenient Speed, and to be put out for their best Benefit, with Interest, and the Residue of his Goods, Chattels and Personal Estate, he gave to Dame Anne his Wife, whom he [251] made Executrix, and at the Making of his said Will declared, he only trusted his Executrix with the Receipts aforesaid, for the Purposes aforesaid, and to be accountable to the Plaintiff William for the Surplus, and the same should be employed for his Use ; that the Executrix proved the Will, and married the Defendant, and the Defendant's said Wife dying, the Defendant denies the Trust, though his Wife had declared the Trust, and before her Marriage made a Deed to one Mason for the better Execution of the said Trust, in Respect she was not fit to manage such Affairs ; but the Defendant insists, that the Deed was made with Power of Revocation, and so void, and that the Defendant is intitled to the said Profits, until the said William attains his Age of twenty-one Years.

This Court was fully satisfied, that it was the Intention of the Testator, and is so proved, that after Debts and Legacies raised out of the Real and Personal Estate, the Overplus of the Real Estate was in Trust for the Use of the Plaintiff William, the Testator's Son and Heir, and decreed the same accordingly, and the Defendant to account accordingly.

[252] PEACHY *con.* VINTNER.

16 Car. 2, f. 777 [1664-65].

Omission in a Bill of Revivor, to make one Defendant a Party, no Cause of Re-hearing, the Proceedings having been in the said Defendant's Name.

That the Plaintiff in a Bill of Revivor had omitted to make the Defendant Margaret the Wife of the Defendant Robert Vintner, who was Defendant to the Original Bill, in whose Right only the Defendant claims, a Party to the said Bill of Revivor, which Omission the Defendant insists will be Error in the Body of the Decree, and would have the Cause re-heard.

The Plaintiff insists, that the Defendants are now come too late, by the Course of the Court, for to have a Re-hearing as to the Merits of the Cause by Way of Appeal against a decretal Order in Michaelmas 1662, for that the Defendants have bound themselves by the said Proceedings, and have submitted thereto, and though the Plaintiff omitted in the Bill of Revivor to pray Process against the Defendant Margaret, yet the Defendants by their own Act have made her a Party ; the Defendant made several Motions in her Name, and executed a Commission in her Name since the

decretal Order, and named her Defendant in the Title of several Orders, and now after a Report made that confirmed *nisi*, and a Reference to the [253] Master to re-hear the Cause, would be to make a Precedent of very ill and dangerous Consequence.

His Lordship declared the Defendants came too late for a Re-hearing, and the Defendants ought not to take Advantage of their own Default, they by their own Act having made the Defendant Margaret a Party Defendant to a Bill of Revivor, her Name must now be used as a Defendant throughout the Cause, and would not relieve the Defendant.

COKER *con.* BEAVIT.

16 Car. 2, f. 378 [1664-65].

Time enlarged as to the Performance of a Decree for Redemption of a Mortgage.

The Plaintiff hath a Decree for the Redemption of a Mortgage, and the Time for the Performance is elapsed, of which the Defendant would take Advantage, the Decree being signed and inrolled.

It appearing, that this Court having very often in such like Cases of inevitable Necessity, and no wilful Default appearing in the Party, enlarg'd the Time as to the Performance of Decrees, notwithstanding such Decrees have been signed and inrolled ; and this being also new Matter subsequent to the Decree, this Court declar'd the Plaintiff was capable of Relief, and decreed to go to an Account.

[254] COLT *con.* COLT.

16 Car. 2, f. 749 [1664-65].

Bill for Dower out of a Trust dismiss'd.

The Plaintiff claims a third Part of the said Trust for her Dower.

This Court, to so much of the Plaintiff's Bill, as relates to the Dower of the Plaintiff Elizabeth claim'd by her out of the said Trust, ordered, That the said Bill be dismiss'd.

STANLEY *con.* MANDESLEY.

17 Car. 2, f. 599 [1665-66].

Mortgage-money decreed to the Executor and not to the Heir.

The Testator lent £1400 to one Pershal, and took a Mortgage of Lands to him and his Heirs in Fee, defeazanced to pay the said Mortgage-money to him, his Executors or Assigns.

This Court declar'd, the Mortgage-money belonged to the Executor, and not to the Heir.

CORBET *con.* MORRIS.

17 Car. 2, f. 569 [1665-66].

Childrens Portions.

The Suit is touching £1000, for which the Plaintiff, as Executrix to her late Husband, seeks to be relieved ; that Sir John Corbet Father of Vincent Corbet, the Plaintiff's late Husband, by Deed of Settlement made in [255] 1652, appoints £1000 a-piece to be paid to every one of his Children therein named (of which the said Vincent was the Eldest), as should be then unmarried, or not provided for at the Time of the Decease of the said Sir John Corbet, at their respective Ages of twenty-one Years successively one after another, according to Seniority of Age, and the Eldest to be the first. And the Question being, Whether the Plaintiff, who was Wife and Executrix of her said Husband Vincent Corbet, shall have the said £1000 being devised to her by the Will of her said Husband, although he was of Age, and married before the said Settlement, but never had any Provision made for him by the said Sir John Corbet his Father.

The Defendant insists, the Plaintiff had no Right to the £1000, for that the Trust limited by the Deed aforesaid was discharged as to the said Vincent Corbet, by his Intermarriage long before the Death of his said Father.

The Court ordered a Case to be made.

THE CASE.

Will.

That Sir John Corbet in 1652, being seized in Fee of the Barony of Stoke and other Lands, conveyed the same in Trust for ninety-nine Years, that out of the [256] Profits and Rents thereof the Trustees should pay to every of Sir John's Children £1000 a piece as should be then unmarried, or not provided for, after they shall attain the Age of twenty-one Years; and they to pay them in Seniority as abovesaid, with Power for Sir John to revoke or alter any of the said Payments, with Power also to limit, appoint or sell the Premises to any other Uses or Persons; That the said Vincent Corbet, the Eldest of the said Children, was twenty-one, and married to the Plaintiff in 1642, and before the said Settlement, without the Consent and Privy of his Father, at which his Father was angry; and the said Vincent had £350 with the Plaintiff in Marriage, which he spent in maintaining himself and Wife, and he never had any Provision made for him other than £30 per Annum for seven Years, if the Father lived so long; but his said Father continued the £30 per Annum to be paid to the said Vincent during his Life, and to the Plaintiff afterwards during the said Sir John Corbet's own Life. And in 1651, the said Vincent made his Will, and thereby devised in these Words (viz.), All my worldly Goods and Estate I thus bestow, *Imprimis*, If my Father Sir John Corbet dye, and leave me, his Son, any Real or Personal Estate, then my said Wife shall have all the said Estate [257] which is or shall be left me by my said Father, whether Personal or Real, and the Rents, Issues and Profits of all the said Estate I give unto my said Wife during her Life, and after her Decease the Principal, if it be a Personal Estate, or the Rents and Profits of a Real Estate, to my Brothers and Sisters equally to be divided, and all the Rest of my Estate in the World I give to my said Wife, and make her sole Executrix, and dies before his Father; and Sir John Corbet being requested to settle a yearly Maintenance on her for Life, she being Relict of his Son Vincent, declared she was well enough provided for already, and would do no more for her; and after the said Sir John Corbet died, not having altered or revoked the said settlement, nor any of the Payments, and in his Life made no other Provision for the said Vincent or the Plaintiff than as aforesaid, and there is received of the Rents and Profits of the Premises sufficient to pay off Sir John Corbet's Debts, and £1000 and upwards, but not sufficient to pay to each of the said Children in the said Settlement, and who were unmarried and unprovided for at the Time of his Death, £1000 a-piece, as is directed by the said Settlement.

And the Question arising upon the said Case being, whether the Plaintiff, who is the [258] Devisee and sole Executrix of the said Vincent, who was married and died without Issue in his Father's Life-time, shall have the £1000 limited to her husband by the said Deed of Settlement, and the Interest since the same became payable, or what Part thereof, inasmuch as he never was any otherwise provided for by his Father in his Life-time than as aforesaid, and notwithstanding the Estate falls short to pay all Portions without Interest, as aforesaid.

This Court having considered the Case declared, it was the Intention of the said Sir John Corbet, that his Son Vincent, who is first made in the Trust, should have a £1000 Portion, as well as the other Children, and therefore she being the Relict and Devisee, and Executrix of the said Vincent Corbet, ought to have the Benefit of the said Portion and Interest so limited to her said Husband, and to be paid equally in Proportion with the other Children, and decreed the same accordingly.

[259] GOODFELLOW *con.* MARSHALL.

17 Car. 2, f. 546 [1665-66].

Replication containing more than the Bill demurred to.

The Plaintiff putting Matter in the Replication which was not contained in the Bill, and which Matter the Plaintiff knew of at the Exhibiting the Bill; the Defendant pleaded and demurred to the Replication, which this Court allowed of.

CONSTABLE *con.* DAVENPORT.

17 Car. 2, f. 435 [1665-66].

The only Freeholder in a Manor in Right of his Church not compelled to inclose.

The Bill is to compel the Defendant, being the only Freeholder within the Manor, to consent to an Inclosure. The Defendant demurs for that there are no Articles of Agreement to compel an Inclosure, nor doth charge that the Defendant is like to receive any Benefit of the Inclosure towards the Benefit of the Church, and that although he be the only Freeholder within the Manor in Right of his Church, yet the same is no Ground in Equity to compel him to an Inclosure.

This Court, as to the Compelling the Defendant to agree to an Inclosure, allowed the Demurrer.

[260] HART v. HART.

17 Car. 2, f. 525 [1665-66]; 18 Car. 2, f. 332 [1666-67].

Personal Estate—Remainder.

The Bill is touching the Real and Personal Estate of Sir Percival Hart deceased, the Plaintiff pretending Title and Interest in certain Lands, Houshold-stuff and Plate of the said Sir Percival in Reversion or Remainder by Virtue of some Settlement made by the said Sir Percival in his Life-time, and also by his last Will, whereby it is ordered and appointed, that William Hart, this Defendant, should have the Use of all his Plate and Houshold-stuff for his Life, and that after his Decease the said Plate and Houshold-stuff should continue to the eldest Son of this Defendant, and so to the heirs of his Body, and so to the first, second and third, and other Sons to the tenth Son of this Defendant, and the Heirs Males of their Bodies, as an Heirloom according to the Limitation of the Lands in the Bill, and for Want of such Issue, to the Plaintiff's and the Heirs Males of their Bodies; so the Bill is to discover the Plate and Houshold-stuff, and that the Defendant may put in Security to leave the said Plate or Houshold-stuff, or the Value thereof, at the Death of the Defendant according to the Will.

[261] The Defendant demurred, for that the Plaintiff having but a Possibility of a Remainder, which is void in Law, hath no Ground or Colour of Relief for the same either in Law or Equity, or to have the Defendant give Security for such Personal Estate.

This Demurrer being argued before Mr. Justice Brown, he held the same good and sufficient.

This Court referred the Matter to Mr. Justice Archer, who certified the Plea and Demurrer to be good.

This Court confirmed the Judge's Certificate, and dismiss'd the Plaintiff's Bill with Costs.

HEYNE *con.* MIDDLEMORE.

17 Car. 2, f. 410 [1665-66].

Partner—Account.

The Plaintiff and Administrator to one Partner sueth the Copartner for an Account of the Intestate's Share, which this Court accordingly decreed.

INGLET *con.* VAUGHAN.

15 Car. 2, f. 476 [1663-64].

Commission of Rebellion.

That one Horwel having arrested the Defendant upon a Commission of Rebellion at the Plaintiff's Suit for the Breach of a Decree, and imprisoned him for six Weeks in the said Horwel's [262] House and other Places, and refused to take Bail for the Defendant's Appearance to answer the Contempt, and the Defendant had by Order of this Court entred his Appearance upon the said Arrest by his Clerk in Court.

It was referred to the six Clerks to certify, whether upon a Commission of Rebellion for the Breach of a Decree, Bill ought to be taken or not, who certified, that Commissioners on a Commission of Rebellion may either take or refuse Bail at their

Discretion, but in Case they refuse, then they ought to bring the Party up to the Court without Delay, and that Bail was offered.

This Court, on reading of a Precedent in the like Nature made in the Lord Elsemere's Time, ordered that the said Horwel stand committed to the Fleet for his Abuse, and to pay to the Defendant his Costs and Charges sustained by his Imprisonment, to be taxed by a Master.

[S. C. Dick. 7.]

ISMOORD *con.* CLAYPOOL.

18 Car. 2, f. 597 [1666-67].

Time enlarged for the Performance of a Decree for the Redemption of a Mortgage.

This Court (upon Motion made by the Defendant) ordered, that notwithstanding the Signing and Inrolling of the said Decree, the Defendant shall have six Months longer time to pay the Mortgage-Money, Interest and Costs.

[263] GORE *con.* BLAKE.

18 Car. 2, f. 353 [1666-67].

1 Chan. Ca. 98 [S. C.]. The Profits of Lands devised for fifteen Years to pay Debts and Legacies; Devisee marries and dies, her Husband shall have the Overplus and not the Heir.

That William Gore being seised of Lands made his Will, and thereby appointed the yearly Profits of all his Lands, over and above what was given to his Wife, should for the Term of fifteen Years be disposed, imployed and improved by his Wife, whom he made Executrix, for the Benefit of the Persons in the Will named for the Payment of their Legacies; and after the Expiration of the said fifteen Years, gave all his Lands to the Plaintiff Gore and his Heirs Males. That after the Testator's Death, Elizabeth his Wife received the Profits two Years, and married the Defendant Blake, and they received the Profits till 1661, at which Time Elizabeth died, and after the Defendant Blake received the Profits: That the Plaintiffs Singer and Hammond being Heirs at Law claim the Interest of the Premises during the fifteen Years, and the Overplus of the Profits, after the Debt and Legacies paid, the Defendant Blake claims the same in Right of Elizabeth, by Virtue of his Marriage, the Defendant Kent claims the same as Executor to Elizabeth, under an Agreement made before the Marriage with Blake, and that she should have [264] Power to make a Will, and by Agreement to receive the Profits.

Now the Question being, to whom the Lease of fifteen Years and the Overplus of the Rents and Profits belong, whether to the Plaintiffs Singer and Hammond, as Heirs at Law, or to the Plaintiff John Gore, to whom the Remainder is limited, or to the Defendant Blake by Survivorship, who married with the Executor, or to the Defendant Kent her Executor, who hath taken Administration *de bonis non* of the Testator William Gore.

This Court, with the Judges, were clearly of Opinion, that the Surplus of the Rents and Profits of the Premises, after Debts and Legacies paid, during the fifteen Years belonged to Elizabeth the Testatrix, and it was the Intent of the Testator William Gore, her former Husband, by his Will, that she should enjoy the same, and receive the Surplusage of the Rents and Profits during the said fifteen Years, and since her Death, to the Defendant Blake and Kent as under her Right; and this Court dismiss'd the Plaintiff's Bill.

[265] GLIDE *con.* WRIGHT.

18 Car. 2, f. 633 [1666-67].

Portions left in Trustees Hands for Children, tho' no Mention of Interest, yet the Trustees decreed to pay Interest.

The Testator left £1200 in Trustees Hands to be paid to the Plaintiffs or to the Survivor of them at eighteen Years of Age or Days of Marriage, which first happens, the Defendants the Trustees refuse to pay Interest in the mean Time towards the Main-

tenance of the Plaintiffs, because none is expressed, nor any Notice taken or Direction given what shall become of the Interest.

This Court decreed the Defendants do from Time to Time henceforth pay to the Plaintiffs for their Maintenance the Interest, Profits and Increase of the said £1200 until the same becomes due, together with all Arrears of Interest.

HAWTRE *con.* DOMINAM WALLOP.

18 Car. 2, f. 357 [1666-67]; 19 Car. 2, f. 131 [1667-68].

Portions for younger Children to be raised out of the Profits.

The Suit is to have all Account of the Profits of Lands and testamentary Estate of Sir Tho. Wallop, Father of the Plaintiff Jane Hawtre, and that she may have an equal Share thereof with the younger Children of the said Sir Thomas, who having Issue by Dame Hester his first Wife, Sir William Wallop, Anne Wallop, and the Plaintiff Jane, and by Dame Mary his [266] second Wife, Thomas Wallop, Mary the Wife of the Defendant Hide, and the other Defendants, did by his Will in 1649, give £1000 to the Plaintiff Jane to be paid her at her Marriage, and devised the Rents of Divers Lands and his Personal Estate to raise Portions for his younger Children, and every of them to have equal Portions, with a Proviso, that what any of his Children have formerly received of him or the Feoffees, to be Part. That in the Year 1651, Jane was married, and had £1000 Portion, and about March following, the said Sir Tho. made a second Will, and devised Lands, together with his Personal Estate, to his Executors, for the Use of his Children (not disposed of nor provided for) to raise Portions for them; and when the said Thomas attained the Age of twenty-two Years, and James twenty-one Years, then a Dividend to be made, and every Child (William and Thomas excepted) to have an equal Part, deducting what they had formerly received, and made one Hall and Clithero Executors, and the Defendant Dame Mary to have an equal Power with them, during her Widowhood; and the said Sir Thomas Wallop, before and after the Time of making the said second Will, that the Plaintiff Jane and Anne, the late Wife of the said Hall, one other of the Daughters by his first [267] Wife, should have an equal Share with his younger Brother, allowing for Part what they have received of him upon their Marriage, and by a Paper-writing of his own Hand, written after the Making of his second Will, and found with his Will after his Death so declared; so the Plaintiff's Bill is to have an equal Share with the younger Children, deducting the £1000 received, as aforesaid.

The Defendants insisted, that Sir Tho. by his second Will, all of his own Hand-writing, devised the Rents and Profits, and Testamentary Estate, for the Benefit of his Children not disposed of nor provided for, to raise them Portions and to bring them up, and explained his Mind as to the Words (Not disposed of nor provided for) should not exclude his Son James from his Part of the Estate; from whence the Defendant's Counsel inforced, that the Plaintiff Jane, whose Name is not at all mentioned in the second Will, is absolutely excluded from having any Part of the Testamentary Estate by force of the second Will, she being before the Making thereof disposed of in Marriage, and received £1000 from her Father, and so could not be intended to be undisposed of or unprovided for, nor yet one of the Children that was to be brought up: And that the Paper-writing aforesaid [268] ought not to be deemed as a Declaration for the Disposing of any Part of the Estate to the Plaintiff Jane, contrary to the express Words of the Will, the said Paper-writing being only a Draught of a Letter not sealed, and was endeavoured by the Plaintiff to have been proved as a Codicil in the Spiritual Court, where Sentence was pronounced, that it was no Codicil: And the Defendants insist, that the said Paper-writing by all Circumstances was made before the second Will, and so ought not to be countenanced or alter the same, nor to be a ground for a Decree that the Plaintiff should come in for an equal Share of the Testamentary Estate, directly contrary to the express Words of the second Will.

The Plaintiff insisted, that the Paper writing was writ after the Making of the second Will, and was found in the Box after the said Sir Thomas Wallop's Death, laid between both the said Wills, and although the said Paper doth not amount to a Codicil, yet it is a good Declaration of the said Sir Thomas to his Executors, that his Intention was, that the Plaintiff Jane should have an equal Share of the Rents and Profits and Testamentary Estate of the younger Children.

[269] The said Paper-writing was refer'd to Law, whether it was written and made before or after the second Will.

A verdict passed for the Plaintiff, that the Paper-writing was written after the Making of the second Will of the said Sir. Tho. Wallop.

This Court, with the Assistance of the Judges, upon reading of the second Will of the said Sir Thomas Wallop, whereby he declared, that for an Explanation of his Mind as to the Gift to his Children was that equal Dividend should be made against them, and every Child, William and Thomas excepted, should have an equal Part, deducting what they had formerly received, or had been paid to or for them; and also reading the said Note, confirmed the Master of the Rolls's Decree, which was, that the said Lady Wallop should account for the Rents and Profits of the Lands, and the Testamentary Estate of the said Sir Thomas Wallop, devised by him, as aforesaid, according to the Will (except the Adventure in the East India Company), and the Master to make a Dividend of the Rest of the Estate, and the Plaintiff Jane bringing the £1000 Portion, which her Father gave her, into Hotch-pot with the Rest of the Estate so to be accounted for, she the said Jane should have her equal Share [270] and Proportion of the said Estate, with the Rest of the younger Children.

WALKER *con.* SYDENHAM.

18 Car. 2, f. 431 [1666-67]; 19 Car. 126 [1667-68].

Trust.

The Bill is to compel the Execution of a Trust created by Alexander Portrey by Deed in 1642, whereby the Premises were to be sold to pay the Debts of the said Alexander, and the Remainder of the Money to be divided into three Parts, whereof Katherine the Wife of the said Alexander to have one Third, and Jane and Mary her Daughters, the other two Parts, and to have several Sums paid to the Plaintiff, which were disbursed by the said Katherine about the Premises and Payments of Debts, and otherwise, the Plaintiffs claiming the same as Executors of the said Katherine, who was Executrix of Hurlstone her late Husband: the said Defendants Jane and Mary aforesaid, being Co-heirs of the said Katherine, deny they know any such Trust, and insist, that the said Katherine, in her Answer to a former Bill exhibited against her by Owen Feltham and his Wife, had sworn the Deed aforesaid was not upon any such Trust, but was made without any Consideration, and meerly to preserve the Estate from Hazard.

[271] This Court dismiss'd the Bill against the Executors and Legatees, in Regard the said Katherine had sworn in a former Answer, as aforesaid, but the Cause being reheard with the Assistance of Judges, the Plaintiffs the Executors and Legatees insisted, that what the said Katherine had sworn was to a Bill exhibited against her by the said Feltham, to have a third Part of the Premises, and with whom she was very much displeased, and used her utmost Endeavour to hinder and keep him from the Estate, and she only swore that the said Deed of Trust was (as she believed) made to preserve the Estate from Sequestration, and that she might make Use thereof or not, as she saw Cause: and for other Reasons now expressed, the Plaintiffs insist, the Bill ought not to be dismiss'd, especially after two Trials at Law, and both found for the Plaintiffs, that it was a good Deed of Trust.

The Defendants insisted, that at the said Trials no Trust was proved, nor to be tried by the Issue, but only the Sealing and Delivery of the Deed of Trust, and insist also, that there ought not to be any Execution of the said Trust after twenty-two Years, the said Katherine always opposing the same, and refusing to consent thereto; and again insisted upon Katherine's former Answer as aforesaid, and if the said [272] Katherine had been living, she could not have been relieved upon the said Trust against her own Oath, and cited a Precedent in this Case between Edwards and Whitehorne to the same Purpose, and the Plaintiffs claiming by her Will only, are in the same Condition with her, and cannot set on foot or be relieved upon the said Trust.

This Court declared, they were not satisfied with the Dismission of the Plaintiff's Bill after two Verdicts, and conceived the Plaintiffs ought not to be determined by the said Katherine's Answer, her Business being then but to disturb and obstruct Mr. Feltham.

This Cause was reheard by the Lord Keeper Bridgman, and he confirmed the Dismission of the first Hearing and set aside the Lord Clarendon's Order, and was quite of another Opinion to the whole Matter therein.

GREENWOOD *con.* HARE.

18 Car. 2, f. 528 [1666-67].

Copyholds.

That John Hare, the Defendant's Father, did purchase Part of the Manor of East Carry for the Lives of himself and his two Sons, Richard and William Hare, and he alone paid the Fine for the same to the Lord of the said Manor, and by virtue thereof the said John [273] Hare became intitled to the said Premises, and according to the Custom of the said Manor had good power to surrender the same, as well for the Lives of the said William and Richard, as for his own Life. That 15 Car. 1 [1639-40], the said John Hare covenanted and agreed by Deed with the Plaintiff's Father to surrender and assign all their Title and Interest in the said Copyhold Premises to the said Plaintiff's Father, his Heirs, &c., and the said John soon after, and before the Making of any Surrender, died, having made his Will and Agnes his Wife Executrix; and soon after the said Plaintiff's Father died, having made his Will and his Wife and the Plaintiff Executors; and since the said Wife the Plaintiff's Mother died, and the Plaintiff being Survivor ought to have the Benefit of the said Deed, and Agreement made with the said Defendant's Father; and to have the said Copyhold Premises surrendered to the Plaintiff's Use according to the Covenant aforesaid, and to compel the Defendant to surrender, is the Scope of the Bill.

The Defendant insists, that he ought not to be concluded by the said Agreement or Contract, the Surrender not being made in the Defendant's Father's Life-time, and insisted, they were neither [274] Parties nor privy to the said Contract or Agreement, so as the same ought not in any Sort impeach the said Defendant's Estate for Life in the said Premises, and the Defendant hath entred and brought his Action for Recovery of the Premises as by Custom is warranted in Case the said Defendant's Father had surrendered in his Life-time.

This Court, forasmuch as the Defendant insisted, that the Surrender being not made in his Father's Life-time, and so ought not to oblige the Defendant to surrender the said Premises being a Copyhold for Lives, and not a Copyhold in Fee, being satisfied of the said Agreement, Purchase and Payment of Purchase-money by the said Plaintiff's Father, and that by the Custom the Defendant's Father could have surrendered all the three Lives, doth leave the Defendant to Precedents touching the said Point, and the Distinction between the Copyhold Estates holden in Fee or for Lives, where Relief hath been given in such Case of a Copyhold for Life, it being offered by the Defendant's Counsel, that it ought to be made against a Copyholder in Fee; and if the said Defendant shall not find Precedents, then it is decreed, that the said Agreement be performed, and that the Defendant do surrender the Premises to the Plaintiff's Use [275] according to the Custom, and an Injunction for quiet Enjoyment.

No Precedents could be found.

JENKINS *con.* KEYMEYS.

19 Car. 2, f. 406 [1667-68].

Settlement.

The Bill is to have the Benefit of a Mortgage of Lands, whereof Sir Nicholas Keymeys and Charles Keymeys his Son, the Defendant Sir Charles's father and Grandfather were seised in Fee, who 1 Jan. 18 Car. 1 [1643], mortgaged the Premises to the Plaintiff's Father for £2000, notwithstanding added a Deed Tripartite 1 April, 18 Car. 1 [1643], made by the said Sir Nicholas and Charles Keymeys, whereby the Defendant claims the Premises as the Heir in Tail of the Body of the said Charles, for that it is a meer voluntary Conveyance to the said Charles without Consideration, and for that there was a Proviso therein, that Sir Nicholas should have Power to charge the Premises with £2000 at any Time by Will or Deed, and the Conveyance made to the Plaintiff's Father ought to be, and is a good Execution of the Power according to the said Proviso; and in the Deed of Mortgage to the Plaintiff's Father there was a Covenant for the Payment of £2000 by Sir Nicholas and Sir Charles Keymeys to the [276] Plaintiff's Father; and that the subsequent Deed 22 Oct. 20 Car. 1 [1644], mentioning the Deed, Proviso and Power, doth not appoint any Person to levy the £2000 and to pay Debts, and Sir Charles

the Defendant's Father hath not paid near £2000 of the said Sir Nicholas's Debts, such as this Court will allow of and prefer before the Plaintiff's Debts.

The Defendant says, Sir Nicholas and Sir Charles were not seised in Fee of the Premises, for that Edward Keymeys, Uncle of Sir Nicholas, being seised thereof by Will, 8 Jan. 5 Jac. [1611] devised to David Keymeys, Son and Heir to Rees Keymeys, the Premises during Life, and after to his first Son and Heir Male of his Body, with Remainder to the said Nicholas for Life, and after to his first Son and the Heirs Male of his Body, and Sir Nicholas, the said David dying without Issue, entred, and was seised for Life, Remainder to his first Son and the Heirs Males of his Body with Remainder over, and on Marriage of Charles his Son the Plaintiff's Father with Blanch the Daughter of Lewis Mansel, and in Consideration of £2500 Portion, a Fine and Recovery was had of the Premises, and the said Deed Tripartite was to the Use of the said Sir Nicholas Keymeys for Life, Remainder to the Use of the said Charles, afterwards Sir [277] Charles, the Defendant, Sir Charles his Father, and the Heirs Males on the Body of Blanch, Remainder to the Body of Sir Charles (which the Defendant is), and so doth not claim by a voluntary Conveyance, the Portion and Marriage of Sir Charles being a Consideration extending to all his Issues, and in the Tripartite Deed there was a Proviso for the said Nicholas to charge the Land with £2000 as aforesaid, who charged the same accordingly, and not long after the said Sir Nicholas died indebted £2000 at least, which Sir Charles the Defendant's Father paid, so as the Lands ought not to be subject in Law or Equity to the Plaintiff's Demand, the rather for that the Plaintiff endeavoured to recover Possession in the Exchequer; but a Verdict was found for the Defendant's Title as Heir Male of his Father, and enjoyeth both by the Will of Edward Keymeys and the Settlement by the Tripartite Deed; and the Defendant insists, that the £2000 was not borrow'd by the said Nicholas and the said Charles, but by the Marquiss of Worcester, and they only secured it, as aforesaid.

The Plaintiff's Counsel agreeing this Case to be against the Plaintiff, the Court dismiss'd the Bill.

[Mews' Dig. Settlement, B. 1. S. C. 1 Ch. Ca. 103; 1 Lev. 150, 237. See *Newstead v. Scarles*, 1737, *West Temp.* Hardwicke, 292; 1 Atk. 265; *Goring v. Nash*, 1744, 3 Atk. 188; *Price v. Jenkins*, 1876, 4 Ch. D. 486.]

[278] GERRARD *con.* STANLEY & AL'.

19 Car. 2, f. 509 [1667-68].

Jurisdiction.

The Bill is, that the Defendants may discover their Title to certain Lands in the County of Lancaster, which the Plaintiff claims as Heir Male of Miles Gerrard; the Defendants having Possession claim by a Conveyance to one John Davis of London, and also a Title to the Defendant Margaret as Heir at Law to the said Miles Gerrard.

The Defendants plead the Jurisdiction and Privilege of the Counties Palatine of Chester and Lancaster, and that the Lands lie in the County Palatine of Lancaster, and that the Defendant by several Acts of Parliament ought not any where else to be impleaded.

This Court, upon reading of a Precedent produced by the Plaintiff against the Jurisdiction of the County Palatine of Chester, wherein was also cited several other Precedents to the Purpose: his Lordship, notwithstanding the said Precedent, declar'd the said Plea to be good as to the Title and Possession of the said Lands or for any Accounts of the Profits.

[279] DOM. GORGE *con.* DILLINGTON.

19 Car. 2, f. 730 [1667-68].

Mortgage.

That Sir W. Lisle mortgaged the Inheritance of the Manor of Appleford to Sir R. Dillington, the Defendant's Grandfather, by Way of Lease and Release, for £1000, in which there was a Proviso, That if the said Sir William Lisle, his Heirs or Assigns did not pay to the said Sir Robert, his Executors, Administrators or Assigns, the Sum of £1300 at Days therein limited, then the said Sir Robert and his Heirs to enjoy the mortgaged Premises, with a Covenant for farther Assurance to the said Sir Robert

and his Heirs, upon Non-payment of the said Money ; which said Mortgage was forfeited in the said Sir Robert the Grandfather's Life-time, whereby he had an absolute Estate of Inheritance therein, to him and his Heirs ; and thereupon the Defendant since the said Robert the Grandfather's Death (being his Heir) hath entred on the mortgaged Premisses, and hopes to enjoy the same, there being a large Personal Estate and no Debts.

But the Plaintiff the Executor insisted, that though the said Mortgage was made to the said Sir Robert the Grandfather and his Heirs, yet it ought to be accounted [280] Part of his Personal Estate, being made payable to him, his Executors, or Administrators, and a Covenant on the Mortgagor's Part to pay it to his Executors or Administrators, not mentioning his Heirs, not forfeited in Sir Robert's Life-time, and the Interest duly paid to the said Sir Robert the Grandfather in his Life-time, and the Heirs of the Mortgagor still in Possession.

The Defendant insists, it is proved, the Mortgage was forfeited in Sir Robert the Grandfather's Life-time, and therefore, where there is a Contest of this Nature between an Heir and an Executor or Administrator, and no Debts in the Case, and if there were, yet where there is no Defect of Assets, as there is not any in this Case, this Court doth never take it from the Heir, and producing a Precedent of this Court with the like Nature of this Case.

This Court conceived a clear Difference between the Cases, the Money being only made payable to the Executor or Administrator, and not to the Heir, and a Covenant to pay the same to the said Sir Robert the Grandfather, his Executor or Administrator, and the Interest-money paid during the Grandfather's Life, and no Entry made by the Grandfather, and the principal money not payable till Novemb. 1668, [281] but the Heir of the Mortgagor still in Possession, and the Interest-money paid since the Grandfather's Death, and being fully satisfied, that what hath been already received by the Defendant, on the said Mortgage, ought to be accounted as Part of the Personal Estate, and so ought to go to the Administrator of the Grandfather, and not to the Heir, and doth decree the same accordingly, and the Defendant is to convey the said mortgaged Premisses unto the Plaintiff and his Heirs.

And touching the £250 secured by a Lease for Years, in the Name of one Tucket, in Trust for Sir Robert the Grandfather ; the Defendant insisted, that a Lease was made, by the said Sir Robert the Grandfather, of Part of his Lands of Inheritance, to one Coleman for Years for a Fine of £250, for securing whereof the said Coleman did assign all his Term to the said Tucket, in which Assignment there was a Proviso for Payment of the Money to the said Sir Robert, or to his Heirs, Executors or Administrators, and the said Tucket accordingly declared the Trust for the said Sir Robert, his Heirs, Executors and Administrators, and hath, since the Death of the said Sir Robert the Grandfather, surrendered the said Lease to the Defendant, as Heir according to the said [282] Trust, the said Coleman not having paid his said Fine, and the Assignment being absolute in Law, and so the Defendant ought to enjoy the said Lands, without any Account for the said Fine ; but the Plaintiff insisted, and so it appeared to the Court, that Coleman being indebted £250 for a Fine, as aforesaid, secured the Payment thereof by Assignment of the said Lease to Tucket, under a Proviso to pay £250, and in Trust for the said Sir Robert the Grandfather, his Heirs, Executors or Administrators ; so the Plaintiff insisted, that if Tucket had surrendered to the Defendant, it is a Breach of Trust, in Regard it being a Chattel it belongs to the Administrator, and not to the Heir, and the Money secured belongs to the Plaintiff, and if any Surrender was made, it was after the Death of the said Sir Robert the Grandfather, or the Defendant's Administration granted to him *pendente lite*.

But the Defendant's Counsel insisted, that the Surrender was made before the Granting the Administration *pendente lite*, and produced a Surrender made by Tucket in September 1665.

This Court declared, that in Case Administration to the Defendant was before the Surrender, that then the Lease to Coleman cannot be thought to wait on the [283] Inheritance, but ought to go to the Administrator, for the Defendant had it as Administrator, and so took the Surrender as a Trust, and therefore in such Case ought to pay the £250 with Damages from the Time of Surrender, or else make a new Lease to the Plaintiff of the Premisses surrendered by Tucket, as effectual in Law as that which was made to Coleman, for the same Term, same Covenants and Rents as in the former Lease, and the Defendant to account for Profits by him received.

PIT *con.* PELHAM.

19 Car. 2. f. 875; 21 & 22 [1667-68].

Construction of a Will.

The Case is, That William Shirley in 1650, being seised in Fee-simple of Lands, upon his Marriage with Jane Heeked for her Jointure, settled the said Premises to the Use of himself and Jane, and the Heirs of their two Bodies; and for Want of such issue, to the right Heirs of the said William for ever. That in 1657, the said William having no Issue made his Will, and as to so much thereof as concerns the Matter in Question, devises in these Words (viz.), I appoint my dear Wife my sole Executrix, my Land at Blandford, which is my Wife's Jointure, I do confirm unto her, and after her Decease I do appoint it to be sold, and the Money that [284] is made thereof to be divided by equal Portions, amongst these four, namely, one Part to be disposed of by my Wife, the other three Parts are my Nephews, William Major, Ezra Shirley, and Jonadab Savage; I give to my Cousin Roger Higham £20, and in Case any of my three above named Nephews shall die before the Decease of my Wife, that then my Cousin Roger Higham shall have that Portion of Money, which upon the Selling of the Land at Blandford should have fallen to that Nephew. And the said Will, Shirley, five Days after the said Will made, died without Issue, and Jane his Wife proved the said Will and possessed the said Premises, and afterwards demised the same to the Plaintiff Pit, and the said Ezra Shirley died in the Life-time of the said Jane, and the said William Major in 1664, for £125 sold the said Premises and his Right and Interest therein, and all his Part and Share of Money, which he, his Executors, &c., might claim, or have out of the said Money to be raised by such Sale by Virtue of the said Will or otherwise, and covenanted for further Assurance; and the said Jonadab in like Manner sold his Interest to the said Pit, and the said Roger Higham, being intitled to a fourth Part of the Premises by the Death of the said Ezra Shirley, sold in like Manner all his Interest to the said Plaintiff [285] Pit, and with like Covenants as the said other Plaintiffs had done, and the said Jane for £300, secured to her by the said Plaintiff Pit payable after her Death, sold all her Interest in the said fourth Part of the Inheritance of the said Lands expectant after her Death, and her Share of what Money should be raised by the Sale thereof, and covenanted for further Assurance; and in 1666, the said Jane died having made her Will, and the said Roger Higham and one Harris Executors, who proved the said Will, and received the said £300, so that according to the said Will, Shirley's Will, the said Lands ought to be sold, there being a Trust raised thereupon for the Benefit of the said Major, Savage and Higham, and the Assignee of the said Jane; and thereupon the Plaintiff Pit, who is a Purchaser of all the other Plaintiffs Interest as aforesaid, and is also Assignee of the said Jane, seeks to have the Defendant Pelham and Mary his Wife, and Mabel Shirley (which said Mary and Mabel are Sisters and Co-heirs of the said Ezra Shirley, who was the Son and Heir of Ezra Shirley, Brother and Heir of the said William Shirley), to convey the said Premises to the Plaintiff Pit and his Heirs, the other Plaintiffs offering to join with them therein.

[286] But the Defendants insist, that if such Will was made, yet the said Defendants Co-heirs, not being therein appointed to sell or convey the said Premises, nor any Person by the said Will appointed particularly to sell the same, and the Lands not devised by the Will, but appointed to be sold; therefore the said Lands are well descended to the said Co-heirs, and they are neither in Law or Equity obliged to sell or convey the same, and submitted to the Judgment of this Court to do as this Court shall direct, in Case the Will be a good Will; and also insisted, that there was as good Equity in this Case for the Heir, as for the Devisees, and these Lands being descended on the Defendants as Heirs, they hope this Court will not compel them to disinherit themselves, and that the Plaintiffs Purchase was after a Suit commenced depending in this Court for the same Thing.

The Plaintiffs insisted, that the Will was a good Will at the Death of the said W. Shirley, and that the Lands were charged with a Trust to be sold, and that no Act since can invalidate the same, and that the said former Bill was only to preserve Testimony for proving the said Will, and the Plaintiff Pit being a real Purchaser in the Life-time of the said Jane, he hath a proper and equitable Suit in this Court [287] to have the said Will performed and the Trust executed.

This Court ordered a Case to be made upon the said Will, taking this to be a Case

of great Consequence and Weight in the Precedence of it, and admitting the said William Shirley was seised in Fee, and made such Will, and that the said Ezra Shirley, Brother of the Defendants Mary and Mabel, died in the Life-time of the said Jane, and that the Plaintiff Pit made such Purchases, as aforesaid.

This Court having perused Precedents in this Case, and advised with the Judges thereupon, declared his Opinion to be for the better Clearing of the Cause for his Determination, and ordered, that a Trial should be had at Law in a feigned Action by Wager. Whether Jane the Relict and Executrix of the said Will, Shirley had Power, and could by the Will have made Sale of the Lands in Question; and also in the next place, whether a Sale by her Executors (admitting such Sale to be actually made) be a good Sale. And in Pursuance thereof a Trial hath been had upon the Point aforesaid, and a Special Verdict thereon found, and several solemn Arguments and Debates thereof have been before the Judges of the Common Pleas, who have given Judgment therein for the Defendants, and the Cause coming again to [288] be heard on the Equity reserved before the Lord Keeper assisted with the Judges, and they having considered of the Precedents offered by the Plaintiff, and compared the same with the Case in Question, find great Difference between them and this Case, upon the Circumstances thereof.

This Court upon the whole Matter, the Will in Question being adjudged void in Law in the very Constitution thereof, saw no Cause or Colour to make good the same in Equity, and dismiss'd the Plaintiff's Bill; but declared this should not be a Precedent.

The Plaintiff appealed to the Lords in Parliament, who adjudg'd and resolv'd, that the Plaintiffs ought to be relieved, and ordered the Lord Keeper to set aside the said Dismission, and adjudged the Defendants, the Heirs at Law, to convey the said Premises to the Plaintiff Pit and his Heirs: Which this Court, in Obedience to the said Order, ordered accordingly.

Note; Purchasers are to be favoured in Equity. See [1] Eq. Abr. 353, 354, 355.

ARGUMENTS Proving from ANTIQUITY the Dignity, Power, and Jurisdiction of the COURT OF CHANCERY.

A Question being raised in the Court of King's Bench, Whether after a Judgment given at the Common Law, the Chancery could in any Case give Relief in Equity? Or, Whether it were not debarred thereof by the Statutes of 27 E. 3, cap. 1, and of 4 H. 4, cap. 23. King James taking Notice of that Difference (and taking himself to be the Judge of the Jurisdictions of his Courts of Justice) did seriously advise thereupon with his Learned Counsel, upon whose Opinions [2] and Certificate, he did give Judgment for the Chancery; and accordingly all Things were in Peace. The Chancery Court went on in the Times of the Lord Ellesmere, Lord St. Albans, Lord Coventry, and all others that were Lord Keepers of the Great Seal of England ever since (as it had formerly done). And (Lord Coke) the then Lord Chief Justice of the King's Bench did never question that Judgment, although he lived many Years after, and was of four Parliaments, wherein he had both Opportunity and Power to have done it, if he had not known that Judgment to have been given according to Justice and the Laws of the Realm; but he desisted, and did openly profess before the Lords of the Privy Council, That he would not maintain a Difference between the two Courts, nor bring it into question, whereof Entry was made in the Council-Book 26 Junii, 1616.

Notwithstanding the Publisher of his third and fourth Books of the Institutes finding (as it should seem) some old Notes collected, when the Question was on Foot and undecided, hath taken the Boldness to print them long after the Author's Death, and therein hath made him to question all again, by mentioning many Cases, wherein divers Persons had been indicted in Præmunire upon the Statute of 27 E. 3, [3] for seeking Relief in Chancery after Judgments given between the Parties at the Common Law, and concluding with [See a Privy Seal to the contrary, 18 Julii, 1616, obtained by the Importunity of the Lord Chancellor, being vehemently afraid: *Sed judicandum est legibus*, and no Precedent can prevail against an Act of Parliament. And Besides, the supposed Precedents (which we have seen) are not Authentical, being most in torn Papers, the rest of no Credit]. Thus far he; wherein,

To omit how prejudicial it would be to the whole Kingdom, if that rule were infallible, That no Precedent or Prescription, Usage or Custom (as some have said) should prevail against an Act of Parliament, and the Distractions it might make in Mens Inheritances, if other Statutes should be so stood upon: And to omit likewise the little Respect used to his said Majesty's Judgment, and the little Charity shew'd to the Lord Chancellor (dead long before) that he should be said to have procured that Judgment by Importunity, being vehemently afraid (though it is more probable the fear was elsewhere); yet seeing, that the Authority of such an Author may have given Occasion (to some) not only to question, but to censure that Judgment, as if it were of dangerous Consequence, because the [4] Judges were not called to it; and that the King's Learned Counsel (who made that Certificate to his said Majesty) were great Practicers in Chancery, and spoke for their own Ends, that the Chancery (when the Statute of 4 H. 4, was made) was no Court to relieve in Point of Equity: And the more ordinary the Chancery was, the more Mischief there was; and that there is no need of a Chancery. The Judges (can and) in all Ages have judged in Equity; and that the Chancery is but an *Officina* only to prepare Writs for the Common Law Courts to proceed upon, &c.

³ In Answer to all which it will be requisite to consider,

I. First, The Office, Dignity and Necessity of Chancellors and Chancery Courts anciently in other Commonwealths and Kingdoms, and with us.

II. Secondly, The Certificate of King James's Learned Counsel to his said Majesty, with Reasons therein expressed.

1. First, In (ancient) Rome the Pretors had Power, by the Law Prætoria, to supply and correct Laws, Varro Lib. 5, de ling. Lat. And by the Law Cornelia, they were [5] punished if they did not judge according to Equity. Cicero Phil. 2.

In the Empire it was said to the Chancellor, *Fasces tibi Judicium parent, & dum jussa Prætorianæ Sedis portare crederis, ipsam quodammodo potestatem reverendus assumis*: And *Persona tua refugium sit oppresso, infirmo defensor, præsidium aliqua calamitate concluso*; sic enim proprie nostros Cancellos agitis, si laserum impia claustra solvatis. See Spelman's Gloss, pag. 126, for which he citeth Cassiodore, lib. 12, formul. 1, who wrote above 1200 Years since.

Besides, all Kingdoms, Commonwealths, Principalities (and subjects also that had *Jura Regalia*) in all Ages have had their Chanceries and Chancellors. The Counties Palatine in England have them to this day: Chester, Lancaster, Durham, &c. The Earls of Pembroke, the Lords of Glamorgan, and other Lords Marchers had their Chanceries and Chancellors before the Statute of Wales, 27 H. 8.

But for the Antiquity and Dignity of the Chancery Court and Chancellor of England, it is observed, that Wilsinus was Chancellor to King Athelstane (for so he is called in a Charter granted to the Abbey of Malmesbury; that Turketulus was Chancellor to King Edward the Elder, and to King Edmund and Edred (Ingulphus) Adulphus to King Edgar, Alsius [6] Abbot of Ely to King Etheldred, who did ordain and grant, that the Church of Ely should then and always hold the Dignity of Chancellor in the King's Court, Histor. Eliens. That King Alfred had a Court of Chancery, 4 Institut. out of the Mirror, cap. 1, sect. 3, and cap. 5, who saith, That it was ordain'd by King Alfred in Parliament, that every Man should have a Writ Remedial out of the King's Chancery, which it may be the Author of that Book (Andrew Horn) meant of such a Course to send for the Parties, as was then used; for if he meant Writs under Seals, as they issued out of the Chancery in King Edward the Second's Time when he wrote, clearly he was mistaken; for there could be no Writs under Seals in King Alfred's Days, neither he nor any of those former Saxon Kings using any; for Seals came in with the Normans. The Saxon Kings Manner was to subscribe their Names and Crosses to Charters, Ingulphus, Cambden 444. Selden, Titles of Honour 785. Some have said that King Edward the Confessor used a Seal, and that his Chancellor had the Custody of it; but that he learned in Normandy, having lived long there before he was King; and then it must necessarily follow, that the former Kings having no Seals, there was some other [7] Use of a Chancellor, and of a Court of Chancery in those Days (if there were a Chancery distinct from the King's Court, which cannot be shewed): For in those Days there were no other Courts but the Sheriff's Court in the Counties, and the King's great Court in Aula Regis, where the Chief Justice of England, the Chancellor, and the Prelates and Earls were the Judges, (whence only those Remedial Writs issued) then to be an Officina only to seal Writs and Commissions for the Law Courts to proceed upon, when neither Seals nor Writs were used, nor any such Courts as now in Westminster-Hall. And what other Use could there be of that Court, or what could there be to denominate them Chancellors; but (as it is said before of the Chancellor under the Emperors) to relieve the distressed, to defend the Weak, to be a Refuge for the Wronged, and to loose the wicked Bands, wherewith the poor guiltless Man was oppressed by the Rigour of the Laws, which is a lively Description of the Office of the Lord Chancellor at this Day, and for which Cause (saith one) a Chancery was ordained.

Mr. Lambert speaking of the Court of Chancery saith, That whensoever this Court of Equity did first begin to be a distinct Court, the Power thereof was [8] always in Exercise; and by a Comparison of two Herbs, which of themselves are poison, but mingled together do make a wholesome Medicine, he sheweth the necessity of Courts of Equity, as well as of those of the Laws: for further Proof hereof, it will be requisite, that we look higher how the Laws were administered in this Kingdom in former Times.

It is apparent that in the Saxon Times, the ordinary Courts of Justice were kept in the several Counties and Hundreds, where the Senator or Alderman, Greve or Sheriff, with the Bishop or his Arch-Deacon were the Judges, *Quorum alter Jura Divina, alter humana populum edocet*. Vide Leg. Edgari, cap. 5, & Leg. Canuti,

cap. 16, 17. In some Cases the Bishop was the sole Judge, as *in causa fractionis fidei* (which is a Case of Breach of Promise, and of Trust, now relieved in Chancery) *Vid. Leg. Alfredi*, cap. 1. In some cases the Senator, &c. was sole Judge; in some Cases both were Judges; of the Bishop's Power, see *Leg. Edwardi Confessoris*, cap. 3, 5, 7. If any man found himself aggrieved with the Judgments in those Courts, he might appeal to the King himself, *Leg. Edgari*, cap. 2. *Nemo in lite Regem appellato, nisi quia in Law Justitiam consequi aut impetrare non poterit, sin summo jure domi utatur ad* [9] *Repon, ut is locus aliqua ex parte allevit, provocato*, which is plain, that the King will relieve him in Equity after Judgment, which it seemeth was done by his Chancellor, who always was a Clergyman in the Great Court in Aula Regis.

William the Conqueror made an Alteration in those Courts; for by his Charter to Remigius (the last Bishop of Dorchester, and first of Lincoln) he did ordain, That no Bishop or Archdeacon should hold any more Pleas in the Hundred, nor should bring any Cause which concerned the Government of Souls to the Judgment of Secular Men; but that the Bishops should judge of such Causes themselves in such Places as they should appoint; and that no Sheriff, Greve or Officer of the King's, nor any Laymen should intermeddle with any Laws which did belong to the Bishop. *Vid. Selden Not. ad Eadmer*, pag. 167, 168, where many Authorities for that Charter are cited; yet afterwards the Bishops did continue to sit in the County-Courts, as appeareth by the Laws of H. 1, cap. 7, & 31. But it was not long before they did erect their Consistories by Virtue of that Charter of William the First. And then the Relief of Equity and Conscience in the Courts of the Counties and Hundreds ceased, and remained after in the King's [10] highest Court in Aula Regis, out of which Court of Aula Regis the four Courts of Westminster, Chancery, King's Bench, Common Pleas and Exchequer, were derived; and the Kings have ever since in their Courts of Chancery justified and relieved their Subjects from the Rigour and Extremity of Law by the Rules of Equity and Conscience, to which the Kings of this Land are sworn, as well as to do Justice according to the Laws. See *Leges Edwardi Confessoris*, cap. 17, and King Richard the First's Oath in Hoveden fo. 374, and Bracton lib. 3, cap. 9, sect. 1, 2, where he saith, That the King's Oath is to judge in all Things according to Equity and Mercy. And Rastall has the same in French in his Abridgment of the Statutes printed 1528. The Words are, *Que il face fair en toutz fez jugemens owel & droit Justice ove discreccion & misericordie*. See also Walsingham pag. 193, of King Richard the Second's Oath, whereby it appeareth, that the Kings of this Realm are bound by their Oaths to administer Justice with Discretion and Mercy, which cannot be done when Extremities of Forfeitures and Breaches of Trust may not be examined, and the Parties relieved because of a precedent Judgment.

These four Courts (then included in one Court, call'd Aula Regis) did follow the King's Court; whereupon they were [11] afterwards called Courts; but by the great Charter granted by King John, and after by King Henry the Third, (in the third Year of his Reign) which he renew'd with some Alterations in the ninth Year, being the eighteenth Year of his Age, The Common Pleas was appointed to be holden in a Place certain, and not to follow the King's Court; yet the Chancellors and Judges of the King's Bench did long after follow the King's Court, as appeareth by the Stat. Articuli super Chartas, 28 E. 1, c. 7.

But King Edward the First being weary of the great Power of the Chief Justice of England (and willing to be rid of him) did appoint more to be Judges of Criminal Causes. And then the King's Bench began to be a distinct Court, and the Law to be a Profession and a Study, and Students of the Laws to be Pleaders and Judges. Pleadings (saith Sir Edward Coke, 1 Inst. 304, b) came to Perfection in Edward the Third's Time, if that may be called Perfection, which hath been the Cause of many Suits, and that many have lost their Lands by omitting or mistaking a Word in Pleading, when otherwise they had good Right. For *Legis verbosae lites plurimae*: And then the Chancery and Exchequer also came to be several Courts. General Custom (saith the Doctor and Student) [12] is the Ground of the Courts of Chancery, King's Bench, Common Pleas, and Exchequer, lib. 1, cap. 7.

But the Authority of the Chief Justice being now divided amongst many, who are equal Judges in the King's Bench, could not make that Court greater than it was before: And the Reason alledged, that it should be superior to the Chancery, because it hath the Stile of *coram Rege*, whereas the Chancery Stile is *coram Rege in Cancellaria*, and *Additio probat Minoritatem* seemeth trivial; for neither was the Stile

of the King's Bench Court (when it was in the Chief Justice alone) always *coram Rege* without Addition, but sometimes *coram Rege de tempore Hugonis Bygod Justiciarii Angliæ*; and sometimes *coram Hugone Bygod Justiciario Angliæ*, not *coram Rege*, 44 H. 3. Notes upon Fortescue, pag. 5.

Neither doth the Rule always hold, that *Additio probat Minoritatem*, unless it be *Respectu ejus cujus est additio*. For this Addition is not in Respect of the King's Bench, but in Respect of the King's Council, after called the Star chamber, because they sate in a Chamber so called.

For Writs issuing out of the Chancery (of the same form, and under the same Seal) returnable some before the Council, some in Chancery, there was a [13] Necessity to make a Difference in the Returns; otherwise no Man could have known where to have appeared; and the Appearances before the Council being *coram Rege & Concilio*, the other must mention the Chancery, in which Respect that Addition was made, and not in Respect of the King's Bench; and sometimes the Appearances in Chancery were *coram Rege* without Addition, Vide Stat. 1 E. 3, cap. 9. And by the same Rule the King's Bench would be above the Star-chamber also, because the Stile of that Court is *coram Rege & Concilio*, which is an Addition.

But for a truer Mark of Superiority the Chancellor is *Secundus a Rege*. The Teste of the Chancery is *Meipso*, whereas the Teste of the King's Bench is *Johanne Brampton Milite*.

And it cannot be denied, but that the Lord Chancellor is above all Judges of the Laws, both here, in France and elsewhere. The Lord Mayor of London is presented to him as to the Chief Justice of England. He giveth the Oath to all the Judges. And 20 E. cap. 3, it is ordained by the King, &c. That all Justices of Oyer and Terminer, and all Justices of Assizes and Gaol-Delivery and their Associates shall first make such Oath in certain Points, as to them shall be enjoind [14] by the King's Council in Chancery, before their Commissions be delivered to them.

I hope it will not be said, but that Precedent and Usage (may and hath) prevail'd against this Act: for there is no such Oath now taken, either by the Justices of Oyer and Terminer, nor by the Justices of Assizes, nor their Associates.

And farther, the Lord Chancellor admitteth all the Judges into their Places, and sitteth above them in their own Courts; calleth the Chief Justices themselves to assist him in Chancery, as the Lord Coventry did the Lord Bramston, where he had no Voice, but was an Assistant only. And when all the Judges are assembled in the Exchequer-Chamber, the Lord Chancellor sitteth above them, and delivereth his Opinion: So did the Lord Ellesmere in the Case of the Postnati. He granteth Injunctions to stay the Proceedings of that and the other Courts. Besides, if the Lord Chancellor did not grant out Writs, the Courts of Common Pleas and King's Bench would sit still and have nothing to do. And before the Statute of Magna Charta he used to deny them; nor did he grant any Writs then but upon great Fines: (Doctor and Student cap. 8). Some of which Fines had been before that Time moderated by King John by his Charter 7 Febr. Ann. 1, in libro Chartarum Archiepiscopi [15] Cant. And if the Register be the most ancient Book of the Law (as it is said 4 Institut. 140, out of *Natura Brevium*) it will follow, that the Chancery is the most ancient Court; for all those Writs were framed and sealed in the Chancery, and without such Writs those other Courts could not proceed. And the Mirror saith, That Cases were judged according to Equity, before the Customs of the Realm were written and made certain, cap. 1, sect. 3.

By all which it followeth, That the Chancery is the Superior Court.

Nor let it be said, That there is no need of a Chancery, because that the Judges (can and) in all Ages have judged in Equity: For although no Man did ever doubt of their Abilities; yet that they ever did judge in Equity (otherwise than as by Commission when they sit in Chancery) or that there is any Remedy at Law by a Writ of Error after Judgment for Equity, is more than can be shewed; certainly such a Writ was never sealed in the Chancery; but that Saying sheweth, that there is need of a Chancery, and of Equity after Judgments at Law, and then the Question will be (not of the Thing, but) who shall be Judges of it. And that certainly is fittest to go as it was wont (as Jupiter said of the Weather) and [16] not now to be transferred to a new Judicature.

And if the Judges should be made Chancellors, how would they execute that Power? Can they examine any Man upon Oath, whether he have received all (or Part of) his

Money upon a Bond or Mortgage? Or whether he have broken a Trust? And will they examine Witnesses *ex officio*; or grant Commissions into the Country? And how shall those be published? And if they should do all this, were not this to erect a Court of Chancery in themselves, and to confound the Courts of Equity and Law together? It might better be said, that there is no need of Trials by Juries: For Trials for Criminal Causes were by Ordeal till H. 3. And then because a General Council had taken away that kind of Trial, the King wrote to the Justices Itinerants to punish some, leaving it to their Discretions how to proceed against such other Offenders. And certainly the Lord Chancellor and that Court are as able to judge a Cause upon hearing of Witnesses, as twelve Country Jurors. No other Countries have any such Trials; but there is no Country but hath Chancellors and Courts of Equity to mitigate the Rigour of their Laws, which Rigour cannot appear till Judgment be passed: for before the Case [17] be adjudged, who can know whether the Law be rigorous or no? If therefore after Judgment there shall be no Remedy, then the Rigour of the Law cannot be mitigated, which were not, *Suum cuique tribuere*; but rather *Discedere ab aequitate, sequendo subtilitates*.

And as to the Objection, that by this Statute providing against a Superior Court, viz. the Parliament, all Inferiors are comprehended, to which End the Archbishop of Canterbury's Case upon the Statute of 13 Eliz. was alledged. And as to the other, that it is an Absurdity to say, That the King is within this Statute and the Parliament, and not the Chancery: It may be answered, That it is no general Rule, that because an Act is made against a Superior it should therefore bind all Inferiors; for the Statute of 1 Eliz. That no Archbishop or Bishop should alien to any Subject, did not extend to Prebends, Parsons, &c. though they were inferior and subordinate to the other. But the Case of the Archbishop of Canterbury was (*e converso*) that the Superior was not bound by an Act made against an Inferior, as may appear by the Acts of 31 H. 8, 13 Eliz. and of Westm. 2, therein mentioned.

Neither is there any Absurdity at all; for if the King assenting to that Act had meant to abridge the Chancery, it is [18] probable the Chancery would have been named in it; but the King intending, that that Act should only extend to Pleas of the Crown, by the Words (Plee roial) there was no Necessity of naming the Chancery that meddled with no such Pleas; and in other Pleas, neither the King nor Parliament are bound by this Statute, as may appear by the continual Practice ever since.

And where it is said, That the more ordinary the Chancery is, the more Mischief there is; so it is said, the more Physicians the more Diseases; yet the Diseases are not in the Physicians, nor the Mischiefs in the Chancery: They are in the Multiplying of Wickedness, and that Men seek to take Advantages by Extremities of Law, which the Chancery doth remove or mitigate by the Rules of Equity.

Of the Necessity of the Court of Chancery, see more hereafter, where the Inconveniencies (if it should not relieve after Judgments) are mentioned.

2. Secondly, concerning the Certificate, and the Persons and Qualities of the Referees: they are all known to be of great Worth and Learning, great Practicers in the Law Courts as well as in Chancery, and very shortly after were advanced to [19] the chiefest Places in both; they were all then of his Majesty's Learned Counsel, and one of his Privy Council sworn to give the King true and faithful Counsel, when they should be required; and in this Case they were required, and had time to deliberate, and they did return their Opinions to his Majesty under all their Hands, which do remain. And can any Man think that they (being Men of such Note) would in such a Case, as concerned the Jurisdiction and Proceedings in this High Court of Chancery (whereof his Majesty himself was to give Judgment) Respect their Practice in Chancery, and their own Ends before their Reputations, Allegiance and Oaths to his Majesty? For they were as much sworn to give their Opinions (in this Case) truly and faithfully, as the Judges are when they deliver their Opinions in Parliament, or when they go their Circuits, or sit in Chancery.

Neither was the Consequence so dangerous in that the Judges were not called to it, for it was a Question of Jurisdiction of Courts; and if Judges should judge of Jurisdictions they might bring all under themselves; therefore neither the Judges, nor the Lord Chancellor, nor any of the Chancery were advised with (for they might be taken to be Parties) but the King did advise with his Learned Counsel, who were [20] indifferent, and sworn to give him faithful Counsel (as is said). And he was a judicious King, and knew best with whom it was fittest to advise.

As concerning the Certificate, it will not be amiss to set down the Substance of the whole Proceedings therein, and the Reasons and Principles of Law, which the said Referees expressed and delivered to his said Majesty as they are recorded.

His said Majesty being informed of this Difference between his two Courts of Chancery and King's Bench, and being informed that there were many Precedents in the Chancery in the times of King Henry VII. and continually since, whereof a Note was delivered to his said Majesty, That such as complained there to be relieved in Equity after Judgments at Common Law, (in Cases where the Judges could not relieve them) directed, That his Attorney General, calling to him the Rest of his Learned Counsel, should peruse the said Precedents, and certify his Majesty the Truth thereof with their Opinions.

Whereupon they returned to his Majesty this Answer as followeth :

According to your Majesty's Commandment we have advisedly considered of the Note delivered unto us of the Precedents of Complainings and Proceedings [21] in Chancery after Judgments at Common Law ; and have also seen and perused the Originals, out of which the same Note was abstracted ; upon all which we do find and observe the Points following.

1. We find the same Note is fully verified and maintained by the Originals.

2. We find, that there hath been a strong Current of Practice of Proceeding in Chancery after Judgment, and many Times after Execution, continued from the Beginning of King Henry VII.'s Reign unto the Time of the Lord Chancellor that now is, both in the Reigns *separatim* of the several Kings, and in the Times of the several Chancellors, whereof divers were great Learned Men in the Law, it being in Cases where there is no Remedy for the Subject by the first Course of the Common Law, unto which the Judges are sworn.

3. We find, That the Proceeding in Chancery hath been after Judgment in Actions of several Natures, as well Real as Personal.

4. We find, it hath been after Judgment in your Majesty's several Courts, the King's Bench, Common Pleas, Justice in Eyre.

5. We find, it hath been after Judgment obtained upon Verdict, Demurrers, and where Writs of Error have been brought.

[22] 6. We find in many of the Causes, that the said Judgments are expressly mentioned in the Bills in the Chancery themselves to have been given, and Relief pray'd thereupon sometimes for Stay of Execution, sometimes after Execution, of which Kind we find a great Number in King Henry the VII.'s Time.

7. We find the Matter in Equity laid in such Bills, in most of the Cases, to have been Matter precedent before the said Judgment, and not Matter of Agreement after.

8. We find in the Cases, not only the Bill preferred, but Motions, Orders and Injunctions, and Decrees thereupon for Discharging and Releasing of the Judgments, or Avoiding the Possession thereupon obtain'd ; and sometimes for the mean Profits, and the Release of the Costs, &c.

9. We find in some of the Cases, that this very Point (that Judgment hath been given) hath been stood upon by the Defendants, and alledged by them by Way of Demurrer, and over-ruled.

10. We find, that the Judges themselves in their own Courts, when there appeared unto them Matters of Equity, because they by their Oath and Office could not stay the Judgment, (except it were some small Time) have directed the Parties to seek Relief in Chancery.

[23] 11. We find, that it hath not only been done in the Times of the several Chancellors, but by the Judges themselves, and that without Difficulty, while they sate in Chancery in the Vacancy or Absence of the Chancellor.

12. We find, the Hands of sundry principal Counsellors at Law, whereof divers of them are not Judges, and some of them now in chief Place, to Bills in this Kind.

13. Lastly, There were offered to be shewed unto us many other Precedents, whereof we heard some read, and found them to be of like Nature with those contain'd in the Note.

And afterwards a Case was presented to his Majesty as followeth.

THE CASE.

A. hath a Judgment and Execution in the King's Bench or Common Pleas against B. in an Action of Debt of £1000, and in an *Ejectione Firmæ* of the Manor of D. B.

complains in the Chancery to be relieved against these Judgments according to Equity and Conscience, allowing the Judgment to be lawful and good by the Rigour and strict Rules of the Law, and the Matter in Equity to be such, as the Judges of the Common Law being no Judges of [24] Equity, but bound by their Oaths to do the Law, cannot give any Remedy or Relief for the same, either by Error or Attaint, or by any other Means.

QUESTION.

Whether the Chancery may relieve B. in this or such like Cases, or else leave him utterly remediless and undone? And if the Chancery be restrained herein by any Statute of Præmunire, then by what Statute, and by what Words in any Statute is the Chancery so restrained, and Conscience and Equity excluded, banished and damned?

Which Case his Majesty referred again to his said Attorney and Learned Counsel, calling to them the Prince's Attorney, who returned this Answer.

According to your Majesty's Commandment we have deliberately advised of the Case sent unto us by the Lord Chancellor, and of the Statutes, as well those of Præmunire as others, as far as (we take it) may concern the Case. And for our better Information herein, we have thought fit to send for, and peruse the Original Records themselves remaining in the Tower of London, of those Statutes not only [25] appearing upon the Rolls, but also upon the Original Roll of Petitions in Parliament, with the King's Answers, which is the Warrant to the Rolls of Parliament. We have taken into Consideration as well Book Law, as divers other Acts of Parliament, which may give Light unto the Statute, whereupon the Question properly grows, together with such ancient Records and Precedents as we could find, as well those which maintain the Authority of the Chancery, as those which seem to impeach the same. And upon the whole Matter we are all of opinion, That the Chancery may give Relief in the Case in Question; and that no Statute of Præmunire or other Statute restraineth the same.

And because we know not, what Use your Majesty will be pleased to make of this our Opinion, either for the Time present or future, we are willing to shew some Reasons of the same, not thinking fit to trouble your Majesty with all those Things, whereupon we have grounded our selves, but selecting but some principal Things which moved us to be of this our Opinion, to the End the same may be a fuller Object of your Majesty's Princely Judgment, whereunto we always submit ourselves.

[26] And first of all, we must lay for a sure Foundation that which was contained in our former Certificate, concerning the continual Practice by the Space of six-score Years, in the Times of King Henry VII., King Henry VIII., King Edward VI., Queen Mary and Queen Elizabeth, of this Authority; and that not only in those Times, when the Authority was managed by the Bishops, which might be thought less skilful or less affectionate towards the Laws of the Land, but also by divers great Lawyers, which could not but both know and honour the Laws as the Means of their Advancement; Sir Thomas Moor, the Lord Audley, the Lord Rich, Sir Nicholas Bacon, Sir Thomas Bromley, Sir John Pickering.

And further, that most of the late Judges of the Kingdom, either as Judges, when they sit in Chancery by Commission, or as Counsellors at Law, when they did set their Hands to Bills, have by their Judgment and Counsel upheld the same Authority. And therefore, forasmuch as it is a true Ground, that *Optimus Legum Interpres est Consuetudo*, especially when the Practice or Custom passeth not among vulgar Persons, but among the most high and scient Magistrates of the Kingdom; and when also the Practising of the same should lie under so heavy Pain as [27] Præmunire, this is unto us a Principle and most implicate Satisfaction, That those Statutes ought not to be construed to extend to this Case. And this of it self we know is of far more Force to move your Majesty than any Opinion of ours, because Kings are fittest to inform Kings, Chancellors to teach Chancellors, and Judges to teach Judges.

But of our Science and Profession we have thought fit to add to these farther Reasons and Proofs very briefly, because in so ancient a Possession of Jurisdiction we hold it not fit to amplify.

The Statutes, upon which this Question grows, are principally two: whereof one is the Statute of Præmunire, and the other is a Statute of simple Prohibition. That of Præmunire is that of 27 E. 3. cap. 1. The Statute of simple Prohibition is the Statute of 4 H. 4. cap. 23. There be divers other Statutes of both Kinds, but the Question will rest principally upon these two, as we conceive.

For the Statute of 27 E. 3. It cannot in our Opinions extend, unto the Chancery, for these Reasons.

1. First, Out of the Mischief, which the Statute provides for and recites, viz. That such Suits and Pleas, against which the Statute is provided, were in Prejudice [28] and Disinherison of the King and his Crown, which cannot be applied to the Chancery; for the King cannot be disinherited of Jurisdiction, but either by the Foreigner or by the Subject, but never by his own Court.

2. Out of the Remedy which the Statute appoints, viz. That the Offender shall be warned within two Months to be before the King and his Council, or in Chancery, or before the King's Justices of the one Bench or the other. &c. by which Words it is opposite in its self, that the Chancery shall give both the Offence and the Remedy.

3. Out of the Penalty, which is not only severe, but hostile, namely, the Offender shall be put out of the King's Protection; which Penalty altogether savours of adhering to foreign Jurisdiction, and would never have been inflicted upon an Excess only of Jurisdiction in any of the King's Courts, as the Court of Chancery.

4. Out of the Statutes precedent and subsequent, as 25 E. 3, cap. 1. and 16 R. 2, cap. 5, which are of the same Nature, and cannot be applied but to Foreign Courts; for the Word [*Alibi*] or [*Elsewhere*] is never used but where Rome is named, especially before the Disjunctive in this Statute, which only gives the Colour, [29] viz. That they which draw any out of the Realm, in Plea whereof the Cognizance pertaineth to the King's Court, or of Things whereof Judgments be given in the King's Court, or which do sue in any other Court, to impeach the Judgments given in the King's Court. This last Disjunctive, we say, which must go farther than Courts out of the Realm, which are fully provided for (by the former Branch) hath sufficient Matter to work upon in Respect of such Courts, which though they were locally within the Realm, yet in Jurisdiction were subordinate to the Foreign, such as were the Legate's Court, the Delegates Court, and in general all the Ecclesiastical Courts at that Time, as it is expressly construed by the Judges, in 5 E. 4, fo. 6.

5. In this, The Sight of the Record of the Petition doth clear the Doubt, where the Subjects do supplicate to the King to ordain a Remedy against those, which pursue in other Courts, than in his own, against Judgments given in his Court, which explains the Word [other] to be other than the King's Court.

6. With this agrees notably the Book of Entries, which translates the Words in other Court, not [*in alia Cur'*] sed in [*aliena Curia*].

[30] 7. This Statute of 27 E. 3, being in Corroboration of the Common Law, as it self recites, we do not find in the Register and Precedent of the Writ. *Ad Cur' Regis*, which are framed upon these Cases, that were afterwards made penal by Præmunire, but only against the Ecclesiastical Courts.

8. Lastly, We have not found any Precedent at all of any Condition upon the Statutes of Præmunire of this Nature for Suits in Chancery, but only two or three Bills of Indictment preferred, *Sed nihil inde venit* for ought appears to us.

To which Reasons there is no Answer at all given (in those Institutes) nor Notice taken of them, but of the Privy Seal for the Inrollment of King James' Judgment grounded upon them, which appears to be twenty-eight Years before the Publishing of those Books (so long that Judgment rested in Peace) only against the last Reason there is Mention made of some Indictments preferred upon this Statute, viz. against Heydon, Lloyd, Dewse, Heale; but they do rather confirm than refute that Reason; for it is not said *Quid inde venit*. There is no Precedent alledged of any Conviction upon those Indictments; and a Man that is indicted is not therefore guilty. And as to the other against Sir [31] Anth. Mildmay, who in the said Institutes (is said to have purchased) and pleaded his Pardon: That doth not prove him guilty neither; for any Man that hath a Coronation or Parliament Pardon will rather plead it than be troubled with a wrangling Adversary; or will purchase a Pardon rather than run so great a Danger, as the Penalty of a Præmunire, upon the Verdict of twelve Men, when he is doubtful that the Judge's Opinion may be against him, and that he would declare the Law to be so.

And farther, it is observable, That this Statute is not fully recited in those Institutes, for it ends at these Words [*Eient jour*] so the Clause of the Remedy, which is to be given by the Chancery, which followeth, and is mentioned in the second Reason, is not recited; although the Remedy, which is to be given by the Judges, is recited afterwards in the same Chapter, pag. 125.

Neither are the Words [*in autri Court*] well translated, for they do not signify (as it is there) [in any Court] where the Word [any] is added more than is in the Original; but [In the Court of another] [*In alterius Curia*] for [*autri*] cannot agree with Court, they differ both in Case and Gender. The same Word is used in the Laws of William the First, [32] cap. 11. *Ki alteri spouse purgist; Qui sponsam alterius viliaverit* not [*aliam*]. And cap. 33. *Li naifs qui departes de sa terre dunt il est nez event a autri terre, nuls nel otent, &c. Nativus qui discedit a terra ubi natus est, & venit ad terram alterius, nullas cum retineat.* And again in the same Chapter in the same Sense. And 14 E. 3. cap. 2. *Presentments que nous serrent devolutz en autri droit.* And 25 E. 3. cap. 1. bis. and cap. 2. *Que le Roy ne prendroit title a presenter a nully Benefice en autri droit, &c.* That the King will not take Title to present in the Right of another Man, &c. And in many other Places; but it is always understood [of another] not [any other] as is there translated: And then the Sense must be, That whosoever shall sue in another Man's Court than the King's, shall, &c. which no Doubt was the Intent of this Statute, as is touched in the Fifth and Sixth Reasons, to which there is no Answer given.

And so the Chancery (being the King's Court, and not the Court of another) cannot be within this Statute, no more than the King's Bench. For Judgments given in the Common Pleas are examined and Reversed by Writ of Error in the King's Bench; but Writs of Error (nor Attaints) being excepted out of this Statute, the [33] King's Bench should fall within it, as well as the Chancery, or any other of the King's Courts.

And if it be said that the former Judgment was no legal Judgment, because it is reversed upon Matter appearing upon the Record, and so ought not to have been judged at all; yet it was a Judgment given in the King's Court, and (by the Construction of this Statute) it ought not to be questioned or overthrown in any other Court. The Consideration thereof made those to look about them, when they saw themselves not unlike to fall into the Pit which they went about to dig for others, whereof they shewed more Fear than the Chancellor did, as appears by the coming off.

So the Chancery and all other Courts within the Realm (except such as were subordinate to the Court of Rome, which were the Courts of another, not of the King) being cleared from this Statute;

The other Statute of 4 H. 4. cap. 22. doth follow to be considered; and therein it will not be impertinent,

1. First, To recite a former Petition of the Commons in the same Parliament, to which Part of the King's Answer (to this Petition) doth relate, and likewise the Statute it self.

[34] 2. Secondly, The Reasons given to King James by the said Referees of their Opinions upon this Statute, and his said Majesty's Judgment upon both Statutes.

3. Thirdly, Some farther Observations upon this Statute, upon which the said Referees might ground their Opinions, tho' they did, as they say, forbear to express them.

The Petition and the Statutes (as they are upon the Parliament Rolls, and) as the Statute is in Print, both in the French and English, are as followeth.

ROT' PARLIAMENTI DE ANNO REGIS HENRICI QUARTI QUARTO.

Item Priont les Co'es que come en les Estatutes faitz a Westm' l'an' de Regne le Roy axel nostre Seignior le Roy que ore est l'an' de son Regne XXV. entre autres estoit ordeigne que null y delers soit pris per petition ou suggestion fait a nostre Seignior le Roy ou son Conseil, si ceo ne soit per enditement des loialx gents de la visne ou tiel l'art si fist en deue manere ou process fait per brieve original ne oust de son franketem't si ne soit mesme dument en response et forigne duel per force de ley. Et outre ceo en l'Estatutz faitz a Westm' l'an' de Regne mesme le Roy [35] Edward XLII. est essentu et accorde par bone governance de la Co'e que nul ho'e soit mis a respondre sans presentment devant Justices ou chose de Record ou per deve processe et brieve original selonc l'ancien Ley de la terre et si rien desore enevant soit fait l'encontre soit void en Ley et tenuz par null' mes par Error Et non obstant quel estatut' puis encea plusors de vouz liegez ount este grevez per diverses briefes et l'es ascuns per simples suggestions sans autres chose trove issauntz hors de la Chancellary sur certain peine comise en y ceux de comperer devant voz en v're Cancellarie ou Conseil ascuns per briefs issantz hors de v're Exchequer *Quia datum est nobis intelligi.* Et ascuns per l'es south v're prive seal de comperer devant v're Conseil a tres grant arrerisment de voz liegez et encontre voz leyes et Estatutz avanditz: Que pleise D'ordeigner que les

Estatutz avantditz de ceo enevant soient pleigenmm't gurdes et outre d'ordeigner que briefs et fres avantditz soient de tout ouster et que nul liege del Roy soit ante de comperer ou respondre per nul tiel brief ou fres ne mis a perde de leur biens ou Chateux et celuy que face il tiel suggestion en temps avenir sur null y de voz liegez soit ceo a voz mesmes v're Conseil Chancelier ou Treasurer ou devant voz Barons de la Exchequer que celuy que face [36] tiel suggestion trove bone et sufficient seury deav'ier sa suggestion a fin que si celuy que ensi est accusez de son bone gree vient en le lieu ou l'avantdit suggestion est et traverse l'avantdit suggestion soit son traverse reseu sans delay et sil soit trove encontre celuy que ensi fist tiel suggestion et pur celuy que ensi est accusez que celuy que ensi est accusez recover sez damagez vers l'accusour a taxer per mesme l'enqueste per quel il est ensi acquite eiant regard a sa disclaundre costages et labors pur sa defence et outre face fyn et ransom a Roy et son corps pris a demorer pur un an en prisone pur la fauxisme avantdit Et que ceste ordinance extende sibien a temps passe come a temps avenir de tieux suggestions pendantz nient uncore discussez.

Rot'.—Le Roy voet chargier ses officers de leur plus abstenir d'envoyer pur ascuns ses Lieges q'ils nont fait devant ses heures mais n'est pas l'intention mesme nostre Seigneur le Roy que mesmes ses Officers tant se abstinerent q'ils ne purront envier pur sez liegez en matries et causes necessaries come il ad este fait en temps des bons progenitours mesme nostre Seigneur le Roy.

[37] THE SAME IN ENGLISH.

Item, The Commons do pray, That whereas in the Statutes made at Westminster in the Year of the Reign of King Edward, Grandfather to our Lord the King that now is, in the 25th Year of his Reign, amongst other Things it was ordained, That no Man should thereafter be imprisoned upon Petition or Suggestion made to our Lord the King or his Counsel, but by Indictment by lawful Men of the Visnage where the Fact was done in due Manner, or by Process made by Original Writ : Nor be put out of his Freehold unless he were duly brought to answer, and judged out of the same by the Law. And farther in the Statutes made at Westminster in the 42d Year of the Reign of the said King Edward, it was assented and accorded for the good Government of the Commons, That no Man should be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ Original according to the ancient Law of the Land ; and if any Thing hereafter should be done to the contrary, it should be void in Law, and holden for null and Error. And notwithstanding the said Statute, many of your Subjects have since that Time been grieved ; [38] some upon bare Suggestions without Proof by divers Writs and Letters issuing out of the Chancery upon a certain Pain therein mentioned to appear before you in your Chancery or Council ; some by Writs out of the Exchequer, *Quia datum est nobis intelligi*. And some by Letters under your Privy Seal to appear before your Council, to the great Hindrance of your Subjects, and against your Laws and Statutes aforesaid. That it may please you to ordain, that the said Statutes may from henceforth be fully kept ; and farther, that the Writs and Letters aforesaid may be altogether taken away, and that none of the King's Subjects may be compelled to appear or answer by any such Writ or Letters, nor made to lose their Goods or Chattels ; and that he, that shall make such Suggestion against any of your Subjects hereafter, whether it be to your self, your Counsel, Chancellor or Treasurer, or before your Barons of the Exchequer, that he, that makes such Suggestion, may find good and sufficient Surety to prove his Suggestion, to the End that he that is so accused may freely come to the Place where the Suggestion is made, and traverse the said Suggestion ; and that his Traverse may be received without Delay ; and if it be found against him that so made the Suggestion, and for [39] him that is so accused, then he that is so accused may recover his Damages against the Accuser, to be taxed by the said Inquest by which he is acquitted, having Regard to the Slander, Costs and Labour in his Defence ; and farther may make Fine and Ransome to the King, and be imprisoned for a Year for the Falshood aforesaid ; and that this Ordinance may extend as well to the Time passed as to come for such Suggestions as hang undecided.

Rot'.—The King will charge his Officers to be more sparing to send for his Subjects, than they have been heretofore. But it is not the Intention of our said Lord the King, that his said Officers shall so far refrain, that they may not send for his Subjects in Matters and Causes necessary, as hath been done in the Times of the good Progenitors of our said Lord the King.

ROT' PARLIAMENTI DE ANNO QUARTO REGIS HENRICI QUARTI.

Item Prient le Co'es que come sibien en plea Roial come personal apres judgments renduz en les Courts nostre Seignior le Roy les parties sont faits venir sur grief peine a la forth devant le Roy mesme a la forth en Conseil et a la forth [40] en Parliament deent respondre de novelagrand anientissement de parties avanditz et que puis est en subversion de la Co'e Ley del terre Pleesca nostre tresereclent et tregracious Seignior le Roy de ent ordeingner remedy issint que apres judgment rendu en toutz Courts nostre Seignior le Roy les parties et leur Heirs ent soient en pees tam le judgment soit anientz per atteint ou per error si error y ad come il ad este per la ley usee en temps de vous tresnoble progenitours Roys d'Engleterre et en mesme la mainere come affiert soit chun matire que pourra estree terminee per la Co'e Ley et que due peine soit ordeynee en cest present Parliament envers ceux que pursuent le contrery Et ceo pur dieu et en le salvation de toutz estates de Roialme.

Rot'. Touchant le primer Article de cest petition quant al judgments renduz en Court le Roy *LE ROY LE VOET* Et quant al ramuant de mesme le petition il est responduz peramongt entre les Co'es petitions.

THE SAME IN ENGLISH.

Item, The Commons do pray, that whereas as well in Plea Roial as Personal, after Judgments given in the Courts [41] of our Lord the King, the Parties are made to come upon great Pain, sometimes before the King himself, sometimes in Council, sometimes in Parliament, to answer thereof anew, to the great Undoing of the Parties aforesaid, and which is more, in Subversion of the Common Law of the Land : That it may please our Most Excellent, and most Gracious Lord the King, thereof to ordain Remedy, so as after Judgments given in all Courts of our Lord the King, the Parties and their Heirs may be thereof in Peace until the Judgment be undone by Attaint or by Error, (if there be Error), as hath been by the Law in Use in the Times of your Noble Progenitors Kings of England. And in the same Manner as it is meet, that every Matter may be (that can be) determined by the Law ; and that due Pain may be ordained in this present Parliament against those that do pursue the contrary ; and that for God his Sake and in Salvation of all the Estates of the Realm.

Rot'. Touching the first Article of this Petition, as to Judgments given in the King's Court, *LE ROY LE VOET* : And as to the Remnant of the said Petition, it is answered above amongst the Commons Petitions.

[42] STATUTUM DE ANNO QUARTO HENRICI QUARTI, CAP. 22.

As it is in the printed Statutes in French.

Item, Come sibien en ple Roial come personal apres judgments renduz en les Courts nostre Seignior le Roy les parties sont faitz venir sur grevouse peine a le foits devant le Roy m's et a la foitz devant le Conseil du Roy, et a le foitz en Parliament dent rendre de novel a grand anientissement des parties suis ditz et en la subversion del co'e Ley del terre ordeines est et establies que apres judgements rend' en les Courts le Roy les parties et leur heirs ent soient en pees tanque al judgement soit anientes per Atteint ou per Erreur si Erreur y ad come il ad este uses per la ley en temps des Progenitours nostre dit Seignior le Roy.

THE STATUTE IN ENGLISH IS PRINTED THUS.

Cap. 22. Item, Where as well in Plea Real as in Plea Personal, after Judgment given in the Court, of our Sovereign Lord the King, the Parties be made to come upon grievous Pain, sometimes before the King himself, sometimes before the [43] King's Council, and sometimes in the Parliament to answer thereof of new, to the great Impoverishing of the Parties aforesaid, and in the Subversion of the Common Law of the Land : It is ordained and established, that after Judgments given in the Courts of our Sovereign Lord the King, that Parties and their Heirs shall be thereof in Peace till the Judgment be undone by Attaint or by Error (if there be Error) as hath been used by the Laws in the Time of the Progenitors of our aforesaid Lord the King.

This Statute (as hath been observed) is but thrice mentioned in all the Law Books, once in Doctor and Student, and twice in those Institutes. And if the supposed Author did intend in those Institutes to make a Question, he did then not keep his Word given

to the Lords of the Council (which was), That he would not draw it into Question, nor maintain any Difference between the Courts, as it is entred in the Council-Book before-mentioned. And if the Publisher of those Books hath done it contrary to his Intention, he hath not done well to publish such Opinions to make a Difference without the Author's Intention : But howsoever it doth appear, that those Books of Institutes were printed but in [44] the Year 1644, which was 241 Years after the Making of this Statute : and it is strange, that in all that Time there should be no Occasion given, nor Opinion delivered, that the Chancery should be within that Statute : But now to be found out so long after. For Seintgerman (in his Book, intitled Doctor and Student) though he saith, That by this Statute, Judgments given in the King's Courts shall not be examined in Chancery, Parliament or elsewhere, and that it is a good Law (wherein notwithstanding he doth mistake) for the Chancery is not named in that Statute nor the Word [Elsewhere:] yet he saith farther, that many Mischiefs may happen thereby : For that Statute was made (saith he) to eschew the Inconveniencies that otherwise Plaintiffs (tho' upon never so good Grounds) should seldom come to the Effect of their Suits ; but that it prohibiteth not Equity, but only the Execution of the Judgment, Lib. 1, Cap. 18. Besides, that Book giveth a general Rule, That where any Thing is excepted from the general Customs and Maxims of the Law by the Law of Reason, Remedy is given in Chancery by Subpœna, and an Injunction is obtained to stop Proceedings at Law, Lib. 1, Cap. 17. And in Case of a Bond (he saith plainly) if the Money be paid and there be no [45] Acquittance, the Law is not that it should be paid again, for that Law were against Reason and Conscience, the Party hath his Remedy by Subpœna : and so in many other Cases, where Conscience serveth for him, Cap. 12, which is as much as Chancery doth or ever did desire.

And so there is no Authority in all the Books of the Law against this Practice in Chancery, and the only Book that mentioneth this Statute is for the Chancery.

2. Secondly, The Referees do certify his said Majesty, That this Statute was made against Proceedings within the Realm, and not against Foreign, and therefore hath no Penalty annexed ; nevertheless they say, we conceive it extends not to the Chancery in the Case delivered, for these Reasons.

1. First, The Statute recites where the Parties are made to come upon grievous Pains, sometimes before the King himself, sometimes before his Council, and sometimes in Parliament, to answer thereof anew, &c., where it appeareth, That the Chancery is not named, which could not have been forgotten, but was left out upon great Reason, because the Chancery is a Court of ordinary Justice, for Matter of Equity, and the Statute meant [46] only to restrain extraordinary Commissions and such like.

2. Secondly, This appeareth fully by View and comparing the two Petitions, which were made the same Parliament of 4 H. 4, placed immediately one after the other ; the first which was rejected by the King, and the second whereupon this Statute was made ; the first being to restrain three ordinary Proceedings of Justice, viz. in the Chancery by Name, in the Exchequer, and before the King's Council by Process of Privy Seal, unto which the King makes a Royal and Prudent Answer in these Words ; The King will charge his Officers to be more sparing to send for his Subjects by such Process, than they have been heretofore ; notwithstanding it is not his Mind, that his Officers shall so far be restrained, but that they may call his Subjects before them in Causes necessary, as it hath been done in the Times of his good Progenitors. And then immediately follows the Petition, whereupon the Act now in Question was unto which the King gave his Assent, and wherein no Mention is made at all of the Chancery or Exchequer.

3. Thirdly, If the Chancery should be understood to be within this Statute, yet this Statute extends not to this Case : for the Words are, That the King's Subjects [47] after Judgments are drawn to answer thereof anew ; which must be understood, when the same Matter formerly judged is put in Issue or Question again : But where the Cause is called into Chancery only upon Point of Equity, there, as the Point in Equity was never in Question in the Common Law Courts, so the Point of Law or Fact, that concerns the Law, is never in Question in the Chancery ; and so the same Thing is not twice in Question, or answered anew, for the Chancery doth supply the Law and not cross it.

4. Fourthly, It appeareth to our Understandings by the Case of Error and Attaint in the said Statute, what Jurisdiction it was that the Statute meant to restrain, viz. Such Jurisdiction as did assume to reverse and undo the Judgment, as Error and Attaint doth, which the Chancery never doth, but leaves the Judgment in Peace, and only medleth with the corrupt Conscience of the Party ; for if the Chancery doth

assume and reverse the Judgment in the Point adjudged, it is void, as appears by 39 E. 3. 14.

5. Fifthly, We find no Precedents of any Proceedings to Conviction or Judgment upon any Indictment framed or grounded upon this Statute, no more than upon the Statute of Praemunire. And the late [48] Indictments are [*contra diversa Statuta*] not mentioning the particular Statutes.

6. Lastly, It were a great Mischief to force the Subject in all Cases to seek Remedy in Equity, before he knew whether the Law will help him or no, which oftentimes he cannot do till after Judgment, and therefore he is to seek his Salve properly, when he hath his Hurt.

There be divers other things of Weight, which we have seen and considered of, whereupon we have grounded our Opinion, but we go no farther than that we have seen.

But because Matter of Precedent is greatly considerable in this Case, and that we have been attended by the Clerks of the Chancery with the Precedents of that Court; and have not been attended by any Officers of the King's Bench with any Precedents of Indictments: If it shall please your Majesty to direct, that the said Officers shall attend us with their Precedents, we shall give your Majesty faithful Report of them, as we have done of this other. All which, &c.

FRAN. BACON, HEN. YELVERTON,
HEN. MONTAGU, RANDL. CREW,
JOHN WALTER.

[49] Upon which Certificate the King gave his Judgment as followeth.

Forasmuch as Mercy and Justice be the true Supporters of our Royal Throne, and that it properly belongeth unto us in our Princely Office to take Care and provide, that our Subjects have equal and indifferent Justice ministred unto them: And that where their Case deserveth to be relieved in Course of Equity by Suit in our Court of Chancery, they should not be abandoned and exposed to perish under the Rigor and Extremity of our Laws, We in our Princely Judgment having well weighed and with mature Deliberation considered of the several Reports of our learned Counsel, and all the Parts of them, do approve, ratify and confirm, as well the Practice of our Court of Chancery expressed in their first Certificate, as the Opinions for the Law upon the Statute mentioned in their later Certificate, the same having Relation unto the Case sent unto them by our Chancellor: And do will and command that our Chancellor, or Keeper of the Great Seal for the Time being, shall not hereafter desist to give unto our Subjects, upon their several Complaints now or hereafter to be made, such Relief in Equity (notwithstanding any Proceedings at the [50] Common Law against them) as shall stand with the Merit and Justice of their Cause, and with the former, ancient and continued Practice and Presidency of our Chancery have done: And for that it appertaineth to our Princely Office only to judge over all Judges, and to discern and determine such Differences, as at any time may and shall arise between our several Courts touching their Jurisdictions, and the same to settle and determine, as we in our Princely Wisdom shall find to stand most with our Honour, and the Example of our Royal Progenitors in the best Times, and the general Weals and Good of our People, for which we are to answer unto God who hath placed us over them: Our Will and Pleasure is, that our whole Proceedings therein, by the Decrees formerly set down, be inrolled in Chancery, there to remain of Record, for the better Extinguishing of the like Differences and Questions that may arise in future Times.

Per ipsum Regem 18 July 14, 1616.

FRAN. BACON, HEN. YELVERTON.

All which Proceedings are inrolled in Chancery.

[51] In farther Vindication of which Judgment of his said Majesty, and to shew that the Chancery is not within the Statute, I desire that these four Things may be taken into Consideration.

1. First, What the Forms were of Making of Laws in those Times, and how they do now differ.

2. Secondly, The Words of this Statute.

3. Thirdly, What the Mischiefs and Grievances were that occasioned this Statute.

4. Fourthly, What the Practice hath been ever since.

First, Concerning the Forms of making of Laws in those Times, it appeareth upon the Rolls, that most of the Laws were then preferred to the King by Way of Petitions, and that the Lords, at the first Sitting down of their House, did appoint Receivers and Tryers of Petitions, a Form yet used, and was done this very Parliament : But that is now *pro forma* only, there is no Use of them : but in those Times after the Petitions were received and had passed both Houses, they were ingrossed by the Clerk into one Roll, and so presented to the King. And after the End of the Parliament, all those Acts which the King had assented unto, and were to be published as Statutes were [52] extracted into another Roll, and Transcripts made of them under the Great Seal of England, and sent to every Sheriff to be proclaimed in their several Counties (Printing being not then invented). But sometimes there was not so much Care taken as ought to have been in making of that second Roll, whereby many Acts are delivered to us imperfect, whereof some Examples are mentioned 4 Institut. To which this Act now in Question might have been added, (but that Use had been made of it against the Chancery) it seeming to be neither faithfully transcribed, nor faithfully translated, and is but abridged (and seven whole Lines together omitted) and yet it is printed among The Statutes at Large. All which may appear by comparing the Print with the Roll of Petitions in that Parliament, Copies of both which are prefixed.

And whereas it was said, That there hath been no Control for these 200 Years : that this Statute was misprinted, and that the Learned Men of that Time knew best how to print the Statute. It is answered, that there was no such Use made as now, nor Cause given to look into it : for it rested 200 Years without any such Exposition, as now is given to it, which late Exposition is the Occasion, that now it is looked into, examined, and (as is [53] observed) ought to be rectified : And Printing was not then invented, the Learnedst Man of that Age knew not what Printing was.

But those Forms of passing Bills in Parliament have been since altered, which began in King Henry VII. s Time, when Petitions were so many and of such Length, that they could not well be comprehended in one Roll : then every Petition was changed into the Form of an Act, and made in English, which before were in French or in Latin, and presented by it self : and if the King did not assent unto it, it was laid aside and not entred upon the Statute-Roll : and since Printing came up, there hath been no Use of any such second Roll to collect the Acts to which the King had assented, nor of making any such Transcripts for the Sheriff to publish them (the Print supplying that Turn). But formerly all the Petitions remained upon the Parliament-Roll, whether the King had assented unto them or no, as is apparent by the Roll of this Parliament of 4 H. 4, now in Question, by which it also appeareth, that before this Petition, there was another Petition of the Commons, wherein they complained, that by Writs issuing out of the Chancery under a Pain, and out of the Exchequer, and Letters from the King's Council, the [54] Subjects were made to lose their Goods and Chattels upon Suggestions (which Petition is Numero 78, Tit. Suggestion) to which the King did not assent, (a Copy of which Petition is likewise prefixed). And after upon the same Roll, Numero 110, doth follow this Petition now in Question, Titulo, Plee Roial & Personal. To which the King doth assent in Part, and as to the Rest he saith, it was answered above amongst the Commons Petitions, whereby it also appeareth, that the printed Books are mistaken, in saying, That it is ordained and established : for it is but the Prayer of the Commons (a Part whereof is not recited) that it may be ordained and established ; the King's Answer being as above : Wherefore,

2. Secondly, The Words of this Statute, as they stand upon the Roll of Petitions, to which the King gave his Answer, and upon the Statute-Roll which is extracted out of it, because they differing one from the other, and the Roll of Petitions being the Warrant for the Statute-Roll, the Sense of that Act ought to be taken out of both : Therefore these Words are to be considered.

1. First, What is meant by the Words Plee Royal.

[55] 2. Secondly, What by the Words, To answer anew.

3. Thirdly, What by the Words, In Subversion of the Common Law.

4. Fourthly, What by the Words, Judgments given in all the King's Courts, and in the King's Courts.

5. Fifthly, What by the Words, Every Matter that may be determined by the Common Law.

6. Lastly, What shall be said to be The first Article of this Petition, and what the Remenant.

1. First, By the Words *Plee Royal*, for so they are written both in the Title, and in the Preamble of this Petition, and in the old printed Books (*Placita Regia*, or *Regis Placita* as they are often called in the Laws of H. 1, cap. 7, 9, 10, 34, 52, are to be understood, being the same as *Placita Coronæ*; for *Lex Coronæ* is all one with *Lex Regia*; as also *Jura Regia*, and *Jura Coronæ*. *Vide* Leg. H. 1, cap. 9, bis, 10, 13, 33, and the Register fo. 61. And *Judicia Regalia*, Par. 2, H. 5, num. 15. And *Actio Regis* and *Causa Regis*, Leg. H. 1, 34, 35. And the 4th Institutes 71, saith, they are called *Proprie Cause Regis*, because they are *Placita Coronæ Regis*: And *Placita Coronæ* *coram Rege* in Parlamento are at the End of each Parliament-Roll.

Therefore by those Words *Plee Royal*, Pleas of the Crown are understood; for the Word *Royal* in French (in which Language this Statute was made) can bear no other Construction, but of something belonging to the King. And that Sense doth stand well, both with the other Words of this Petition, and with the Grievances of those Times, which occasioned it, as shall be shewn hereafter.

The Translator of this Statute (as it is in the late printed Books in English) doth render this Word by *Real*, whereunto it may be he was induced by the Relation of it to *Personal*; But the Word *Personal* standing in Relation to *Royal*, must signify Pleas between Party and Party, and not draw *Royal* to be *Real*, in Relation to it. But this Construction of *Royal* by *Real*, the French Language, as it is said, will not bear, nor must it be interpreted by *Real*, as supposed to be mistaken by the Writer, when it is twice written *Royal*, in the Parliament Roll, and printed *Royal*: And where *Real* is to be signified it is written *Real*, as *Chose Real*, *Action Real*, *Service Real*, and never *Royal* to signify *Real*.

[57] And if it were rendred by *Real*, yet it were nothing as to the Chancery; for in those Times all Trials between Party and Party for Land were for the most part by *Real* Actions, as Writs of Entry, Writs of Right, Assise of Novel Disseisin, which last was the speediest Remedy for the Recovery of a Man's Right at Common Law, Westm. 2, cap. 29. But now the Practice of the Law is so much altered, that these Actions are seldom used, and almost antiquated; and instead thereof Actions of Trespass, of Ejectione Firmæ, of Replevin, are come up, whereby Men are put out of their Lands, and mean Men are returned upon Juries, which then they were not; and they oftentimes observe more a Word of the Judge than the Testimony of the Witnesses. But let the Practice of the Law be reduced to what it was in those Times, and let no Man be dispossest'd of his Land, but by a Judgment upon a *Real* Plea, and the Chancery will meddle with no such Judgments. And Acts of Parliament must be construed and taken as the Law was holden, when they were made, 2 Inst. pag. 2. For it is no Reason to apply this or any other Statutes to Judgments upon such Pleas as are invented since, and that Age knew not or used not.

[58] But the Word being *Royal* must not be altered to serve a Turn; for a Syllable or Letter could not be amended in a Writ or Process, but by a Statute of 14 E. 3, cap. 6, much less can this Word be altered, it must be taken as it is written, for Acts of Parliament are not within that Statute.

2. Secondly, The Words, to answer anew, are considerable; for (as is said in the third Reason) in the Chancery, no Man is put to answer anew. It is the Plaintiff at Law that is put to answer in Chancery; and he cannot be said to answer anew having never answered before; nor is any Part of the same Matter answered again, or in Question in Chancery, that was in Question, and judged at Law; But because the Plaintiff would by Rigour of Law (having gotten a Judgment there) take a Forfeiture or break a Trust, he is put to answer that in Chancery according to Conscience, which Matter neither was in Question, nor can be determined by the Common Law, for the Law hath no Cognizance of it; and therefore those Words do shew that it was not the Chancery that was intended by this Statute.

3. Thirdly, It would be considered, what is understood by these Words, in Subversion of the Common Law.

[59] The Common Law doth seem to be set in Opposition by some, not only to the Civil Law, to the Ecclesiastical Law, to the Statute Law, but also to the Chancery, and to the Decrees thereof, as if those Decrees were no part of the Law of the Land, and of the Common Law; and as if the Lord Chancellor were no Judge of the Law: For the Petition saith, that such answering anew is in Subversion of the Common

Law of the Land; which cannot be understood of the Chancery, it being Part of the Law of the Land.

But for the Clearing thereof, it will be very requisite to look into the Beginning of ours and others Laws, as how that Term of Common Law first began, the Word Common being never applied to one, but to many. As when two or more Nations or People, which were formerly governed by several Princes and several Laws, were afterwards united under one Prince and one Law, then such Laws were called Common Laws; so we read of *Jus Commune Romanorum* that governed the whole Empire: *Jura Communia Longobarda & Romana*, when the Longobardi had conquered a great Part of Italy, and were united to the ancient Inhabitants, and others.

So with us, when the Saxons had conquered a great Part of this Island, and [60] had set up several Kingdoms in it, and had several Laws, whereby those Kingdoms were governed; as the West Saxon Law, the Mercian Law, the Northumbrian Law, and afterwards the Danes prevailing set up their Laws, called of them the Danish Law.

These several Kingdoms coming to be united, and the Name of England given unto this Kingdom, by them; and afterwards Edward (called the Confessor) being sole King thereof, caused one Body of Law to be compiled out of those several Laws; and did ordain, That those Laws (of his) should be common to all his Subjects; and in those Laws of King Edward the Confessor, that Term of Common Law first began with us, being called Common in Respect of those several People that before lived under several Laws, to whom those Laws were now Common; though in Respect of the Author they were called King Edward the Confessor's Laws, or St. Edward's Laws. Ran. Cestr. Spelman, Stow, Speed, Daniel.

King William the First did endeavour to abrogate those Laws, yet was afterwards perswaded to confirm them; to which notwithstanding he added divers of his own; and after him King Henry the First did the like, both whose Laws are lately published by a Learned Gentleman; yet [61] when some of the succeeding Kings, especially King John, did endeavour to overthrow those Laws, the Subjects contended for them, which Contention brake out into an open War (called the Barons Wars) which took End in the Granting of the Charters of Liberties, called the Great Charter, and the Charter of the Forests; tho' for a Time those Wars broke out again, yet again ended by Confirmation of those Charters, as all our Histories mention.

And although those Laws of King Edward have been much altered by King William the First, and King Henry the First, and many of them grown obsolete, and many Customs grown up, which now pass for our Common Law; yet in those Laws of King Edward the Confessor, the Words [Common Law] first began: And no Man can doubt but King Edward's Chancellors (whereof he had three successively, whose Names are remembered to this Day, and mentioned in the Fourth Institutes) were used by him, both in the Compiling and Distributing them, as there was Occasion; for the Chancellor and Chief Justice of England were Assistants to the King in all Judgments, for many Ages before and after; and neither then, nor for many Years after (King Edward the Confessor's Time) was the Common Law [62] come to be a Profession, nor Lawyers made Judges or Pleaders.

In former Times the most learned Clerks were best studied in the Laws, so the Clergy thrust into almost all Places of Judicature, when it was said, *Nullus Clericus nisi Causidicus*: But King Edward the First, (after the Conquest) being (as it is said) weary of the great Power of the Chief Justice of England, was the first that alter'd that Course, by making Lay-men Judges, (who kept the Robes of the former Judges, as they do to this Day) and then the Common Law came to be a Profession and a Study, and Students of Laws to be Pleaders in Courts, and after to be Judges; and from that Time the [Common Law] by Degrees is grown to that Height we now see it is come to.

It cannot be denied but that the Chancery, as it judgeth in Equity, is Part of the Law of the Land, and of the ancient Common Law; and let it not be imputed to the Chancery, that the Lord Chancellor hath too great an arbitrary Power in making of his Decrees: For if it be well observed, the Judges use as great a Power in declaring what is Law, as the Lord Chancellor doth in declaring what is Equity; and if either be covetous, timorous or malicious, as [63] much Hurt may be done by the one as by the other; whereas in Truth, neither of them ought to proceed in doubtful Cases without the Judgment of Parliament.

Therefore by these words [in Subversion of the Common Law] the Chancery cannot be understood, as it judgeth in Equity; for Equity is and always hath been a Part of

the Law of the Land : *Aequa Justitia* is Part of *Recta Justitia*, and precedes it, for it cannot be *Recta* unless it be *Aequa* : There is *Lex Terræ* mentioned in *Magna Charta* wherein the Chancery is included for Equity, as well as the Judges are for Law ; for *Judicium Parium* is of the Fact only. The Statute never meant that the Jury should judge either what was Equity or what was Law, but left those to their respective Judiciatures, by these Words [*per Legem Terræ*].

And that Relief was given in Equity in Former Times, appeareth by the Law of King Edgar, cap. 2. before mentioned. And by the Laws of Henry First : *Graviora placita soli justitæ et misericordie principis addicuntur*, cap. 11. And again, *Nemo apud Regem Proclamationem faciat de aliquo, qui ei secundum legem rectum offerat in Hundredo suo*, cap. 34, which is [64] meant plainly by an Appeal to the King.

And after this Statute of *Magna Charta*, it is said of Sylvester de Eversden (who was Lord Chancellor 29 H. 3) That he was cunning in the Customs of the Chancery ; which must be understood in Judging of Causes, not of making of Writs, those belonging not to the Lord Chancellor.

And by the Statute of *Articuli super Chartas* 28 E. 1. It is ordained, That no common Pleas shall be from henceforth held in the Exchequer, cap. 3, whereby it appears that the Law Courts were not then settled.

And on the other Part the King wills, That the Chancellor and the Justices of his Bench shall follow him, so that he may have at all Times near him some that be learned in the Laws, which may be able duly to order such Matters as shall come unto the Court at all times, when need shall require, cap. 4. The King had no Chancellors then but Bishops, and they were to order Matters of Conscience, as the Judges Matters of Law.

27 E. 3. cap. 26. In the printed Books concerning Merchants, Right shall be done in Chancery at every Man's Complaint.

36 E. 3. If any man be grieved contrary to the Articles before mentioned, [65] he may come into the Chancery, and have Remedy, without pursuing elsewhere.

Parl. 2. Rich. 2. Numero 30. The Commons petition, That the Lord Chancellor may make no Orders against the Law.

Resp. The Use heretofore shall stand, so as the King's Regality be saved.

And again in the same Parliament, the Commons petition, That no Person should appear upon a Writ, *De quibusdam certis de Causis* before the Lord Chancellor, or any other of the Counsel, where Recovery is thereof given by the Common Law, which must be understood after Judgment.

Resp. The King willeth as his Progenitors have done, saving his Regality.

Parl. 17 R. 2. cap. 6. It is ordained, That the Chancellor shall have power to award Damages according to his Discretion, to such as shall be unduly vexed by Writs grounded upon false Suggestions.

So as Judgments given in Chancery cannot be said to be in Subversion of the Common Law of the Land ; the Chancery being a Part of the Law, and the Judgments there being *præter, non contra Legem*.

4. Fourthly, The Words in the Petition being [Judgments given in all the King's Courts] in the Plural and the King's [66] Answer being only [in the King's Court] in the Singular (tho' the Print makes it Plural) cannot be extended to any Court but to one (especially being an Answer to a Petition which was made in the Plural) which Court of the King can be no other but the King's Bench, where Pleas of the Crown (intended here by the Words *Plee Royal*) were held, and no Pleas between Party and Party, unless it were very seldom, were then determined in that Court.

5. Fifthly, These Words in the Petition [every Matter that may be determined by the Common Law] shew plainly, that there were some Matters then in Consideration, that could not be determined by the Common Law, viz. Cases of Conscience, which Matters cannot be denied to be proper for the Chancery, as the Chancery stands in a Notion severed from the Common Law ; for it cannot be thought that it could be the Meaning of any Parliament, that those Matters should not be determined at all, for then there should be a Failure of Justice ; and those Words can bear no other Meaning, but that the Law should determine those Causes, which are within the Cognizance of it, and can be determined by it ; but other Matters which are not within the Cognizance of the Law, as Equity, [67] should be determined elsewhere, which must be in Chancery.

And it is said, That such Matters ought to be brought and determined in Chancery

before they be judged at Law : it is answered, That the Judgment at Law is nothing as to those Matters, for (as it said before) the Common Law has no Cognizance of them, as in the Case of a Bond : the Question at Law is, Whether it were sealed and delivered, or the like, and that being found by Verdict, Judgment followeth that the whole Sum shall be paid : whereas the Chancery examineth (not the Sealing and Delivery of the Bond, but) what was at first due, what hath been paid since, what doth remain unpaid ; and accordingly doth order the party to take but what is justly due to him, with his Damages and Costs, and will not suffer him to take £800 because he had a Judgment for so much, where it was proved, that all was paid but £20 as the Case was lately in Chancery, where it was decreed, That the party should take but what was justly due unto him, notwithstanding his Judgment. But that Decree, (as the Rest) if the Chancery should be within this Statute, will be judged unlawful, and the Plaintiff at [68] Law shall have Execution of that Judgment for £800 where only £20 is due.

And it is worthy Observation, That these Words [Every Matter that may be determined by the Common Law] are omitted in the Printing of this Statute ; certainly there was no good Meaning in the Compiler, or in the Printer to leave them out, for they are in the Roll of Petitions in that Parliament to which the King did give his Answer, and do serve as a Key to open and expound all the other Parts of this Statute ; *Sed tulerunt Clerici.*

6. Lastly, It falleth to be considered, what shall be said to be [the first Article of this Petition, and what the Remanent]. The King's Answer is, that touching the first Article of this Petition, as to Judgments given in the King's Court, he doth grant it ; but as to the Remanent, it is answered above amongst the Commons Petitions, of which Distinction there is no Mention made in the printed Books, but all joined together, as if all had been granted, which again argueth the Compiler, or Printer, of no good Meaning. Nor is this Statute recited in the said Institutes. But to take the King's Answer as it is, this Statute must be divided into two Articles ; and the King's Grant of the first cannot be extended to all, nor farther than the [69] Petition, nor the Petition farther than the Grievance, which was, viz. That Judgments were questioned by the King himself, or by his Council, or in Parliament, which comprehendeth not the Chancery, nor could the King understand that it did include the Chancery, for then he should grant more than was demanded, and more than he intended : for he had denied before upon the same Parliament-Roll to restrain his Chancellor ; and if now he should restrain him, he should both deny and grant the same Thing at the same Time, as it were with the same Breath. But the King denying the Remanent, by saying it was answered above, that Remanent must be something which was contained in a former Petition of that Parliament, and in this also. And in all the Roll of that Parliament there is nothing of this Petition contained in any other, but only in that Petition [Tit. Suggestions, Num. 78] which the King denied, and that Part of the Petition is denied here also : for the Remanent, which the King saith was answered above, can bear no other Meaning, nor refer to any Thing else. Therefore the Words of this Statute are not General, as the Print would make them, but are restrained by the King's Answer to the first Article only, which is to Plee Royal, viz. Pleas of [70] the Crown, and cannot extend to any Thing that can concern the Chancery.

And if there were any doubt, King James's Judgment has cleared it : for Acts of Parliament are *Facta Regum*, whereof Bracton saith, the King is the only Judge, Lib. 1, cap. 16.

Considering therefore, that these Clauses are omitted out of the Print, which are in the Roll of Petitions in that Parliament ; and that they do much conduce to the true Understanding of this Statute ; and that there is such Variance between that Roll and the Print ; it is very requisite the Print should be corrected, for it may make many to err, that do not consult the Petition-Roll in Parliament.

3. Thirdly, It is a good Rule for the Understanding of this and all other Statutes to know what were the Mischiefs and Grievances in the Kingdom, which the Parliament meant to remedy. For as it is observed in the 4 Institutes, many Records of Parliament can hardly be understood unless you join thereunto the History of the Times. And whosoever will look into those Times shall find that the great Grievance of calling Causes into Question after Judgments, were only Judgments of Treason, or Misdemeanour against the King.

[71] And of such our Histories are full, That King Richard the Second not much above four Years before the Making of this Statute, had caused many to be questioned,

and the Duke of Gloucester his own Uncle to be put to Death, and after to be condemned; and likewise the Earls of Arundel and Warwick, and the Lord Cobham to be arraigned and condemned; and the first put to Death, the other two to be banished, the one to the Isle of Man, the other to the Isle of Jersey, where they were committed to Perpetual Prison; and another Lord Cobham likewise to be arraigned. And besides those Noblemen, there were seventeen whole Counties drawn in Question for taking Part with them, whereof many Knights, Gentlemen, and others were grievously fined, some at £100, some at 1000 Marks; all which had their Pardons by Acts of Parliament, 14 R. 2, c. 1. And some of them had special Pardons; but those Pardons were all made void and revoked by the King with the Assent of the Lords, at the Request of the Commons in Parliament, Anno 21 R. 2, c. 2. Besides, many both in the City of London, and in divers other Countries, were forced by King Richard the Second to sign Blanks, called Blank Charters, wherein the King or his Council might cause what [72] they would to be written; many of which Blank Charters King Henry IV. about two Years before this Statute caused to be openly burned at the Standard in Cheshide. And likewise in the Beginning of King Henry IV.'s Reign, many Noblemen were degraded by Act of Parliament, and divers were put to Death, and many Things were done not agreeable to the Laws: For that was a Time full of Conspiracies, Insurrections, Rebellions, War; those were the Grievances which occasioned this Petition, and which the King was willing should be redressed, that Men might live secure after they had their Pardons, and after they were cleared by the Judgment of Law, and not be called in Question, and have their Pardons, Patents and Estates taken from them by the King or his Council, or by Parliament contrary to Law; other Grievances we read of none, that were considerable or fit for the Commons to petition against, especially so earnestly, as to desire Redress for God's Sake, and for the Preservation of all the Estates of the Kingdom.

Lastly, The Practice is to be taken into Consideration, to shew how this Statute was understood and expounded, at, or soon after, the Making of it; for it is a Rule, that *Contemporanea Expositio* is especially to be regarded.

[73] Rot. Parl. 3 H. 5, num. 46. The Commons in their Petition say, that the Chancery did proceed against the Law, and defeated Judgments of Law. And pray, that no Subpoena might be granted for Matters determined at Law, under the Pain of £10.

Resp. *Le Roy aviserá.*

Rot. Parl. 1 H. 6, num. 41. The like Petition.

Resp. The Statute of 17 Rich. 2, c. 6, shall be observ'd.

NOTE. That neither of these Petitions do mention that such Proceedings in Chancery were against the Statute of 4 H. 4, which would not have been omitted, if the Parliament had then thought that the Chancery had been within it.

Likewise in King Henry VII.'s Time there are many Precedents of Relief given in Chancery after Judgments at Common Law, when Cardinal Moreton was Chancellor, and after when Archbishop Warham was Chancellor and ever since; but it appeareth, by that which hath been said before, that neither Cardinal Moreton nor Archbishop Warham were the first that brought in the Precedent; and if they had, yet it is 160 Years since Moreton was first Chancellor, and the continual [74] Usage and Practice since may very well admit it now for a Law; for Usage and ancient Custom make Law. 1 Institut. fol. 115, a. And although it were granted, that no Usage nor Custom could hold against an Act of Parliament, yet against a Construction of an Act of Parliament (where the Words themselves are not plain and binding) Usage and a continued Course will hold; for in some Cases it is said, that though the Law, which was grounded upon an Act of Parliament, were thus; yet *aliter utitur in dictis nostris*. 4 Institut. 107.

Many Judges when they sate in Chancery, by Commission, in the Vacancy or Absence of the Lord Chancellor, have decreed Causes there after Judgments at Law.

Likewise in the Exchequer-Chamber, Dutchy-Chamber, in the Courts established in the North and in Wales, and generally in all other Courts of Equity, Matters have been called in Question, and relieved since the Making of this Statute without Respect, whether they had been judged, or not judged before at Law.

And it would be well considered why this Statute, and the other of 27 E. 3, should be so much urged against the Chancery, and be observed in the other Courts. For the Chancery is not named [75] in either of them; and if they be general Laws, why

should they not bind the Common Law Courts as well as the Chancery ? For in those Courts, besides Errors judged in the King's Bench, there is nothing more common than after Judgments given in Actions of Ejectione Firmæ, Trespass, Replevin, Prohibitions, new Actions are brought, and the same Title tried again, and Verdict given against Verdict, and Judgment against Judgment, and Suits carried from Court to Court, for one and the same Right or Title. How are the Parties then or their Heirs in Peace, that had the first Judgment, it not being undone by Attaint or Error, as this Statute prescribes, neither of them being excepted in that of 27 E. 3, nor their Possession taken from them by a Writ of an higher Nature, but by bringing a new Action of the same Nature of the former ; and questioning all again, that was in question, and judged before, such Actions being called Pick-Purse Actions, as who hath the best Purse will prevail : And no Ejectione Firmæ was brought against a Stranger before the 14 H. 7, long after this Statute ; and therefore, though not within the Letter, is as much within the Intent of the Statute as any Decree in Chancery ; and yet that must be upheld, altho' it was at first a Question, [76] whether it were not Maintenance in the Lessor to maintain such an Action.

And why should it not be as lawful, after a Judgment at Law once obtained, to plead this Statute to a new Declaration as to a Bill in Chancery ? Wherein is the former Judgment more undone by a Decree, than by another Judgment upon a Verdict ? And wherein are the Parties made to answer anew in the one more than in the other, if the Chancery did disaffirm the former Judgment, which it doth not ? And it by Differences of Parties or Actions, Things may be questioned at Common Law to overthrow or avoid the former Judgment upon the same Point of Right or Title, Why should it be excepted against, that the Equity of a Cause should be examined in Chancery after a Judgment, which neither was nor could be in Question before the Judges at the Common Law ? In the Common Law Courts all being brought into Question again, the Parties made to answer anew, and to answer the same Thing, that was answered and adjudged before ; whereas in the Chancery nothing of the former Matter, nothing of the Judgment is touched, but only the corrupt Conscience of the Party is corrected, because he would take an Advantage by Rigour of Law against all Equity and good Conscience. And there can be [77] no Question, that the Chancery should be within those Statutes, more than the other Courts ; either all are bound by them, or all are free.

The Article against Cardinal Wolsey, That he had examined divers and many Matters in Chancery, after Judgments thereof given at the Common Law, in Subversion of the Laws, and made some Persons to restore again what they had in Execution by virtue of the Judgment at the Common Law, as it is reported 4 Institut. is too general and uncertain ; for those Matters might concern Presentments to Churches, Prebends or other Benefices mentioned in the Statutes of Provisions, 16 Ric. 2, cap. 5, or other Matters that might be proper for the Common Law, and not for the Chancery ; or he might reverse the Judgments in the Points adjudged ; for the Cardinal did many Things with a high Hand, as appears by the other Articles, and by his Usage of Sir John Stanly, mentioned in the 38th Article, and then he was worthily complained of : But if they were Matters fit to be relieved in Equity (though after Judgments at Law) it is not probable that Sir Thomas Moore would have set his Hand to such an Accusation, as knowing that to have been done before the Cardinal's [78] Time, and by himself, as is certified by the Referees, if this be a true Copy, which may be doubted ; because Sir Thomas Moore doth sign before the Dukes and other Noblemen, which Place was not given to the Lord Chancellor till after his Death : And it is well known that the Cardinal's Man [Cromwel] did take him off from all Accusations in Parliament, yet this Article was the Cause of all the Rest : Forty four are there printed under the Title of the Court of Chancery : but it not mentioning what those matters were, that the Cardinal did examine in Chancery, doth fall off of it self.

And for Throgmorton's Case so much stood upon, as wherein all the Judges are said to have given their Opinions ; it was thus,

Throgmorton being possessed of a Term, by a Grant from the Crown, rendring a Rent, with a Proviso to be void for Non payment, within forty Days, and having made many Failures, which appear'd upon Record, Queen Elizabeth granted away the Inheritance, which came to Sir Thomas Heneage, and from him to Sir Moyle Finch, in Right of his Lady, who entred and sealed a Lease to one Roots to try the

Tate, and upon a Demurrer in the Exchequer, Judgment [79] was given for Roots, the Lessee; whereupon Throgmorton brought a Writ of Error, upon which the Judgment was affirmed; and after all that, he exhibited a Bill in Chancery, pretending for Equity, That the Non-payment of the Rent in 9 Eliz. was by the Fault of a Servant, and no wilful Failure; To which Bill Sir Moyle Finch and Roots made Answer, and did set forth several Failures, in the ninth, tenth and seventeenth Years of Queen Elizabeth, and at divers other Times, which they alledged did appear upon Record; and therefore, and for other Causes mentioned in their Answers, they demanded Judgment, whether the Court would hold Plea thereof or not: And Mr. Attorney General being of the Defendant's Counsel moved, That the Matter touching the Lease, wherein the Plaintiff sought Relief, might be dismissed; because the Lease had been, by the Opinion of the Judges, adjudged to be void in the Exchequer, for that the Rent was not paid to her Majesty within forty Days, according to the Conditional Clause contained in the Lease. To which Motion, Mr. Philips being of the Plaintiff's Counsel, made Answer and shewed, That the Default of Payment in the ninth Year of Queen Elizabeth was not voluntary, [80] but grew by the Negligence of a Servant; but that the Rent was afterward paid, and that the Lands were enjoyed quietly by the Lessee so long as the Inheritance remained in her Majesty, until the Defendant's Entry, and therefore prayed, That the Matter in Equity might be retained. But forasmuch as the Cause was of great Weight, and would be a Precedent, the Lord Keeper minded, before he gave any Order, to confer with the Judges, and directed that the Bill, Answer, and Records, which shewed the Defaults of Payments, should be brought to the Judges, as appeareth by an Order in Chancery, 28th of May, 39 Eliz.

And 15th of November following, the Lord Keeper did declare in open Court, that all the Judges, except one that was absent, had considered of this Cause, and were all one of them, that had not so considered, excepted of Opinion, That the particular Case as it stood, was not meet to be retained and examined in Chancery; yet his Lordship said he would be advised, and give such Order as should be meet; as appeareth by an Order then made, which was the last in that Case.

Now the particular Case, as it stood, was upon the several Forfeitures, for [81] Non-payments of the Rent; and the Bill seeking Relief but against one in the ninth Year of her late Majesty, the Rest of the Failures being not mentioned; and the Lease having been adjudged void in Law, not only for the Failure in the said ninth Year, but for the other Failures also, for which no Remedy was sought; the Case as it stood might not be held meet to be examined and relieved in Chancery, for it stood upon Divers Failures, and likewise upon the Queen's Interest, against whom there was no Equity to be sought in Chancery.

But in all those Proceedings it doth not appear, that the Lord Keeper did make any Order to retain the Bill, as is alledged, nor that there was any Petition to the Queen, nor any Reference from her to the Judges, nor any Certificate of the Judges (either than Verbal) to the Lord Keeper (as is said) and by him declar'd in Court; none of which could be unknown to the Attorney General, although now it be otherwise urged under his Name in the 3d and 4th Institut. By which the Statute is made the only Reason of the Judges Opinions, whereas it doth not appear, that this Statute was once mentioned in all those Proceedings.

Sir Moyle Finch's Answer is not to be found (it is not unlikely to have been [82] burned when the Fire was in the Six Clerks Office) but it seems, the Cause was not discuss'd, nor there was no Dismission enroll'd, nor any Order for a Dismission entred; neither doth it appear that there were any further Proceedings in it: But howsoever that Opinion of the Judges being given upon the several Forfeitures and the Queen's Interest, and the Judgment that Throgmorton's Lease was void, that Case doth nothing concern the Question.

And the Inconveniences that would follow to the Subject, if the Chancery should not receive after Judgments in Cases of Frauds, Breaches of Trusts, Forfeitures, &c. where the Common Law cannot relieve, would prove so great and intolerable a Grievance, that no Man could live under such Laws; for any Man that will take Advantage may obtain a Judgment at Law before the other can get a Decree, or an Injunction in Chancery, what Equity soever this Case requireth, and then he must be remediless for ever, and therefore, all Fraud, Circumvention, corrupt, crooked and unconscionable Dealings of crafty, deceitful Persons would be countenanced, encouraged and abetted, and the ancient Rules of Equity and Conscience smothered and suppressed

upon the imaginary [83] Credit and Reputation of a Judgment at Law, which though of great Weight, may be unconscionably gotten, especially since all Men know, that not one Judgment of an hundred is pronounced in Court, nor the Case so much as heard or understood by the Judges, but entred by Attornies, which then they were not, but pronounced by the Judges in open Court.

Therefore it would be Encouragement to imagine that the Makers of that Law 4 H. 4. did ever intend that such Judgments entred so secretly and underhand, that it is oftentimes difficult to find them, should not be examined, and the Parties relieved; so that by these Words in the Statute [After Judgments given in the Court of our Sovereign Lord the King] they could intend such Judgments as should be entred by Attornies without the Judges Knowledge.

Neither can it be thought that the Parliament 21 Jac. cap. 26. wherein Attornies are excepted from being Felons, if they acknowledge Judgments for any Person without his Privy, did intend either that the said Attornies should be free from all Punishment in such Cases, or that such Judgments should be of so great Weight and Force, as never to be questioned, nor the Party relieved, but utterly undone, [84] because an Attorney hath acknowledged a Judgment against him, whereof he can know nothing till he be taken in Execution.

For admit (as is mentioned in the 3d Institut. 123), that the Plaintiff doth by Collusion retain an Attorney for the Defendant (without the Defendant's Knowledge) and the Attorney confesseth the Action, and Judgment is entred, must this Judgment be binding for ever, and shall the Defendant have no Way to help himself? The Book saith, that in this case the Defendants sought Remedy in Parliament, and that the Parliament did give Power to the Lord Chancellor by the Advice of two Judges, to hear and Order the Case in Equity [whereupon it concludeth, that the Chancery could not do it without higher Authority] which is no very good Consequence.

For that Case was a mixed Case of Equity (to right the Defendant) and of Misdemeanour (to punish the Practice) and therefore requireth several Judges that might inform the Parliament of both; but that Petition shewed, that the Court, wherein this Judgment was given, could not give Remedy in that Case: and the Reference shew'd, that it was not conceived to be within the Stat. 4 H. 4. For then the Parliament (in its Power of [85] Judicature) could not have meddled with it; and so that Case must have been without Remedy, as all others of the like Nature must be, if this Construction hold, whereof no Doubt there will be so many that it were better to live under no Laws than such as do give way to, and do not provide Remedies against such Mischiefs.

And Statutes being always to be expounded so as there be not a Failure of Justice, 2 Institut. 23. And the Chancery Court being now the only ordinary Remedy, that is left to prevent and give Relief in such Cases, it is strange it should so earnestly be endeavour'd to be abridged of that Power, when as this Strictness to maintain the Rigour of the Law is observed no where besides. The Parliaments of France (which are Courts of Justice) and the Lords of the Session in Scotland (where the Chancellor hath the Chief Place) do minister Justice, not according to the Rigour of Law, but with reason and Equity, Camden in Scotis pag. 8. And must we above all others be debarred of that Benefit, and left remediless, and the Chancery tyed up from giving Relief, only upon Inferences, and the Construction of a Statute wherein it is not named, and the King having denied in the very same Parliament, and upon the same Roll, to restrain his Chancellor?

[86] And where it was said, that it is against a Maxim of Law, for a Man to help himself against a Record upon a bare Surmise, let it not be thought that the Chancery doth help any Man upon a bare Surmise; for if he doth not bring very good Proofs, the Chancery doth dismiss him, and punish him by making him pay good Costs, so far it is from relieving any that are causelessly troublesome: Nor is the Chancery to be guided by every Maxim of Law, but it is to control such Maxims as are against the Law of Reason. Doctor & Stud. lib. 1, cap. 17.

And it is worthy Observation, that the Judges themselves do oftentimes extend their Directions, (and do therein play the Chancellors), to mitigate the Rigour of the Law after Verdicts, by staying the Postea, and by Consequence the Judgment, and sometimes after Judgment by staying Execution till the Party will consent to take what they in Equity think fit (by what Law they do so, themselves best know). But it is as necessary that the Chancery should give Relief after Judgments, as the Judges

to stay the Judgment or Execution, and themselves to order the Matter in Equity : But neither the Chancery nor any other Courts are within this Statute, but only those which are named in it, which are [87] the King himself, his Council, and the Parliament ; and in Cases only which concern the King, as hath been said ; none of which concern the Chancery.

For the meaning and true Sense of this Statute (as it stands upon the Parliament-Roll of Petitions) is, that no Man should be drawn into Question at the King's Suit, which is expressed by the Words *Plea Regal*, and put to answer again before him, or his Council, or in Parliament, that hath been acquitted by Judgment of the Common Law (as those were that had their Pardons before mentioned) ; or such as should hereafter be acquitted by Judgment of the Common Law ; and in that Sense this Statute hath been observ'd ever since, and no such Judgments have been questioned by the King, or by his Council, or in Parliament.

But it were a strange Construction of this Statute to say, that the Chancery alone, and no other Court, should be bound by it, and that the Parliament should give no Relief in any Case whatsoever after a Judgment at Law, be it obtained by Corruption apparent, Injustice, Fraud, &c. And that the Subject should be left destitute of all Help after a Judgment, unless he can overthrow it by attainting the Jury, or by Error ; whereas an Attaint is so Penal, that one Jury will rarely attaint another (for it may be their own Cases). And Error for the most part is in the Pleadings, and the like Strictness to observe the Rule of the Law must be held by the Judges upon the Writ of Error, as was held in the former Judgment.

To conclude therefore ; neither the Words of this Statute nor the King's Intention in granting Part of it, nor the Mischiefs before, that did occasion it, can maintain any such Construction ; that the Chancery for Matter of Equity should be bound by it ; and the Practice in Chancery, and in all other Courts of Equity since, doth shew plainly, that it was never so understood.

And so King James's Judgment stands firm.

Virga Æquitatis, Virga Regni tui.

REPORTS and CASES Taken and Adjudged in the COURT OF CHANCERY, in the Reign of Kings Charles I., Charles II., James II., William III., and Queen Anne. Vol. II. [1668–1693].

EVERY *contra* GOLD.

20 Car. 2, fol. 921 [1668–69].

Portions raised by Deed and Will.

The Bill is to be relieved for two Legacies of £1500 apiece, which the Plaintiff claims as Administratrix to her Daughters, Susanna and Martha Every ; given and secured to them by several Conveyances, and by the last Will of William Every their Grandfather.

[2] The Case is (viz.) That the said William Every the Grandfather, in Consideration of a Marriage between William Every, his Son, and the Plaintiff Martha, a Daughter of Sir John Pool, by Deed 22 April, 7 Car. 1 [1631], did provide, That if William his Son should die without Issue Male by him on the Body of the said Plaintiff Martha begotten, and should have two Daughters by the Plaintiff Margaret, then living ; or if the said William should fail to have Issue Male which should be living, until the same Daughters should respectively attain 18 Years of Age, or be married, that then the Recovery therein named should stand seised of the Premises, to the Use of the Recoverors and their Heirs, for the raising £1500 apiece for the Portions of the said Daughters, and £20 apiece per Annum for each of their Maintenance in the mean Time, to be paid at their respective Ages of 18 Years or Days of Marriage, which should first happen ; and if either of the said Daughters should die before that Age or Marriage, the Portion of her so dying to be distributed to the Survivor ; and if all the said Daughters should die, their Portions not paid or payable, then the same should be paid to the next Heir of William Every the Grandfather.

[3] That William Every, the Son, had Issue by the Plaintiff one Son named William, and two Daughters, the said Susan and Martha, and by Deed of Bargain and Sale, and Release thereupon, both dated in December, 1651 ; in which Release, so much of the Tripartite Indenture as relates to the Daughters Portions is recited. William Every, the Grandfather, conveys to Gold, Doble and Holloway and their Heirs, Lands in Somersetshire, to the Use of William the Grandfather for Life, and after to Gold, Doble and Holloway for 200 Years, with other Remainders over upon Trust out of the Profits, or by granting Leases or Estates to pay his Debts first ; and then for raising to and for the said Susan and Martha, so much Money as should supply and Advance their respective Portions, to them severally thereafter to be given by William the Grandfather, either ready Money or otherwise, to be limited by any Act thereafter to be executed in his Lifetime, or by his last Will, to the Sum of £1500 apiece, together with £20 per Annum, until the said £1500 apiece should be paid unto them : the same to be in Satisfaction of all Monies that they might claim by Force of the said Indenture Tripartite, with Proviso, That if the said William the Grandfather should, by Will or otherwise, appoint them £1500 apiece, [4] or £1500 to the Survivor of them, for their Portions with such yearly Maintenance, as aforesaid, so as the same should be well and truly paid unto them accordingly : Or if, before such Portions should be paid, the said William Every their Brother should die without Issue Male, whereby the said Premises should

be charged for raising of Portions and Maintenance aforesaid; that then the Trustees should not levy the Portions by that Indenture limited, other than what should be paid in the Lifetime of William Every their Brother. And it is thereby declared, that in Case the said Susanna or Martha, or either of them, should die before their Portions (in and by the said last Indenture to them limited) should become due and payable to them, that then the said Portion and Portions of them, or either of them, so dying, should not go or be to the Survivor of them, or to any the Executors, Administrators or Assigns of them, or either of them; but should go to whom the said William the Grandfather by Writing or Will should appoint, and for Want thereof to his Executors or Administrators. And it is further declared, That the said Susan and Martha shall not have any Benefit, in case that they, or any other of them, should take any Advantage or Benefit by Means of the said Indenture tripartite, or any [5] Proviso therein contained. And then, the 9th of March 1651, William the Grandfather makes his Will, therein reciting that he had by several Deeds, all dated Feb. 21 Car. 1 [1646], granted to Knight, Cade, Webber and Ford, certain Lands in the County of Dorset, for Terms of Years, determinable upon the Death of certain Persons therein mentioned, upon Trust and for the Use and Benefit of such Person or Persons to whom he should by his last Will give, limit, or appoint the same: And by his Will gave, limited and appointed, all the said Estates and Terms so by him granted to the said Knight, Cade, Webber and Ford, to the Defendants Gold and Doble, in Trust, that the said Gold and Doble, or the Survivor of them, or the Executors or Administrators of the Survivor of them, should dispose of all the Rents and Profits of the said Lands, or should otherwise sell, assign and convey the said Estates and Terms, as to them should seem most convenient, towards the Raising of £1500 apiece to the said Susan and Martha: And did thereby give and appoint to each of the said Susan and Martha £900 to be paid unto them severally out of his personal Estate, whereof he should die possessed, accounting therein all such Monies which he had or should lend upon the Specialties taken in the Names of Gold and Doble, towards the [6] farther Raisings of their said Portions to £1500 apiece, having (as by his Will is expressed, by his Deed dated the last Day of December then last past) made Provision for Advancing their said Portions to the Value out of his Lands in Con Somersset; which said Portions his last Will and Meaning was, should be paid unto them the said Susan and Martha severally, at their respective Ages of twenty-one Years, or sooner, if they should be respectively married with the Consent of the said Gold and Doble or the Survivor of them; with a Proviso, That if William Every, his Grandson, should happen to die without Issue Male of his Body lawfully begotten, before the said respective Portions should become payable to the said Susan and Martha, according to the Time before limited, whereby the said Susan and Martha should be intitled to £1500 apiece, by Virtue of the said Indenture tripartite, made upon his deceased Son's Marriage: then the said Legacies or Appointments or Portions unto Susan and Martha thereby made should be void, and of his Will made Gold and Doble Executors. And the Plaintiff, as Administratrix of her said two Daughters, Susan and Martha, exhibited her Bill against Gold and Doble, Executors of William the Grandfather, and Webber the surviving Trustee in the Deed of the Lands [7] in Somersset, and against John Every, the Heir in Tail of William the Grandfather, and seeks to be relieved upon the Deeds and Will before mentioned, for the £1500 apiece, given to Susan and Martha her Daughters.

The Defendants say, that William the Grandfather died in the Life time of William the Grandson, and that the personal Estate of William the Grandfather came to £4000, and that William Every the Grandson was buried 23 Nov. 1660, and was about twenty Years old when he was buried; and Susan, the Plaintiff's Daughter, was buried 25 July 1655, and was about eighteen Years old when she was buried; and Martha the Plaintiff's Daughter was buried 4 July 1660, and was about twenty Years old when she was buried; and it appears there was sufficient personal Estate to satisfy the several Portions demanded.

Which Case the Master of the Rolls having considered, and upon the Hearing before him declared, That he was satisfied with £1500 apiece, by the Deed and Will aforesaid, for Portions to Susan and Martha, Daughters of the Plaintiff, was a Debt or Duty well fixed in them by the said Deeds and Will, and by their Deaths did accrue and belong to the Plaintiff their Mother, as Administratrix to them, and therefore did decree the same should be paid accordingly.

[8] From which Opinion and Decree the Defendants appealed to the Lord Keeper,

who being assisted by the Judges, and upon reading the Deeds and Will aforesaid, were all clear of Opinion, That the Indenture tripartite of 27 June, 7 Car. 1 [1631], is not, as the Case now stands, material or conducing to the State of the Case, or to the Limitation of the Time for Payment of the Portions; for that the same is by Deed or Bargain and Sale, and Release thereupon in 1651, barred, and a new Provision made for raising the said Portions in such Manner as he should limit by any Act in his Life-time, or by his last Will. By which Deed the Survivorship between the two Daughters is barred, and a Provision made, That if either of them die in the Life-time of William the Grandson, the Portion of her so dying shall not go to her Executors, but to the Grandson. And William the Grandfather, having by his Will of the ninth of March 1651, wherein he recites the Deed of December 1651, limited and appointed £900 apiece to be paid to his Daughters severally out of his personal Estate, towards the raising their Portions to £1500 apiece, having (as is recited) made Provision by his Deed dated the last of December 1651, for advancing their Portions to that Value. And he doth by his Will declare and appoint, that such Portions [9] should be paid unto them the said Susan and Martha severally, at the respective Ages of twenty-one Years, or sooner if they should be married; and both of them dying unmarried before they or either of them attained the Age of twenty-one, in the Life-time of William the Grandson: And the said Deed of December 1651, relating to the Will, and both of them making one entire Provision and Limitation of the said Portions, how the same shall be raised, and what Time paid.

His Lordship and the Judges were all clear of Opinion, there was no Ground for the former Decree made by the Master of the Rolls, or Pretence of Claim to either of the said Portions of £1500 by the Plaintiff, as Administratrix to Susan and Martha, and discharged the Decree and dismiss the Bill. *Vide post* [2 Chan. Rep.] 290 this Dismission confirmed by the Lords.

BEAUCHAMP *contra* SILVERLOCK.

20 Car. 2, fo. 765 [1668–69].

Orphans Money.

That William Beauchamp, the Plaintiff's Father, being a Freeman and Citizen of London, by his last Will gives a third Part of his Lands and Tenements, whatsoever and wheresoever, to the Plaintiff, and appointed Dorothy his Wife Guardian to his Children, and made her sole Executrix, and Richard Cambden, Robert Cheslyn, [10] John Pace and Hogan-Hovell Overseers; and the said Dorothy makes her Will afterwards, and gave the greatest Part of her Estate to the Plaintiff, and willed her Brother Hogan Hovell, and her Sister Margaret Cheslyn, and the Survivor of them to be Guardian to her Children, and made the said Hogan Hovell and Margaret Lovell her Executors, and died. That by Articles of Agreement between Hogan Hovell, Robert Cheslyn and Margaret his Wife, reciting the Will of Dorothy Beauchamp, whereby they agreed to administer the Estate to the best Benefit of the Children, and exhibit a true Inventory into the Prerogative Court, and that they should with the Consent, and not without the Consent and Knowledge of each other, use their best Endeavours to get in the Estate, and not to release any Part of it without each other's Consent, and that if Hogan Hovell should die and Margaret survive, then the Executors or Administrators of Hogan Hovell to make a true Account to Margaret, of all the estate which he should receive of the said Testators, and pay the same to Margaret, or to such Person who shall by the Consent of the said William Beauchamp, the Plaintiff, be chosen as Guardian to receive the same, or to such Person to whom by Right or Law the same ought to be paid, and the same Agreement [11] and Covenant is, if the said Margaret should die, and Hovell survive.

That Robert Cheslyn died, and the said Margaret married the Defendant James Silverlock.

And Hogan Hovell possess'd himself of the greatest Part of the personal Estate of the Plaintiff's said Father and Mother, and received the Profits of the Lands of the said Margaret, receiving only Title as Executor.

That Hogan Hovell made his Will and Mary his Wife Executrix, and afterwards the Guardianship of the Plaintiff, the Orphan, is at his Friend's Decree committed to Sir William Bateman.

That the said Mary Hovell, the Executrix of Hogan, exhibited an Account into the Orphans Court of the Money received by her Husband, belonging to the Plaintiff, out of which Allowances being made there rested due to the Plaintiff £933, and that afterwards the Defendant Silverlock and Margaret his Wife, the surviving Executrix of Dorothy, did by their Deed empower Sir William Bateman, then reputed a Man of great Estate, to receive of Mary Hovell, Executrix of Hogan Hovell, who was the other Executor of the said Dorothy, the said £933 to the Use of the Plaintiff, and to give a Discharge for the same: that Sir William Bateman received it [12] accordingly, and gave a Discharge for it in the Name of Silverlock and his Wife, and gave Security after that to the Court of Aldermen, to pay the Plaintiff £800.

That Mary Hovell died, and made Executors.

That the Plaintiff did several Times after he came of Age own Sir William Bateman to be his Debtor for the £933, that the Plaintiff received of Sir William Bateman £440, and gave Acquittances for it; the first was on the fourth of January 1663, the last on the twenty fifth of July 1666; that the Plaintiff came of Age in December 1663, and the said Sir William Bateman became Insolvent at Christmas 1666.

The Question touching the said £933 claimed by the Plaintiff, and whether the same should be charged on the Defendant Silverlock, and surviving Executor of Dorothy Beauchamp, or on the Defendant Sir William Bateman, who had given Security to the Chamber of London, as aforesaid, for the Plaintiff's Use.

This Court as to the Executors of Mary Hovell declared, there was no Reason to charge them therewith; but that they ought to be discharged and dismiss from being accountable for the same. And as to the Defendant Silverlock, the Case being, as aforesaid, declared that there was a clear Intention of all Parties to perform the [13] Articles aforesaid, and that the said Defendant Margaret never received any Estate during Hogan Hovell's Life, and that Sir William Bateman being chosen by the Consent of the Friends of the Plaintiff's, and by the Order of the Court of Orphans appointed Guardian to the Plaintiff, she the said Margaret gave in an account to the Court, and empowered Sir William Bateman to receive the Money, who before had given Security to answer the same, or the greatest Part thereof; and when the Plaintiff came of Age, he admitted and owned Sir William Bateman to be his Guardian, and received several Sums of Money from him, and Sir William proved not Insolvent till three Years after; and so there being no Default in the said Defendant Margaret, there was no Reason to charge her the said Margaret with the same, but that she ought to be dismiss'd and discharged from the same. But Sir William having given Security to the Court of Orphans for £843 Part of the said £933 by him received, by Order of the Defendant Margaret, and that for the Residue (being £90. 10s.) there was no Security given by the said Sir William. This Court declared, That the Defendant Margaret ought to be charged with the same, and decreed accordingly, but not with Interest for it.

[14] WINDHAM *contra* LOVE.

20 Car. 2, fo. 100 [1668-69]; 21 Car. 2, fo. 741 [1669-70].

Executory Devise.

The Bill is, That the Dean and Chapter of Winchester, June 17 Jac. granted the Premises to Gilbert Searle, his Heirs or Assigns, during the Lives of the two Defendants, Barnaby, Robert and Nicholas Love, Sons of Dr. Nicholas Love, and to the Survivor of them in Trust for the said Dr. Love: And the said Gilbert Searle, in July 17 Jac. [1619] demise'd the said Premises to the said Dr. Nicholas Love for 99 Years, if the said Nicholas, and the Defendants, Barnaby and Robert Love the Sons, or any of them should so long live; and the said Dr. Love had the original Lease made by the Dean and Chapter, delivered to him by the said Searle; and afterwards the Premises by mean Conveyances came to Nicholas Love the Son, who claimed the same absolutely to himself during the said Term, and was the reputed Owner thereof. And in the late usurping Times, the said Nicholas the Son had the Premises confirmed to him, and the said Defendants never pretended any Right, Possibility, or executory Estate in the said Premises after the Death of the said Nicholas the Son. And the

said Nicholas the Son, by Act of Parliament declared, forfeited his Estate to his Majesty [15] upon Account of Treason, and his Majesty granted the Premises to the Duke of York and his Heirs; and he 18 Car. 2 [1666-67], granted the Premises, and all the Writings to the Plaintiffs. their Executors, Administrators and Assigns, during the Residue of the Term.

The Defendants insist. That the said Dr. Love the Plaintiffs Father, by his Will, 15 Car. 1 [1639-40], did devise the Premises to Dulcibella his Wife for Life, for so many Years of the said ninety-nine Years as should be spent in her Life; and after her Death, then to the said Nicholas Love the Son for so many Years of the said Term as he should live; and, after the Death of him and the said Dulcibella, unto the Defendant Barnabas, his Executors, Administrators and Assigns, for all the Residue of the said Term, and made the said Dulcibella his Executrix, who assented to the said Will and executory Devise, and she enjoyed the Premises during her Life; and after her Death, which was about 1656, the said Nicholas Love the Son entered, and by Virtue of the Will possessed the Premises for the Residue of the said Term as was not spent, and not by Virtue of any Assignment, nor otherwise than the said executory Devise, and if the said Nicholas did purchase the Premises of the Usurpers, the same ought not to prejudice the Defendant Barnaby's Right and [16] Interest in the Premises by the said executory Devise, which he claimeth after the Death of Nicholas the Son, by Virtue of the said Will of his Father, as aforesaid, and say, That Nicholas the Son had no other Estate therein, but in Expectancy of the Death of Dulcibella.

This Court referred it to be tried at Law upon this Issue (viz. Whether the Defendant Barnaby, by the Will of the said Dr. Love, hath or shall have any Estate or Interest, or Possibility in the Premises, after the Death of the said Nicholas Love, the Son, if the Term so long continue.

The said Issue was tried, where a Special Verdict was found, That Gilbert Searle being possess'd of the Premises for the Lives of Nicholas, Robert, and the Defendant Barnaby, demised the Premises, to Dr. Nicholas Love for ninety-nine Years, if either of the Three live so long; and that the said Dr. afterwards made his Will, and devised the Premises to Dulcibella his Wife, for her Life, and after to Nicholas his Son for his Life, and if he died without Issue, then to the Defendant Barnaby, and made the said Dulcibella Executrix, who assented to the said Devise: That in Easter Term last the Special Verdict was argued in the King's Bench, and upon great Debates Judgment was given for the Plaintiff.

[17] This Court declared, That the Defendant hath no Right or Title to the Premises: and decreed the Plaintiffs their Heirs and Assigns, to enjoy against the Defendant.

Vide this Case well debated at Common Law, in Siderfin's Reports, p. 450. Windham and Love.

MOSELY *contra* MAYNARD.

20 Car. 2, fo. 999 [1668-69], & 22 Car. 2, fo. 274 [1670-71].

Bill to have a Will decreed.

This Suit is to have the Will of Sir Edward Mosely decreed, which upon a Trial hath been found a good Will.

This Court with the Assistance of Judges declared, They saw no Cause to decree the said Will.

This Cause also is touching Alteration of Possession.

The Point touching the Decreeing of the said Will heard and argued again.

The Plaintiff insisted, That it is the proper Justice of this Court, to settle Estates in Peace and Quietness, and pressed to have the Will decreed: especially, for that no Purchasor would meddle under the Title of the Will, and that the Plaintiff was by the Will to raise £10,000 to be paid according to the Directions of the said Will by a Time therein prefixed, or else be forfeited his Estate therein.

[18] But the Defendants insisted, It is altogether improper to decree a Will in this Court, especially to the Disinheriting of a Feme Covert, and her Son an Infant, and that this Court had refused to decree the same in a former Order with Judges. This Court ordered a new Bill to be brought.

The Point touching the Condition in a Will, settled on a Bill of Review, the Proofs in the original Cause not allowed to be read.

MACKLOW *contra* WILMOT.

20 Car. 2. fo. 548 [1668-69].

Defendant not to be examined upon Interrogatories.

The Plaintiff would have the Defendant examined on Interrogatories, to discover Deeds and Writings and to be examined to other Matters.

The Defendant insists, That what the Plaintiff now moves for may be of dangerous Consequence, being to discover the Estates of Purchasors, to whom the said Defendant hath sold most of the Land in Question, and it is now long since the Cause was heard, and many Attendances on the Master, and Examinations before him, and the Decree is enrolled by the Plaintiff; wherefore the Defendant ought not to be examined on Interrogatories, being to put up the Order on hearing, [19] in a Point that the Plaintiff at the hearing did not think fit to move for.

This Court, in Regard the Examining of the Defendant on Interrogatories is omitted out of the Decree, would not now order it.

DOM. READ *cont.* READ.

20 Car. 2, fo. 146, L. B. [1668-69].

Ne exeat Regnum. 1 Chan. Ca. 115 [S. C.].

This Case is touching the Granting a *Ne exeat Regnum* against the Defendant.

The Defendant insisted, That the said Writ ought not to be issued out, for that the Affidavit of the Lady Read, did not contain Ground sufficient to warrant it. For that the Writ is a Writ of Prerogative on behalf of the Crown; and the Reason of granting it is, that the Party against whom it is prayed intends to convey away some considerable Treasure out of the Kingdom, or do some other Matter prejudicial to the King or his Government, which the Affidavit doth not Specify; and if that were, yet no Writ doth regularly lie in this Case against a Layman to find Security, as this Writ is, but only against a Clergyman; neither is the Writ indorsed, as formerly it ought to be, and therefore ought to be superseded, and several Cases were offered, and Precedents [20] produced on the Behalf of the Defendants.

But the Plaintiff insisted, That by the Affidavit of Sir John Read, the Defendant, conveying and making over his Estate to others, standing out an Excommunication, and absconding his Person, and giving out that he intends to go beyond the Seas, the said Writ is well warranted; and for Justification thereof several Cases and Precedents were urged; and it appearing that the only Matter which carries any Countenance or Pretence of irregular issuing the Writ, that it ought to be for a Clergyman to find Security, and not for a Layman, is an Opinion taken up in a Posthumous Work of the Lord Coke, being called his third Institutes, contrary to the general Authorities, Precedents and Practice of granting Writs of *Ne exeat Regnum* in former and later Times, which are usual against a Layman to find Security, as well as a Clergyman, or else there can be no Writ at all to be found in the Register against a Layman to find Security in any Case, or any *Ne exeat Regnum* against a Layman; neither is there in the Register any such form of Indorsing the Writ as is suggested, but what is inserted in the Register is but a Note of some Observer. So that his Lordship, with the Judges, are of Opinion upon the whole [21] Matter, that there is no Ground to grant a Supersedeas of the said Writ of *Ne exeat Regnum*, but that the same was well granted, and ought to stand, and ordered it accordingly.

DIXON *contra* READ.

20 Car. 2, fo. 46 & 561 [1668-69].

No Relief against a Bond entred into to a Solicitor, to pay £100 when a Verdict should be recovered.

The Bill is, That the Plaintiff being sued by the Defendant Read in the Sheriff's Court in London, upon a Bond of £200 for the Payment of £100 to the said Defendant by the Plaintiff, when the said Defendant, being a Solicitor, should recover a Verdict on the Behalf of one Thrale; upon which Bond, though the Defendant was so far from being instrumental in getting any such Verdict, that he acted for Thrale's Ad-

versary; yet the Defendant hath gotten a Verdict on the said Bond: Whereupon the Plaintiff removed the Cause into the Mayor's Court, and from thence into this Court by *Certiorari*, and the Plaintiff (according to Proceedings in such Cases) proved his Suggestions: Yet the Defendant, without a *Procedendo*, hath removed the Proceedings back, out of the Mayor's Court into the Sheriff's Court, and hath there taken out Execution, and taken the Plaintiff's Bail thereupon and levied £102.

[22] This Cause was heard by the Master of the Rolls, who saw no Cause in Equity to relieve the Plaintiff against the Penalty and Interest of the said Bond.

This Cause came to a Re-hearing before the Lord Chancellor, being assisted with the Lord Chief Justice Hale, who were of Opinion with the Master of the Rolls, and confirmed his Decree.

SMITH *contra* HOLMAN.

20 Car. 2, fo. 192 [1668-69].

Plaintiff, two Days before the Commission for Examination of Witnesses, was arrested by the Defendant, and in Execution; ordered to be discharged, and the Defendant to pay Costs, and be at the Charge of a New Commission.

That the Defendant caused the Plaintiff's Bill at Law to be arrested, soon after the Plaintiff and Defendant had joined in a Commission for examining of Witnesses, which was for the same Matter here in Question; and also about two Days before the Execution of the Commission, the said Defendant caused the Plaintiff to be arrested when he was preparing for the said Commission, so that the Plaintiff could not execute the same.

The Plaintiff prays, That the Defendant, for such his Abuse, being against the ancient Privilege of this Court to Suitors, that are in the Management of their Causes in this Court, may stand committed, and pay the Cost of the last Commission and Damages sustained by the said Arrest.

[23] The Defendant insisted, he was ignorant of such Privilege, and that the Plaintiff was now in Execution.

This Court, in Favour of the Defendant, spared the Commitment, but ordered him to pay the Plaintiff Costs of the last Commission; as also his Costs and Damages sustained by Reason of the Arrest, Imprisonment and Prosecution thereon, and referred to a Master of this Court to tax, and that the Plaintiff giving a new Judgment for the Debt in Question, the Defendant shall, at his the Defendant's Charges, presently release and discharge the said Plaintiff out of Execution, and the Defendant to be at the Charges of a new Commission, and the Plaintiff to take an Injunction till hearing of this Cause.

WISEMAN *contra* FOSTER

20 Car. 2, fo. 731 [1668-69].

Marriage with Consent, &c.

The Plaintiff's Father, George Brigges, by Will devised to the Plaintiff Anne £500 for her Portion, which was appointed to be paid her at the Age of one and twenty Years, or Day of Marriage, and made the Defendant, Dame Anne Foster, his then Wife, and his Son George, his Executors; and by a subsequent Clause in his Will declared, That it should [24] be in the Power of his Executors, to order and dispose of the Plaintiff's Portion, according to their Discretion, to the Use of the rest of the Children, unless the Plaintiff should marry by the Advice and Consent of the Defendant, Dame Anne, and others, who were Overseers of his Will, or the greater Part of them: And the Defendants insist, That the Plaintiff hath married without such Consent, therefore ought to have but £250. Whereas the Plaintiff insists, That the said Clause was intended only *in terrorem* and Awe to the Plaintiff Anne, to induce her to take heed how she married, and not that she should lose any Part of her Portion, so as she married one who deserved the same, which she hath done with the Consent of the major Part of the Overseers.

The Defendants insist, That the Plaintiff marrying, as aforesaid, ought to have but £250 as by the Memorandum in the Will, and the rest to be distributed amongst the other Children of the Testator.

But the Plaintiff insists, That in this Case there was not by the Will any Devise over to the said other Children.

This Court, upon reading the Proofs touching the Approbation of the major Part of the Overseers, and their Consent to the Plaintiff's Marriage, decreed the [25] Defendants to pay the £500 and Damages. See 1 Cha. R. 84, *Post* [2 Chan. Rep.] 366, Max. Eq. 53 to 60.

ROWLEY *contra* LANCASTER.

21 Car. 2, fo. 993 [1669-70].

Will. Devise of Money to be paid at a Day to come. Devisee dies before the Day, yet payable to his Administrator.

That Matthew Lancaster bequeathed to John Creeke, £100, thus, (*viz.*) £50 in one Month after the Expiration of his Apprenticeship, and the other £50 within one whole Year after the Expiration of the said Apprenticeship, and made the Defendant Executor: That the Apprenticeship expired 29 Sept. 1664, but John Creeke dying before the Legacy was paid, the Defendant refuses to pay it to the Plaintiff the Administrator of the said John Creeke.

The Defendant insists, That he paid the fifty Pound due within a Month after the Expiration of the said Apprenticeship, and that the said John Creeke died before the whole Year after the Expiration of his Apprenticeship was expired, and therefore the other fifty Pound was not due to the Plaintiff.

This Court being assisted with Judges were clear of Opinion, That the said Legacy was *Debitum in presenti solvendi in futuro*, and decreed the said fifty Pound to be paid to the Plaintiff with Damages.

[26] FRY *contra* PORTER.

21 Car. 2, fo. 568 [1669-70].

Will. [S. C.] Eq. Abr. 111, c. 4; 1 Mod. 300; 1 Chan. Ca. 138.

That the Earl of Newport, deceased, by his Will devised to the Plaintiff the Lady Anne, the Messuage called Newport House, with the Appurtenances, thus: (*viz.*) I do give and bequeath unto the Lady Anne, Countess of Newport, my dear Wife, all that my House called Newport House, and all other my Tenements and Hereditaments whatsoever in Middlesex, for her Life; and after her Decease, I do give and bequeath the said House, and all other my Tenements and Hereditaments, as aforesaid, to my Grandchild the Lady Anne Knowles, the Daughter of Nicholas Earl of Banbury, by the Lady Isabella my late Daughter, and to the Heirs of her Body lawfully to be begotten. Provided always, and upon Condition, that my said Grandchild, the Lady Anne Knowles, do marry with the Consent of my said Wife, and of Charles Earl of Warwick, and Edward Earl of Manchester, or the major Part of them. And in Case the said Lady Anne Knowles do and shall marry without the Consent of my said Wife, and the major Part of my Trustees aforesaid, or shall happen to depart this Life without any Issue of her Body; then I will and [27] bequeath all the said Premises unto my Grandson George Porter, Son of my deceased Daughter, the Lady Anne, late Wife of Thomas Porter Esq., and to his Heirs for ever.

The Bill is to be relieved against the Forfeiture of the said Estate, for not performing the said Condition in the Will, and marrying against the Consent of the Trustees and the Mother: Yet the said Mother was told, That the Plaintiff was about to marry, and said nothing to the Contrary; whereupon the Plaintiff married and hath Issue.

The Plaintiff insisting, That if any Error was committed in marrying, it was through Ignorance and not Obstinacy, she the Plaintiff being very young, and knew not of the Proviso or Condition in the said Will; and it would be very unreasonable to make the Happiness of the Plaintiff to depend upon the Consent of Strangers in Point of Marriage, to put it into their Power to keep her during her Life, either from marrying, or from her Estate, and thereby make them Masters of her Affection or Fortune, and to disinherit her and her Children.

But the Defendant insists, That the reason of inserting the said Proviso into the said Will was, that the Plaintiff the Lady Anne might be disposed of in [28] Marriage without Disparagement, and therefore that she should marry with the Consent of the said Countess and the two Earls, or the major Part of them; and of that other Clause, (*viz.*) That if she married without such Consent, then he gave the said House

and Premises to the said Defendant George Porter, the Infant, and his Heirs for ever ; and that the said Lady Anne having married a Person very unequal to her Fortune, and without such Consent, as aforesaid, having little or no Estate, had made a wilful Breach of the said Proviso, or Condition in the said Grandfather's Will ; and the said George Porter claims the said House to him and his Heirs, by Virtue of the said Condition and Limitation over to him by the said Will, the Construction whereof is to be made out of the Will itself, and not otherwise ; and the said Lady Anne had Notice of the said Will before Marriage, there being Discourse of it by the Trustees to her ; and so the Lady Anne ought not to be relieved against the said Forfeiture or Limitation aforesaid.

This Court, with the Judges, and on Perusal of Precedents, are clear of Opinion and fully satisfied, That the Plaintiff ought not to be relieved against the said Forfeiture, and that the same was such [29] as ought not to be relieved in Equity, and dismissed the Plaintiff's Bill.

Vide this case in 1 Mod. Rep. p. 300 with Counsels and Judges Arguments, *seriatim*.

SHALMER *contra* TRESHAM.

21 Car. 2, fo. 560 [1669-70].

Bill to discover Settlements in Trust. Plea, That the Defendant is a Scrivener, and had taken Oath, not to discover the Secrets of his Clients, Over-ruled.

The Bill is to discover the Deeds of several Lands, and whether they were not made in Trust, and whether the Debt demanded by the Plaintiff were not mentioned in a Schedule thereunto annexed.

The Defendant pleaded, That he was a Scrivener by Profession, and hath taken the accustomed Oath that Scriveners do before they are made free in London, whereby he is obliged not to discover the Secrets of those Persons Business that employ him in that Trade, without their Leave ; and that he was employed by and assisted Sir John Langham in the Purchasing of the said Lands, and the Writings concerning the Premises he drew, and hath the keeping thereof by the said Sir John's Direction, and so ought not to discover the said Writings, contrary to his Trust, nor any Thing relating to this Matter.

[30] This Court declared, That the Oath of a Scrivener doth not oblige from a Discovery, more than the Oath of any other Freeman of London : And if it had been in the Case of a Counsellor at Law, the said Plea had been insufficient in this Case ; and over-ruled the Plea, saving he is not to answer to whom he paid the Purchase Money.

ALFORD *contra* PITT.

21 Car. 2, fo. 181 [1669-70].

Demurrer. Remedy at Law. Award.

The Plaintiff's Suit is to have the Benefit of an Award. To which the Defendant demurred, and says, That the Plaintiff ought to take his Remedy at Law.

This Court over-ruled the Demurrer.

LANGTON & AL' *contra* TRACY & ASTREY.

21 Car. 2, fo. 376 [1669-70].

Payment of Debts.

The Bill is to have the several Debts due to the Plaintiffs, being Creditors of the Defendant Roberts, paid.

THE CASE IS (*viz.*)

That Thomas Roberts conveyed the Manor and Lands in Question to the Defendant Tracy for Payment thereof, and of his other Debts ; but before that Conveyance to Tracy, the Defendant Nicholas standing engaged as Surety for the said Roberts [31] for several of the Debts, the said Roberts made the said Nicholas a Lease of the Premises for sixty Years at a Pepper-Corn Rent ; and such Lease being made, and no Care taken for satisfying the Debts, the Plaintiffs sue the said Roberts for their Debts, so to avoid such Prosecution, made the aforesaid Conveyance to Tracy in Fee, upon special Trust to pay all his Debts ; but Tracy combining with the Defendant Astrey, who had pro-

cured the said Nicholas to assign the said Lease to him, after Notice of the Trust, contrived a Conveyance of the Premises from Tracy to him the said Astrey by Way of Bargain and Sale intolled, so that Astrey pretends himself a Purchaser of the Premises from the said Thomas Roberts, and not under the said Deed of Trust, or Lease and Assignment, and pretends the Trust is destroyed, the said Conveyance being not intolled, whereas the said Deed was well executed, and the Trust accepted, by which the said Deed cannot in Equity be made void until Payment of the said Debts.

The Defendant Astrey insists, That the Deed to Tracy for the payment of Debts was a void Deed, as against a Purchaser, there being no Creditor party or privy [32] thereto, nor any Schedule of Debts thereunto annexed, and that the said Conveyance was voluntary, and made only between Roberts and his Wife, and Tracy, and the Creditors not Parties thereto; and that by the said Conveyance, Roberts was to have all such Money out of the Premises, from Time to Time, as he thought fit for the Livelihood and Subsistence of himself, his Wife and Family, and that the said Conveyance to Tracy being voluntary, and in its Nature but in Trust for Roberts, and revokable by him after the Conveyance to Astrey; and Roberts having exhibited a Bill against Tracy, to set aside the said Conveyance, Tracy surrendered the same to Roberts, who revoked it, and both cancelled it; and afterwards Roberts and his Wife conveyed the Premises to Astrey, and levied a Fine thereon.

But the Plaintiff insists, That after the Conveyance to Tracy was made, he declared he would pay the Plaintiff's Debts, which is proved by the Plaintiff Sir John Knight.

The Defendant insists, That Sir John Knight is interested and intitled to some of the Debts in Question, and continued a Plaintiff throughout the Cause, and is not struck out of the Bill, and is but a single Witness, and his Evidence denied by the Defendant's Answer, and therefore his Deposition ought not to be read.

[33] This Court declared, they would see Precedents where a Conveyance made voluntarily for Payment of Debts, and no Creditors named or appearing in any fix'd Certainty of the Persons, and with a Proviso for the Grantor to have Maintenance out of the Premises, conveyed for himself and Family, without Limitation of how much; whether such Conveyance be revokable by the Grantor and Grantee.

This Court, with the Assistance of the Judges, were clear of Opinion, That the Deed from Thomas Roberts to Tracy, and the Trust thereby created, were made and created with an honest Intention to pay the Debts of the said Thomas Roberts, and that the same was not fraudulent, though no certainty of the Debts appear therein; but the same being made on a Trust, which was a good Foundation, and a just and honest Consideration, and none of the Creditors complaining of any fraud, the same ought to be taken as a good Deed, and the Defendant Astrey coming in under this Deed, and having Notice of this Trust, and paying the Debts under it, ought to receive no Countenance in this Court, but the Estate ought to be charged with the same, in whose Hands soever the same shall come, and decreed the Deed of Purchase from the said Roberts to Astrey to be set aside, and Astrey to account for the Profits, &c. [34] and the Plaintiffs, and all the Creditors to be paid their Debts out of the said Estate.

EYRE *contra* GOOD & AL'.

21 Car. 2, fo. 211 [1669-70].

Award.

The Bill is to be relieved against a Bond of £1000 Penalty for the Performance of an Award, whereby Possession and Profits of Lands are awarded to the Defendant.

The Defendant insists, That there was no Surprize in the said Award, but the said Award was by the Direction of the Plaintiff's Friends, and says, it ought not to be set aside, which if it was, it would involve many Suits; and insisted, That the said Award is in the Nature of an Agreement, and ought to be performed.

This Court taking Notice, that the Award in Question was not made by the Order of this Court, but that it proceeded from the voluntary Submission of the Parties; two Judges being chosen by themselves, who declared their Opinion, That they saw no Cause to decree the Award to be set aside, nor on the other side to confirm it, or to relieve the Plaintiff; but ordered both Bills to be dismiss'd, the Plaintiff electing to go to Law: This was heard by Justice Tirrel.

[35] This Cause to be re-heard before the Lord Keeper, being assisted with Judge Wild, who confirmed the Order above.

HALE contra ACTON.

21 Car. 2, fo. 409 [1669-70].

Devise by Will, and an Agreement about a Portion, not intended several Sums.

That Edward Eltonhead by his Will gave the Defendant Mrs. Gilbourne £1000, to be first paid after his Debts, besides a Share out of the Dividend of the Estate, when as after the making the said Will, the said Edward Eltonhead and Henry Gilbourne, Father-in-Law to the Defendant Mary Gilbourne, before her Marriage came to an Agreement, for what the said Mary should have out of the said Estate, and that there should be but £1100, and the same was to be in full of what was intended her thereout, and that the said Edward Eltonhead often so declared, and in his Life-time paid £500, and after his Death his Executor paid £100 more in pursuance of the said Agreement, so as the chief Point then controverted being, whether the said Defendant Mrs. Gilbourne ought to have the £1100 Portion, and £1000 Legacy, mentioned in her Father's Will, or that he intended to give her any more out of his Estate than the said £1100.

[36] The Master of the Rolls declared, That the £1100 ought to be in full of what the Defendant Gilbourne was, and ought to have out of the said Estate, and decreed accordingly.

This Cause came to be re-heard before the Lord Keeper Bridgman, who declared he saw no Cause to alter the said former Decree, and so confirmed it.

BRABANT contra PERNE.

21 Car. 2, fo. 146 & 344 [1669-70].

Copies of Depositions, not to be recorded or exemplified.

Depositions of Witnesses under the hand of a Six Clerk, then in a Cause between Butt and Perne, about thirty Years since, the Plaintiff in this Cause prayed the same might be recorded, the Record of the original Depositions in that Cause being lost.

But the Defendant Perne's Counsel insisted, it would be of dangerous Consequence and Precedent, to suffer Copies of Depositions to be recorded, and used as Evidence in Case of Title of Land, there being no Cause in Court or Parties to the said former Suit, there being since the Dismission of the said former Suit two Trials brought by the said Butt concerning the said Things in Question, upon both which two Nonsuits passed against the said Butt's Title, the Witnesses which were examined [37] in this Court being all then living, and two Verdicts upon full Evidence on both Sides; and one other Verdict since 1664, hath been found for the Defendant's Title against the now Plaintiff's Title, and some of the Witnesses at the said Trial have sworn otherwise than is expressed in those Copies of the Depositions, which the Plaintiff would have now recorded and exemplified.

This Court would not allow the said Copies of the Depositions to be recorded or exemplified, but they being before ordered so to be by the Master of the Rolls, it is ordered they shall be vacated and made void and cancelled, and taken off the File.

ALEXANDER contra ALEXANDER.

21 Car. 2, fo. 324 [1669-70].

Bill to discover Assets.

The Suit is to discover the Estate of Richard Alexander deceased, which is come to the Defendant's hands, to satisfy a Debt of £300 due to the Plaintiff from the said Richard Alexander.

The Defendant insisted, That the Plaintiff ought not to have Relief in this Court, in regard the Assets in the Defendant's hands were legal Assets, and nothing appeared, but that the Plaintiff had her proper Remedy at Law, having not proved [38] any Thing more to be in the Defendant's hands than was confessed in the Defendant's Answer.

But the Plaintiff insisted, That this Court hath directed Accounts in Cases of this Nature to avoid Circuity of Action, and further Charge and Trouble of Suits; and that this Court being possess'd of the Cause, and the Parties at Issue on Proofs, the same was as proper for this Court, as at Common Law.

This Court ordered Precedents to be searched, where this Court hath directed Accounts and given Relief in this Case, and the Cause coming to be heard on the Precedents and Merits thereof, and the Plaintiffs insisted, that there is sufficient Assets of the said Richard Alexander come to the Defendant's hands, to satisfy the Plaintiff's Debt with Overplus.

This Court decreed the Defendant to come to an Account for the Estate of one Blackhall, unadministered.

[39] YATE *contra* HOOKE.

21 Car. 2, fo. 939 [1669-70].

Mortgage by Demise and Re-demise.

That John Hele, on the 23d Dec. 1654, for £2000 mortgaged Longs Court and other Lands to Jasper Edwards, his Executors, Administrators and Assigns, for ninety-nine Years, and the said Edwards on the 25th of Dec. 1654, re-demised the same to the said John Hele for 98 Years at a Pepper-Corn Rent, on Condition, That if the said John Hele, his Heirs, Executors, Administrators and Assigns, did not pay to the said Jasper Edwards, his Executors, Administrators and Assigns, £2150 at a certain Day therein mentioned, that then the said Re-demise to be void, and covenanted for him, his Heirs, Executors and Administrators, to pay the same accordingly; and in Hilary Term 1654, the said John Hele acknowledged a Judgment of £4000 to the said Jasper Edwards, for the Performance of the Covenants, in the said Demise and Re-demise; and after, in 1656, the said John Hele for £500 mortgaged the said Premises to Joseph Jackson, his Executors, Administrators and Assigns, reciting the said Mortgage to Jasper Edwards, to have and to hold the said Premises to the said Joseph Jackson, his Executors, Administrators and Assigns, for the Residue of the said Term demised to the [40] said Jasper Edwards, and to hold the Reversion to the said Joseph Jackson, his Heirs and Assigns, for the Use of the said Joseph Jackson, his Heirs and Assigns for ever, on Condition, That if the said John Hele, his Executors, &c., paid to the said Jackson, his Executors, &c., £515 in June next following, then the said Deed of Mortgage to be void, and the said John Hele to re-enter as in his former Estate; and the said John Hele covenanted with the said Jackson, his Heirs, &c., to pay the said £515, and for further Confirmation, granted to the said Jackson all his Equity of Redemption; and afterwards the said Edwards and Hele for £2000 paid by Jackson to the said Edwards, the said Edwards and Hele assign'd the said Premises to Jackson, with Condition of Proviso, That if the said Hele, his Heirs or Executors, should pay to the said Jackson, his Executors, &c., £2060, then the said Demise from Hele to Edwards to be void; and afterwards in 1657, Edwards assign'd the said Judgment of £4000 to the said Jackson, his Executors, &c., and the said Hele in 1660, died, leaving the said Defendant Sir Thomas Hooke his Nephew and Heir.

And the said Jackson having made his Will, and devised to his Daughter Sarah, Wife of the Defendant Alford £2000, and to the said Joseph Jackson his Son £2000, [41] with his Lands, Tenements, &c., and to the Heirs of his Body; and for Want of Issue, then the one Half of his Lands so given to his Daughter Anne Yate, and the other Half to his Daughter Earle, and the Issue of their Bodies equally; and that in Case his personal Estate fell short, then every Legatee to abate in Proportion to make it up the one Half, and the other Half his Son Joseph should make good out of what he had bequeathed to him, and made the Defendants Yate, Earle and Aldworth Executors; and if his Estate should amount to more than he had bestowed, then that the said Joseph and Sarah should have the one Half of it, and his son Yate and his Wife, and his Son Earle and his Wife, and what Child he should have living at his Decease, the other Half: Afterwards the said Joseph Jackson, having in his Account accounted the said Mortgage Money as Part of his personal Estate in 1661, died, leaving the said Joseph Jackson his Heir; that no Entry had been made either by the Testator in his Lifetime, or by the said Joseph his Son and Heir, upon the said mortgaged Premises; but the said John Hele and Sir Thomas Hooke had received all the Rents and Profits.

¶ So as the Question was, whether the said Mortgage-Monies are due and payable to the Heir or Executor of the said Testator Joseph Jackson.

[42] This Court, upon reading the said Deeds and Will, conceived that there was

no Question in the Case, but that the said several Sums of £2000 and £500 being the Mortgage-Money, ought not to go to the Heir but to the Executors, and to be accounted Part of the Testator's personal Estate, he having by his Will given his real Estate by Name to his Heir, besides his Portion of £2000 and one fourth Part of the Overplus of his personal Estate, the rather, for that it was not in the Power of the Heir to discharge the Judgment or the Mortgage, and the Monies by the several Provisoos being made payable to the Executor, and not the Heir; and the original Mortgage being but for Years, tho' altered by Act in Law, and the Testator having by Will charged the Lands devised to his Heir to supply the Deficiency, if the personal Estate should not be sufficient: Whereas, if he had not taken the Mortgages to be Part of his personal Estate, he would have supplied the same out of the Mortgages; and decreed Sir Thomas Hooke to redeem, and he pay the Plaintiffs, the Executors, the Mortgage-Money with Interest.

[43] *TOLSON contra LAMPLUGH.*

21 Car. 2, fo. 786 [1669-70].

Depositions taken in a former Cause made use of—Proofs.

The Plaintiff prays Liberty to make use of Depositions taken in a former Cause, wherein Henry Tolson, the Plaintiff's late Father deceased, was Plaintiff, against Abraham Molline and his Wife, and Mr. Winstanley, Defendants.

The Defendant Lamplugh insisted, That there is no Colour or Ground for the using the said Depositions taken in the Cause, wherein the said Henry Tolson was Plaintiff at the Trial, directed those Depositions, being taken in a Cause whereto neither the Defendants, the Lamplughs, are parties; and there is more Difference of the Title between the Defendants, the Lamplughs, and Mr. Molline and Winstanley, than between the said Lamplugh and the Plaintiff Tolson.

The Plaintiff Tolson insisted, That the Defendants, the Lamplughs, claimed and derived their Title under Mr. Molline and his Wife, and Winstanley, and so the said Depositions ought to be used at the trial, which the Defendant denied.

This Court declared, That the Depositions in the said former Cause, ought not to be used against the now Defendants the Lamplughs, unless they claim under the [44] said former Defendants; but if they do, then the said former Depositions ought to be admitted as Evidence against them.

HUNTON contra DAVIES.

22 Car. 2, fo. 386 [1670-71].

Bill for Remainder of Purchase Money.

The Bill is for £500, Remainder of £2900, which M. Hugh Ordley was to pay for the Purchase of Land to the Plaintiff's Father, which £500 was decreed to be paid to one Castle in 1637, for the Use of the Plaintiff, which £500 and Interest, comes to £1184, and to have the Defendants the Purchasors of the Land to pay it.

To which Bill the Defendants, the Executors of Ordley, pleaded, That Mr. Ordley lived in London till 1662, and the Plaintiff might have had Remedy against him, and it being a Debt thirty three Years since, and no Suit commenced against Ordley in his Life-time, nor any till now, and the Lands enjoyed by others now, and the Defendants the Executors have nothing to shew for the Payment and Case, and all former Parties concerned therein being dead, and therefore after all this Time the Defendants hope this Court will not suppose that the said Money is unpaid, or that the Defendants ought to be charged therewith, and the Defendants being Executors and [45] Strangers to all the Matters aforesaid, this Court held the Plea and Demurrer good.

MALPAS contra VERNON.

22 Car. 2, fo. 360 [1670-71].

Bill of Review.

A Bill of Review, to reverse a Decree, whereby the Plaintiff is decreed to pay more Money than by his Agreement on his Purchase he was to pay.

This Court declared, That without a special Agreement at the Time of the Purchase, for Payment of the Debt claimed by the Defendant, the Plaintiff ought not to be

obliged by the Decree to pay the Defendants, no such Agreement appearing by the Decree, or any Proof offered at the Hearing.

The Defendant insisted, That by the Proofs there is an Agreement proved, whereby the Defendant, amongst other Creditors, was to be satisfied his Debt.

Now the Point being, whether any special Agreement was made for the Purpose aforesaid, and the Court had declared no new Proofs could be admitted in the Cause, this Court ordered by Consent, That the Cause be heard on the said Point of Agreement on the old Proofs, and no other.

[46] COMES CASTLE-HAVEN *cont.* UNDERHILL.

22 Car. 2, fo. 106 [1670-71].

Bill of Review.

This is a Bill of Review, to reverse a Decree in 12 Car. 1 [1636-37] wherein the now Defendant was Plaintiff against the Lady Vice-Countess of St. Albans, his Wife, and others, Defendants: The Points of Error were, That the Decree was grounded on a Bill exhibited by the now Defendant against the said Lady St. Albans, his then Wife, and was made by Consent, without any judicial Hearing, whereby a settlement and Disposition of the said Lady's Lands, whereof she had an Estate in Fee, was made without any Fine or Recovery levied or suffered, or any other legal Act done, to bar and bind her or her Inheritance, which the said Plaintiff conceives could not be done, the said Lady being a Feme Covert, and could not in Law or Equity Consent, nor could her Trustees by her Consent charge the Inheritance, wherein they had no legal Assurance.

The now Defendants insist, That 2 Car. 1 [1626-27], the said Lady St. Albans, after her Inter-marriage with the now Defendant, did settle £300 per Annum, and several Recoveries were suffered, whereby the same would have come to the Defendant after the said Lady's Death, as an Estate in [47] Fee, the said Lady dying without Issue.

That afterwards the said Lady and the Defendant came to another Agreement, viz. That the Defendant should have £400 per Annum out of the said Lady's Estate, to him and his Assigns for Life, and in Consideration thereof the said Defendant agreed to quit and debar himself of and from all Claim and Interest to any of the rest of the said Lady's Estate, real or personal, during their joint Lives, or after her Death; and in Case of Failure of Payment, or the said Lady's Death, the Defendant was to enter into all the Estate for Satisfaction; which said £400 per Annum was settled by Deed tripartite, 14 Car. 1 [1638-39], and the said Agreement and Settlement was confirmed by a Decree 17 Car. 1 [1641-42], by the Consent of all Parties, and that the said Lady by Will gave away from this Defendant all her Lands and personal Estate, which the Defendant had given her Power to do, and she died, and for Non-payment of the said £400 per Annum the Defendant entred upon the Lands, liable to the Payment thereof, and the Defendant hopes the said Decree shall not be reversed.

The Plaintiff insists, That the Title in Law in the Lady's Estate was in Trustees before her Marriage with the Defendant, and so agreed to be continued without his intermeddling therewith, he bringing [48] no additional Estate to the said Lady, and that there was no Fine levied to the Trustees, or otherwise, of her Estate of Inheritance, and that the Uses upon the Recoveries were with Power of Revocation in the Lady alone, and that Pursuant to such Power, by Deed 14 Car. 1 [1638-39] she revoked the same, and settled the same in Trust for such Persons and their Heirs, as she by her Will should appoint, and that the said tripartite Indenture and Decree did not discharge the Trust, nor take Notice of the Recoveries, and that the said Lady in 1659 did appoint, that her Trustees upon the said Recoveries shall convey Part of her Land to the Plaintiff Solmes's Father, and the Plaintiff Terrell, and the rest to her Heir at Law; and that in 1650, the said Land came first to be charged, which was after the Lady's Death, and presently after there appeared Infancies, which was the Reason the said Decree was not sooner impeach'd.

This Court being assisted with the Judges, taking into Consideration the Length of Time since the Decree was made, and how long they were resting under it without any Complaint, and that the Heirs have a Benefit by the Lady's separate Power of Disposing, who disposed accordingly by her Will.

[49] This Court, with the Judges, declared and are of Opinion, that the said Decree, grounded on the tripartite Indenture 14 Car. 1 [1638-39], was and is a good Decree, and ought to be perform'd; and dismiss the Bill of Review.

WHITE *contra* EWENS & AL'.

22 Car. 2, fo. 237 [1670-71].

Appeal from a Decree.

This is upon an Appeal from a Decree, the Case being, That Dame Anne Brett, Relict of Sir Alex. Brett, having a Jointure in the Manors and Lands of Whitstanton, and Alexander her Son having on the Marriage with Elizabeth, the Daughter of Sir William Kirkham, agreed to settle £250 per Annum Jointure on the said Elizabeth; but being disabled to do it, by Reason of Dame Anne's Jointure, he being seised only of £120 per Annum in Whitland, and the reversion of Yarkcombe, the said Alexander agreed with the said Dame Anne, that his Heirs, Executors or Administrators, should pay yearly after his Death, to Sir Humphrey Lind and George Brett, £250 per Annum during the said Dame Anne's life, if the said Elizabeth should so long live; and thereupon the said Dame Anne joined with the said Alexander in a Grant of a Rent-charge of £250 per Annum out of Whitstanton, for [50] the Jointure of Elizabeth; and Alexander 12 Jac. 1 [1614-5] demised Whitland and Yarkcombe to Lind and Brett the said Trustees, for an hundred Years, to commence immediately after such Time as the Heirs, Executors, or Administrators of Alexander should fail to pay the said £250 per Annum to the said Trustees, during the Life of the said Elizabeth.

That 15 Jac. 1 [1617-18] the said Alexander died, and there being a failure of Payment of the £250 by the Children, Executors, &c., of the said Alexander, to the said Elizabeth, or to the Trustees, for the Use of the said Dame Anne, the said Dame Anne paid the same out of Whitstanton, and thereby the said Lease of 100 Years of Whitland and Yarkcombe did commence; and thereupon she entred, and received the Profits of Whitland, and the said Dame Anne paid the £250 during the Life of the said Elizabeth.

That the said Alexander leaving three Children, viz. Robert, Mary, and Anne wholly unprovided for, and by Agreement the said Dame Anne was to pay £80 per Annum for the said Children's Maintenance, from the Death of the said Elizabeth their Mother; and that the said Dame Anne and her Trustees should assign the said Lease of 100 Years to the said Children, when at Age.

[51] That 17 Jac. 1 [1619-20] the said Lease was assigned to the Children, to commence from 1636, that the said Dame Anne paid the said £80 per Annum Maintenance, which with £1750 she had paid to the said Elizabeth, amounting to more than the Value of the said Lease of Whitland, whereof she received the Profits, till about 1636, the said Mary one of the Children being dead, and that the Defendant Ewens having married Anne the other Daughter, they and the said Robert Brett the Son held the said Premises as Joint tenants, by Virtue of the said Lease; but the said Robert Brett receiving more of the profits than his Share, the Defendant Ewens and his Wife sued out a Writ of Partition in 1654, a Moiety was delivered to the Defendant Ewens, and Judgment given, that the same should be held in Severalty; and the defendant Ewens, 12 Car. 2 [1660-61] for £132 Fine, and £20 per Annum, demised Part thereof to the Defendant Nurse, who assigned to the Defendant Rutland.

That the Plaintiff White insisting, That Robert Brett acknowledged a Judgment to Richard White in 1644, extended the Defendants Moiety, and brought an Ejectment, and got a Verdict by Surprise; since which the Defendant brought an Action, and obtained a Verdict; whereupon the [52] Plaintiff exhibited his Bill, and hath stayed the Defendants by an Injunction.

To have an Account of the Profits received, and a Lease 12 Jac. 1 [1614-15] being twenty Years since, is contrary to the Limitations and Rules both at Law and Equity.

The Plaintiff insists, He is now in the Place of the said Robert, but in a better Condition, his said Judgment under which he claims being long since extended in the Life-time of the said Richard White and Robert Brett, and before any Action brought, and if the said Lease be satisfied, the same ought to be set aside: And to take off the Length of Time insists, That by a Decree made in the Court of Wards in 1640, the Defendants were to account with the said Robert Brett, and the Plaintiff's Father Richard White really lent the said Money for which the Judgment was got: and in

1646 on Extent, had a Moiety of Whitland delivered, and that notwithstanding the Lease to the three Children, the Lady Anne had Possession of Whitland till 1637.

The Defendants insist, That the Lady Anne paid £1750 and £80 per Annum, during the Minority of the Children, which is more than the Value, so look'd on herself an absolute Owner, and disposed of the said Lease whereof the said [53] Robert had a Moiety, and that this differs from ordinary Mortgages, the Lease being to commence after Failure of Payment by the Heirs, Executors or Administrators of the said Alexander, and there was no Proviso therein, and that the said Lady Anne in all Probability hath paid many hundreds of Pounds, and Elizabeth might have lived many Years longer; and though the Lady Anne had paid treble the Value, yet she must have been contented with her Security, and the said Robert Brett did not think the same worth redeeming; and though the Reversion in Fee was extended in 1646; yet the said Robert Brett and the Defendant Ewens continued Possession till Judgment on the Writ of Partition, and from thence till 1662, which was twenty Years after the Plaintiff's Judgment, and the Lady Anne was to continue Possession till the Children attained twenty one Years of Age; which was in 1636, when the said Demise to them made did commence.

This Court, being assisted with the Judges, were of Opinion and declared themselves fully satisfied, That the Plaintiff ought not to have any Relief against the Defendants, but that the Bill ought to be dismissed, for that his Lordship doth take a Difference betwixt the Lease which is to commence after Failure of Payment, [54] and a Mortgage with a Condition subsequent, and the rather in this Case, for that the Breach was in the Failure of Payment of £250 per Annum, which the said Lady was thereby obliged to pay for a young Life, and so might have been paid for many Years; and if it had been paid in the Casualty for twenty Years, the Heirs would never have redeemed it, and therefore no Reason why the Plaintiff should take Advantage thereof; and also the Agreement before mentioned between the said Dame Anne and Kirkham weighed much in this Court, to which Agreement Robert the Heir, by his enjoying of the Premises so assigned, together with the Defendant Ewens and his Wife, after he came of Age, consented, and there was no Disturbance during the Tenancy in Common as to the Right, but as to Perception of Profits only; and the Heir permitting the Defendant Ewens and his Wife to have Judgment on the Writ of Partition, was a Consent of the whole, and in this Consent it is not the Heir, but a Stranger, who seeks to redeem; and no Man, that puts himself after so long a time into a Condition to redeem, shall have any Relief here; and it is the stronger against the Plaintiff, that no consideration is proved for the said Judgment, which was [55] entred so long since as the Year 1640, and after sixty Years, this Court will not relieve the Plaintiff, but dismiss the Bill.

BOULTER contra CHESTER & AL'.

22 Car. 2. fo. 60 [1670-71].

Bail to answer no more than what is expressed in the Ac etiam Bill.

The Question being, Whether the Plaintiff Boulter, who was a Surety for one Ree, should pay any more than the Sum of £40, for which he was Bail for the Appearance of one Roger Ree at the Defendant's Suit, the *Ac etiam* Bill being only for £40, whereas the Defendant demands £55 for a Year's Rent for the Premises, and £10 Damages for Want of Repair of the Premises, besides Costs, and would fix the same on the Plaintiff the Bail; but the main Question being, Whether the Bail ought to answer or pay any more than what was expressed in the Writ, which is £40, or whether he ought to answer or pay what might have been recovered, in case the said Ree, for whom the Plaintiff was Bail, had appeared and defended the Action;

This Court conceived, That the Defendant Stretton ought to have no more than what was expressed in the Writ and *Ac etiam* Bill, for which the Plaintiff was only Bail, but his Costs in the same already taxed at Law and by the Master, and ordered the same accordingly.

[56] *FLOYER contra HEDGINGHAM.*

21 Car. 2. fo. 809 [1669-70].

Copyholder not to be admitted by Letter of Attorney.

That no Copyholder ought to be admitted to any Copyhold Estate by Letter of Attorney, for that he ought to do Fealty at the Time of his Admittance, which cannot

be done by an Attorney; but ought to be done in Person, by Reason that no Man can swear by Attorney.

HUNT *contra* JONES.

22 Car. 2 [1670-71].

Limitation of a Lease.

The Bill is, That the Defendant Jones, who is the surviving Trustee, may assign and convey all his Interest and Estate in Brockley in Com. Worcester to the Plaintiff, the said Plaintiff intitling herself thereto as Administratrix to Edward Palmer; the Plaintiff setting forth by the Bill, That Edmund, late Bishop of Worcester, did by two Indentures of 30 & 31 Eliz. [1598] demise the premisses to the late Queen and her Assignee, during the several Terms and Rent therein expressed, that the several Estates, Terms and Interest being come and vested in the said Edward Palmer for the Remainder thereof, he the said Palmer by Deed in 1652, in Consideration of a Marriage then to be had between him and the Plaintiff Mary, assigns the said Premises unto Giles [57] Palmer and the Defendant Jones, and their Executors, for the Residue of the said Terms upon Trust to permit Elizabeth Palmer, Mother of the said Edward, to enjoy the said Premises for Life, and then to the said Edward for his Life, and after their Lives, then to the Plaintiff Mary for her Life, and after their Deceases, then to the Heirs Males of the Body of the said Edward Palmer and the Plaintiff Mary, and for Default of such Issue, then upon Trust for the right Heirs of the said Edward, to their own Use, Benefit, and dispose as by the said Deed, &c.

That the said Edward and Eliz. Palmer being dead, Letters of Administration were granted to the Plaintiff Mary, by Virtue whereof she is well intitled to the said Premises, and to the Trust and Benefit thereof, for the Remainders of the said Terms to come, and that the Defendant Jones, as the surviving Trustee, ought to assign to the Plaintiff, and the Plaintiff insists that all the Remainders after her Death are void in Law and Equity.

The Defendant Jones insists, That the Trust extends to the Child or Children of the said Edward Palmer, and the Defendant Elizabeth Palmer, an Infant, being his Daughter, she may question him for the same, in case he should assign as aforesaid, and prays the Court will take Care [58] for the Infants. But the Plaintiff insisting, That both in the Cases of Executors and Administrators the Point hath been frequently adjudged, and the Limitation to the Heirs Male, or Heir General, being a void Limitation in Law, where there is no Executor, the Trust shall come to the Administrator.

This Court declared, That both in Law and Equity the Benefit of the Trust in such Case doth belong to the Executor or Administrator; but the Plaintiff Hunt having married the said Plaintiff Mary, and claiming in Right of her who is Administratrix to her former Husband Edward Palmer, the Court thought it hard, that by Virtue of the said Administration she should carry away the Estate to her second Husband, and thereby strip the Infant thereof, from whose Father the Estate first moved, and it not appearing that the Ecclesiastical Court, when they granted the Administration, took any Consideration for a Distribution to be made for a Provision for her, this Court would consider of the Case, and also of the Limitation and Consideration of the said Deed, and deliver their Opinion.

This Court being assisted with the Judges, it appearing that the Interest and Estate of the Terms, and the Trust and Benefit thereof, is, by the Death of the said [59] Edw. Palmer and his Mother, come to the Plaintiff Mary for her Life, and there being but thirty Years of the said Term to come, and in Regard the Ecclesiastical Court cannot make a Distribution of the Remainder of the Terms, not knowing but that the said Mary may live till the Expiration thereof.

This Court directed the Defendant Jones to assign and transfer the Premises and all his Interest therein, &c., in the said Terms to the Plaintiff or such as they should appoint.

DARRELL *contra* WHITCHOT.

20 Car. 2, fo. 516 [1668-69].

Trusts.

The Plaintiff had a Trust in a Lease of a Coal Farm by Patent from the late King, which Lease was afterwards renewed by the King, and other Trustees named therein,

and the Defendant being one of the Trustees insists, he was a joint Patentee for the valuable Consideration of £500. But the Plaintiff insists, The Defendant comes in as the Plaintiff's Trustee, and not to be subject to the same Trust in the new Lease, as he was under the old Lease.

But the Defendant insists, The new Patent was to the new Trustees for Service done by them to this King, and this [60] Defendant's £500, and this Defendant was not Trustee for the Plaintiff, but was in for his own Use, which Patent this Defendant had pleaded, and was allowed.

Yet the Plaintiff insisted, There was a continued Trust, and the Defendant and the King declared, he had a Respect for the old Tenants, and the Defendant coming in under the Tenants Interests, ought to be in Trust for the Plaintiffs, and that though there be no Tenant Right against the King, yet the King did consider the Tenants, and that this Case, is but the same with that where a Mortgagee or Trustee renews a Church Lease, in which Cases this Court had given Relief.

This Court with the Judges declared their Opinion, That there was no ground at all to relieve the Plaintiff, and so dismissed his Bill.

EPISCOPUS SARUM *contra* NOSWORTHY.

23 Car. 2. fo. 720 [1671-72].

Arrears of Rent.

This Case is touching a Rent of £67 per Annum reserved on a Lease of Lands made by John late Bishop of Exon to the Defendant, and the Plaintiff by his Bill says the Defendant never paid the said Rent to the Plaintiff, nor any Part thereof during all the Time he was Bishop of Exon, which was for six Years, whereby [61] a great Arrear is incur'd and due to the Plaintiff from the Defendant, for which the Plaintiff seeks Relief.

The Defendant insists, that he directly tendered the said Rent to the Bishop, while he was Bishop of Exon; but he refused the same having an Intention to impeach the said Defendant's Estate; and now the Plaintiff is translated to another See, and so he ought not in Law or Equity to Demand the said Arrears, but ought to be debarred from receiving the same by his Refusal, as aforesaid.

His Lordship was clear of Opinion, that by Law the Plaintiff could not recover the said Arrears; but how far the Plaintiff was relievable in Equity was the Question, and his Lordship ordered Precedents to be produced, where there hath been a just Duty, but no legal Remedy, and ordered a Case to be stated.

It appearing that the Plaintiff, while he was Bishop of Exon, would not accept the said Rent, his Lordship, with Judges assisting him, were clear of Opinion, That there was no ground in Equity to give the Plaintiff any Relief, and dismiss'd the Bill.

[62] BARTHOLOPE *contra* WEST.

23 Car. 2, fo. 744 [1671-72].

Equity of Redemption—Assets.

The Plaintiff's Suit is to have the Benefit and Equity of Redemption of Leases mortgaged, and other Trust Estates, made liable for the Payment of his Debt, being on Judgment for £2000, and to have a voluntary Deed of Trust set aside, as against the Plaintiff.

This Court decreed the Plaintiff to have the Equity of Redemption to be liable, and as Assets to satisfy his said Debt of £2000, and set aside the said voluntary Deed of Trust, and all Trust Estate and Surplus thereof after preceding Debts paid, to be Assets in Equity for the Payment of the Plaintiff.

HOOKE *contra* ARTHUR.

23 Car. 2, fo. 523 [1671-72].

The Court of Chancery will not try or ascertain Damages recoverable at Law.

The Defendant having recovered Damages for Breach of a Covenant in a Lease, at Law, but the Plaintiff insists, That there is not so much Damages due, as the Defendant

hath sworn in his Answer, therefore the Plaintiff hopes this Court will reimburse him what is overpaid to the Defendant.

[63] This Court declared they would not try nor ascertain the Damages in this Court, but ordered the Parties to Law on the Covenant.

DOMINA KEMP *contra* KEMP.

23 Car. 2 [1671-72].

Devise.

This is on a Case stated (*viz.*)

That upon Articles of Agreement between Sir Robert Kemp and Thomas Steward, the Plaintiff's Father, upon the Marriage of Sir Robert with the Plaintiff, it was agreed £500 Marriage Portion, should be paid unto Sir Robert or his Executors, and in Consideration thereof, the said Sir Robert should settle a Jointure of £200 per Annum on the Plaintiff his Wife, and if the said Sir Robert should die before such Jointure settled, then he was to have Lands chargeable with the Plaintiff's Dower, which should fully Recompence the £200, and that Sir Robert by his last Will devised to the Plaintiff a Rent-charge of £200 for her Life, to be issued out of the Manor of Spenishall and Lands thereto belonging, and of certain Farms called Linilts and Mortimore, and Ravels, and the Frywoods, in full Satisfaction of the said Articles, and all Dower claimable by the Plaintiff, and also devised the said Farms unto the Defendant Mary [64] his Grandchild; To have and to hold immediately after the Death of the Plaintiff his Wife, and by a subsequent Clause in the Will he devised all the Lands (not therein before disposed of) to the Defendant Thomas Kemp the Father for Life, Remainder to Thomas his Son for Life, with Remainder over; and also gave the Plaintiff his Coach, Horses, Plate and Jewels, &c., and one third Part of his clear personal Estate: And the Plaintiff conceived, that she ought by the Will to have both the Rent-charge and the Farms for her Life by the aforesaid Devise, *viz.* where the same are devised to the Defendant Mary, To have and to hold after the Plaintiff's Death: So to have the same by the said implicit Devise, without Extinguishment of the said Rent-charge, is the Plaintiff's Suit.

This Court declared, they saw no Cause to decree both the Rent-charge of £200 per Annum, and the Farms aforesaid to the Plaintiff, but the Rent-charge of £200 per Annum to the Plaintiff only.

[65] BOUCHER *contra* ANTRAM.

23 Car. 2, fo. 97 [1671-72].

Will.

The Bill is, That Alice Lowman, the Plaintiff Katherine's late Mother, did in Dec. 1669, by Will, give and dispose unto the Plaintiff Katherine a Legacy of £160, and made the Plaintiff, who married another of the Daughters, Executor.

The Defendant insists, That the Testatrix made her Will in these Words, *viz.* Item, I give unto my Daughter Katherine Boucher the sum of £160 for her to have the Use of it during her Life, and her Child or Children to have it after her Decease; but if she happens to die, leaving no Child surviving her, I Will that the said £160 shall be to and for the sole Benefit and Use of my Daughter Elizabeth Antram and her Children, which Elizabeth is the Defendant's Wife, and the Defendant is willing to pay the said £160 to the Plaintiffs, or either of them, he being secured against the Title and Claim of the surviving Child or Children of the Plaintiff Katherine; and if she should die leaving no Child or Children behind her, then against the Title of the said Elizabeth and her Children.

[66] This Court decreed the Defendant to pay unto the Plaintiff £160 with full interest; but as to the Clause in the Will which directs, That for Want of Issue by the Plaintiff Katherine, the said £160 after her Decease shall be to and for the Benefit and Behoof of the Defendant's Wife and her Children.

His Lordship declared, it being a Personality, is in the Nature of a Perpetuity, and so a void Devise, and therefore the Defendant, nor his Wife and Children, ought to have any Benefit thereby, but be debarred from the same, and that the said £160

ought to be absolutely vested in, and come unto the Child or Children of the Plaintiff Katherine, and decreed the same accordingly.

CHAMBERS *contra* GREENHILL.

24 Car. 2, fo. 288 [1672-73].

Bill of Review, because the Plaintiff can now prove a Tender and Refusal, which he could not prove before, dismiss.

A Bill of Review brought by the Plaintiff, to reverse the Decree in this Cause : the Plaintiff would now examine to a Matter of Tender and Refusal, which he could not prove before the Hearing, but since the Decree signed and inrolled he can prove it.

The Court ordered Precedents to be searched, which being produced by the Plaintiff, his Lordship declared the said [67] Precedents seemed of no Weight to the Plaintiff's Purpose, and dismissed the Bill of Review.

CROSTER *contra* WISTER.

24 Car. 2, fo. 688 [1672-73].

Bill of Revivor.

The Defendant insists, The Plaintiff ought not to have brought a Bill of Revivor in this Case, but to have taken out a Subpœna in the Nature of a *Scire Facias* to revive the Decree, the same being signed and inrolled in the Life-time of the Plaintiff's Testator; therefore the Defendant demurs to the said Bill.

The Plaintiff insists, It is at the Plaintiff's Election to revive the said Decree inrolled, and to have Execution thereof by Bill or Subpœna in the Nature of a *Scire fac'* : And as this case is, the whole Proceedings could not be revived by Subpœna, in Regard several Proceedings have been relating to Costs since the Decree, which Proceedings can be only revived by Bill, and therefore the most proper Course was, to revive all Things by Bill.

This Court held the said Bill to be well brought, and held the Demurrer insufficient.

[68] STOELL *contra* BOTELAR.

24 Car. 2, fo. 390 [1672-73].

Supplicavit of the Peace on Petition, and not on Motion, nor any Indorsement on the Back thereof ; yet good.

That a Writ of Supplicavit of the Peace issued against Sir Oliver Botelar, upon a Petition and Articles exhibited by the said Stoell.

The Defendant insists, The said Writ issuing on Petition and not on a Motion in Court, nor any Indorsement made on the Back of the Writ, as by the Form of the Statute is required, and but three of the said Articles being sworn to by the Articulate, it is irregular.

This Court on reading Precedents, notwithstanding the Objections aforesaid of Botelar, was fully satisfied, that the Supplicavit was well granted and warranted.

MONNINS *contra* DOM' MONNINS.

24 Car. 2, fo. 85, 178 [1672-73].

Demurrer to a Bill for Discovery, whether the Defendant be married or not, good ; for that if she be married it would be a Forfeiture of her Estate, and the Bill dismiss.

The Bill is to have the Defendant to discover, whether she be married since the Death of Sir Edmund Monnins her late Husband : The Defendant demurred, for that in case she was married since the [69] Death of her said Husband, the same amounts to a Forfeiture of her Estate and Interest in several Goods and Things, devised to her by the Will of her said Husband, to be held and enjoyed by her during such Time as she should continue her Widowhood, and so ought not to discover as aforesaid.

This Court held the Demurrer good, unless the Plaintiff produced Precedents, which the Plaintiff could not ; so the Bill was dismissed with Costs.

WARREN *contra* JOHNSON.

24 Car. 2. fo. 543 [1672-73].

Money in Trust for the Children of J. S. it shall be for the Benefit only of the Children that he then had, and not born afterward.

That Mary Warren, the Plaintiff's Grandmother, put £60 into the Defendant's Hands in Trust, for the Benefit of the Children of Mark Warren her Son, who at that Time had but three Children, Whereof the Plaintiff was one ; but now hath six Children.

This Court is of opinion, That the said £60 belonged only to the Children of the said Mark Warren, which he had by his then Wife at the Time when the said Money was given, and decreed the same accordingly.

[70] WALLOP *contra* DOMINAM HEWETT.

24 Car. 2. fo. 218 [1672-73].

Legacies given by a Will and a Codicil, are distinct, not one and the same.

The Plaintiffs Henry and John Wallop seek Relief for £400, viz. £200 apiece Legacy given them by the Will and Codicil of the Lady Crofts.

The Case is, That the Lady Crofts by her Will gave the Plaintiffs £100 apiece, and afterwards by a Codicil annexed to her Will gave the Plaintiffs £100 apiece.

The Question is, Whether the said Legacies so given be one and the same, or distinct and several Legacies, or what her Intention was in Reference to the same, and desire the Judgment of the Court therein.

This Court with the Judges, on reading the said Will and Codicil, were of Opinion and satisfied, That the said Legacies in the said Will and Codicil mentioned are not one and the same, but distinct and several Legacies of £200, and decreed the Defendants to pay the said Plaintiffs £400.

[71] THORNE *cont.* NEWMAN.

24 Car. 2. fo. 8 & 371 [1672-73].

Deed of Revocation.

That Nicholas Burnell, Father of the Defendant Margaret Newman, being seised of the Premises in 1652, demised the same to Elizabeth Stone for ninety-nine Years at a Pepper-Corn Rent, with a Proviso to be void on Payment of £590, and the said Elizabeth died and made Elizabeth Wheat her Executrix, and Thomas Baker marrying the Defendant Margaret Newman in November 1657. Elizabeth Wheat and the said Nicholas Burnell assigning the Premises to Thomas Baker, and the said Baker for £500 borrowed of the Plaintiff, assigned to one Minterne in Trust for the Plaintiff in 1659, and Baker failing in Payment contracted with the Plaintiff, for £770 more, that he would give his Interest in the Premises absolutely, without any Power of Redemption, and Baker and Minterne did joyn accordingly in 1660.

And the Plaintiff insists, that the Defendant claims the Premises by a Deed dated the 19th of Aug. 1659, whereby it is pretended, That by Indenture made between the said old Burnell of the one Part, and Thomas Lewis and Bartholomew Pickering of the other Part, the said Burnell in Consideration of the natural Love and [72] Affection to the said Margaret, and for the settling and confirming of the Premises for the Uses therein, and for five Shillings covenanted to stand seised of the Premises to himself for Life, Remainder to the Defendant Margaret for Life, then to the Wife of the said Thomas Baker, Remainder to the Heirs of her Body, with Remainders over, and the said Burnell dying in 1659, the Premises were then vested in Margaret, and that Baker in her Right became seised of the Freehold thereof, and that thereby the Remainder of the said Term of ninety-nine Years was drowned, and so the Assignment to Minterne, and the Assignment by Baker and Minterne to the Plaintiff was void, and so the Plaintiff a Purchaser for £1300 like to be defeated.

And the Plaintiff further insists, That if the said Deed were ever sealed, it is with a Proviso of Revocation, to be void on Payment or Tender of twelve Pence to Lewis or Pickering, or either of them in Middle-Temple Hall, and that Burnell did tender twelve Pence to Lewis, with Intention to make void the said Deed, and declared so to Lewis

that she did revoke the said Deed, and pulled the Seal off from it, and that a Memorandum was indorsed on the Back side of the Deed, That there was 22d of Oct. 1659 twelve Pence tendered to Lewis to revoke the said Deed ; but the Defendants [73] pretend, because the twelve Pence was not tendered in the Middle-Temple-Hall, therefore the Revocation was not legal, and so the said Deed is still in Force, and the Plaintiff's Estate drowned.

The Defendants admit the Case to be as aforesaid, but insist, That the said Deed 19 Aug. 1659, was intended for a Settlement on the Defendant Margaret, for a [Provision for her after the Death of the said Baker her Husband, he having not made any Jointure, and that the said Defendants claim the Premises by the said Deed, whereby immediately upon the Death of Burnell, the Freehold of the Premises vested in Baker in Right of the said Margaret his Wife, and so the Plaintiff's Estate was drowned, and that Baker was not by Intention of the said Deed to sell away the Premises for any longer Time than his own Life, without the said Margaret's Consent, and joining with him in a Fine thereof.

And the Defendants further insist, That the 12d. ought to have been tendered in the Middle-Temple-Hall, else the Deed must be in force ; and if any Memorandum or Declaration were made as aforesaid, the same was done out of Design only, to have the said Baker make the said Margaret a Jointure.

[74] But the Plaintiff insists, That he ought to hold the said Premises for the Residue of the said Term for ninety-nine Years against the said Deed.

This Court was satisfied, That the Plaintiff ought in Equity to enjoy the Premises against the Defendants, and that the said deed ought to be set aside, as against the Plaintiff ; but the Defendants are to redeem.

The Bill being to set aside a pretended voluntary Conveyance set on Foot by the Defendant, which Deed is with Power of Revocation upon the Tender of 12d., and the 12d. was tendered accordingly with Intent to revoke the said Deed, and the said Deed is accordingly cancelled ; but the Defendants, in Respect the 12d. was not tendered at the Place appointed, set the said Deed up at Common Law ; and upon a Trial at Law, without any Defence made by the Plaintiff, the Defendants were non-suited ; and the Plaintiff being a Purchaser of the Premises, first by Mortgage for £500 and afterwards by absolute assignment for £770 more ;

The Lord Keeper, upon reading the said cancelled Deed, saw no Cause to alter the Master of the Rolls his Decree aforesaid, but ordered the same to stand confirmed.

[75] COMES STERLING *contra* LEVINGSTON.

24 Car. 2, fo. 113 & 432 [1672-73].

Settlement with Proviso not to attempt the Impeachment of it. Court directed a Trial at Law, and that the Trial should be no Forfeiture.

That Sir Peter Vanlore the Elder, being seised in Fee of the Lands, by Deed covenanted to stand seised thereof to several Uses, under which all Parties to the Suit claim several Parts of the Premises ; and there being a Proviso in the said Deed, That if young Sir Peter Vanlore, or the Issue (whose Issues and Heir the now Plaintiffs are), should attempt to impeach the said Settlement, that then the Uses to him and them limited by the said Deed should be void, and that by the Death of several Persons several Parts of the Premises were accrued to the said Plaintiffs, but that by reason of the said Proviso and several Ambiguities in the said Deed, it was doubtful to what Parts the Plaintiffs, the Heirs general, were entitled unto ; so to be protected against the said Proviso, and to have the Partition of the Lands, is the Bill. His Lordship declared, it was most fit that a Trial at Law be had touching the Plaintiff's Right and Title, and that such Action to be brought shall not be taken or construed a Breach of the Proviso aforesaid, or Forfeiture of the Plaintiff's Right and Title to the Premises.

[76] SMITH *contra* SALLET.

24 Car. 2, fo. 382 [1672-73].

Fines of Copyholders, whether certain or arbitrary ; it having been tried at Law, the Court would not relieve the Plaintiff, other than for the preservation of Witnesses.

The Bill is to have an Issue directed by this Court, to try whether the Fines of the Copyholders, due to the Lord of the Manor, were certain or arbitrary.

The Defendant insisted, that there had been several Trials already, and Verdicts have passed for a Fine certain, and particularly one in Ejectment before Mr. Justice Windham, and another before the Lord Chief Justice Hale, upon a special Issue, directed out of the Exchequer, Whether the Fines were certain at 8d. an Acre, and 8d. a Cottage, or not? And a Verdict passed on both Trials for a Fine certain.

This Court declared, They could not relieve the Plaintiff in Equity, other than for the Preservation of Testimony, and dismissed the Plaintiff's Bill.

[77] *LEWIS contra LEWIS & AL'.*

24 Car. 2, fo. 664 [1672-73].

Trust of a Term devised to J. S. and then to J. D. to be disposed of as the Testator should appoint by his Will or Writing. He makes a Writing, and declares it to himself for Life, and after to such Persons as he should by Will or Deed appoint, and for Default of that, to his Executors; and made no other Will or Deed, the Executor shall have it.

This is on a Case stated, (*viz.*).

That the Lord St. John and his Trustees demised a Lease on the Premises for ninety-nine Years unto the Defendant Turner, if the Plaintiff Alice, then Wife of Dr. William Lewis, and Theodore Lewis Son of the said Dr. Lewis, and on Fielder, or either of them, should so long live. That this Lease was made at the Nomination of, and in Trust for the said Dr. Lewis: That after in July 1666 the Doctor made his will, and as to the Premises devised them to the said Alice for Life, and after her Death, then to the said Theodore Lewis, to be disposed of as the said Doctor shall appoint them by his Will in Writing or Deed, and of his Will made the said Alice his Executrix: That in March 1667 by a Declaration in Writing, to which the said Doctor and the Defendant Turner are Parties, and executed by them both, the Trust of the Premises was thus declared, *viz.* for the said Doctor for Life, afterwards for such Person or Persons as the said Doctor by his Will or Deed should appoint, and in Default, then for the Executors or Administrators of the said Doctor: That in July 1667, the Doctor died without making any other Will or Deed, or other [78] Appointment, for the Disposing of the Premises: That Alice, by Virtue of the said Will and Deed, entred and possessed the Premises: That it appears also in the Case, some Proof was offered touching a parol Declaration of the said Dr. Lewis his Intention, that his Son Theodore should have the Benefit of the said Lease; but that being by Parol against a Declaration in Writing, the Court conceived it not material in the Case; and that it is also in the Case, that the said Theodore claimeth so much of the Term as should be behind at the Death of the said Alice, and that the said Alice claims the whole Term, as Executrix to the said Dr. Lewis.

The Court at the first Hearing was assisted with Mr. Justice Atkyns, who inclined to be of Opinion for the said Theodore, and that the said Defendant Turner, the Trustee, ought to execute the Trust for him: But his Lordship differing in Opinion, and having since advised upon the Case with Mr. Justice Windham, and several other of the Judges, who were all clear of Opinion, That according to the Declaration in Writing, the Plaintiff Alice, the Executrix, is well intitled to the Benefit of the said Lease.

[79] This Court therefore doth decree, That Turner the Trustee do execute the Trust, and convey and assign the said Lease, and the Remainder of the Term therein, to the Plaintiff Alice, or whom she shall appoint.

LANCE contra NORMAN.

24 Car. 2, fo. 233 [1672-73].

Recognizance.

The Plaintiff Lance his Suit is, that the Day before the Marriage of the Plaintiff and his Wife, the said Plaintiff's Wife was perswaded to enter into a Recognizance of £2000, without Defeasance to the Defendant Norman, being the Plaintiff's Wife's Brother, to which the Plaintiff was not privy or consented, which Recognizance the Plaintiff seeks to have set aside and vacated.

The Defendant Norman insists, That the Plaintiff was Suitor to his Sister, designing to gain her Estate, but she not likely to have Children, intended the said Defendant Norman Part of her Estate; and upon that Account gave the said Recognizance.

and at that Time the said Norman was in the Country, and no Ways knowing of it, nor had Contrivance in it, but the said Plaintiff proving unkind to his Wife, and having turned her out of Doors, and parted with her, not making any [80] Provision for her, this Defendant hath put the same in Suit.

The Plaintiff insisted, that his said Wife voluntarily absented from him, and took and conveyed away great Part of his Estate, and hath acted as a most insolent and unchastel Wife, and entered into the said Recognizance without his Privy.

This Court being assisted with the Judges was satisfied, that the said Recognizance was entered into the very Day before Marriage, without Deceazance or the Plaintiff's Privy, whereby to defraud the Plaintiff, and one Witness only deposed the Plaintiff's Consent to the drawing the said Recognizance, who hath an Assignment of the same to himself.

The Court decreed the said Recognizance to be set aside and vacated on the Record thereof, and a perpetual Injunction is granted against it, and this Court proposed, on the said Plaintiff's Wife's returning back all the Estate which she took and conveyed away, that the Plaintiff do allow her £20 per Annum, which was consented to by the Plaintiff, for her separate Maintenance.

[81] HOWARD & UXOR *contra* HOOKER.

2 [424] Car. 2. fo. 587 [1672-73].

Fraudulent Deed by Feme, &c.

Bill is to set aside a Deed made by the Plaintiff Eliz. in Feb. 1666, before her Marriage with the Plaintiff Sir Philip Howard, and that the Plaintiff Sir Philip, in Right of his said Wife, might have all her Benefit and Interest in or to the Estate of Sir John Baker her former Husband, and receive the Rents and Profits of the Premises.

The Case being, That Sir John Baker the Father being seised in fee of Lands by two Deeds tripartite of Lease and Release made between himself of the one Part, Sir Robert Newton deceased of the second, and Sir John Baker the Son, and Dame Eliz. the Plaintiff, and sole Daughter of Sir Robert Newton of the third Part, in Consideration of a Marriage between the Plaintiff Dame Eliz. and Sir John Baker the Son, and £40000 Portion, conveyed the same to Sir Robert Newton and his Heirs, Part of which Lands were for the said Dame Eliz. Jointure; and Sir John Baker the Father, and Dame Mary his Wife being dead, Sir John the Son sold Part of the Premises for Payment of Debts, Part whereof was the Jointure of Dame Eliz. and in Consideration of the [82] said Dame Elizabeth joining in such Sale, and parting with her Jointure, Sir John her Husband in lieu thereof, and of £1500 to be paid to Dame Elizabeth for a Jointure-house, limited the Premises unsold to the said Dame Elizabeth and the Defendants for 400 Years upon Trust, by Sale thereof to pay the said Dame Elizabeth the said £1500, and also the Rents and Profits of the whole until Sale, and the Residue of the said Premises remaining unsold to Dame Elizabeth during her Life, and after to wait on the Inheritance. And in 1658, the Inheritance was conveyed to Sir Robert Newton and his Heirs, and he by Will devised the same to the said Dame Elizabeth for Life, Remainder to the first Son of the Plaintiff Sir Philip and Dame Elizabeth; so the Plaintiff being intitled to the £1500 and the Term of 400 Years after the Trusts performed, and so ought, in Right of the said Dame Elizabeth his Lady, to continue in the Possession of the Premises, and receive the Rents and Profits thereof, which the Defendants refused to do, pretending the Term of 400 Years is limited to them upon other Trusts, and in particular that the Plaintiff Dame Elizabeth, before her Marriage to the Plaintiff Sir Philip, by her Deed of the 9th of February 1666, assigned to the Defendants all Monies then due, or to be [83] payable to her by Virtue of the Deed in Trust for her Benefit, and to be at her Disposing during the Joint-Lives of her and the said Sir Philip, whether she married or continued Sole, and that she should have Power by Writing under her Hand and Seal to dispose thereof, for the Benefit of her Daughter by her former Husband, and that she hath disposed thereof accordingly, which said Deed the Plaintiff insists is fraudulent or with Power of Revocation, and never mentioned to Sir Philip, and that Sir Philip after his Marriage settled £500 per Annum on the said Dame Elizabeth for her Jointure, which he would not have done, if he had known or understood the said Dame Elizabeth had made such Deed or Disposition as is aforesaid of her former Husband's Estate; and since their Marriage she desired Leave of Sir Philip that she might receive the Rents and Profits of the

said Lands of her former Husband, without mentioning the said Deed, and therefore the same ought to be set aside.

The Defendants do insist, the said Dame Elizabeth, before her Marriage with the said Philip, did declare to him, that whoever did marry her should have no Benefit of any Estate that she had by her former Husband, and that Sir Philip did agree to bar himself thereof, and take no Benefit [84] thereby, and that Sir Robert Newton looking upon the Estate as settled on his Grandchildren, as aforesaid, and had given his personal Estate and £700 per Annum to the Plaintiffs and their Sons; and the said Sir Philip, in all the Life-time of the said Sir Robert Newton, never pretended Right to the said Estate, or intermeddled therewith, that there is no Reason to set aside the said Deed of the ninth of February aforesaid.

This Court being assisted with the Judges on reading the said Deed, it not appearing unto this Court, that the said Sir Philip had any Notice of the said Deed 9th of Feb. 1666, till after the Death of the said Sir Robert Newton, which was several Years after the Marriage, nor was privy nor consented to the making of any such Deed: but having Intimation that Dame Elizabeth intended to dispose of her Interest in her former Husband's Estate, from such Husband as she should marry, broke off the Treaty of Marriage, which was afterwards brought on again by some Friends of the said Dame Elizabeth, and that the said Sir Philip was induced to marry the said Dame Elizabeth, upon the Hopes and Confidence of having the Interest she had in the Estate of the said Sir John Baker her former Husband, without which he would never have married her, [85] and that the said Sir Philip never knew of the said Deed of the 9th of Feb. 1666, but the same was a Fraud upon Sir Philip, and that therefore no Use ought to be made thereof, and decreed the said Deed of the 9th of Feb. 1666, be absolutely set aside, and no Use to be made thereof against the said Sir Philip, or any claiming under him.

POTER *contra* HUBBERT.

24 Car. 2, fo. 591 [1672-73].

See vol. 3, 78. Mortgage redeemed after 36 Years.

This Bill is to have a Redemption of a Mortgage made in 1636, by the Plaintiff's Father, to one Abraham Dawes for £5000, and for Non-payment of the Mortgage-Money, Sir Thomas Dawes, Son and Heir of the said Abraham Dawes, entred in 1641, and he and his Assigns have ever since taken the Profits. And the Defendant insists, that the said Thomas Dawes in 49 conveyed the mortgaged Premises to Hugh Hubert the Defendant's Father, for £7000, and that in 1641, when Sir Thomas Dawes entred, there was £5000 due on the Mortgage besides Interest, so he would be charged with £350 per Annum for mean Profits since that Time, and would have £6 per Cent. Interest for the £7000 from the Time of its appearing on the Conveyance.

[86] This Cause being first heard by Judge Rainsford, who ordered the Plaintiffs to redeem, and the Account for the Interest of the £5000 to begin from 1636, the Time of Lending the Money, and from that to 1642, Interest to be paid according to Acts then in force, and from 42 to 46, Interest at £8 and £4 per Cent.

The Cause being heard again by the Lord Keeper Bridgman, assisted with Judge Tyrrel, Morton and Wild, who ordered the Plaintiff to pay Interest for the £5000 to 1641, at £8 per Cent., and from 41 to 49, the certain Profits of the Mortgaged Premises to go in Discharge of the Interest till that Time, and that if the remaining Interest with the £5000 should in 49 amount to £7000, then the Plaintiff to pay Interest for £7000, else only for so much as the Principal and Interest, according to the Statutes in force.

This Cause was again re-heard by the Lord Chancellor Shaftsbury, assisted with Judge Vaughan, and Judge Rainsford.

The Defendant insisted, that setting of the Interest against the certain Profits, from 41 to 49, as aforesaid, was a great Advantage to the Plaintiff, and that after so long a Time, the Plaintiff ought not to be permitted to redeem.

[87] This Court nevertheless was satisfied, that the Plaintiff ought to redeem, and the Matters now in Controversy being, Whether the certain Profits of the Premises shall go against the Interest from 41 to 49, or not; and whether the Plaintiff shall pay Interest for any more than the £5000 first lent, or not; and what Interest he shall pay at least during the hard Times of War.

This Court on hearing Precedents was clear of Opinion. That the setting the certain Profits of the Premises against the Interest from 41 to 49, ought to be discharged, and decreed the same accordingly.

And touching that Point, for what Monies the Plaintiff shall pay Interest, either for the £5000 only, or any greater Sum.

This Court with the Judges were of Opinion, That the Plaintiff ought not to pay Interest for any greater Sum, than only for the £5000, the original Mortgages: This Court declaring, there is no Reason to give Interest upon Interest, and that the now Defendant ought not to be in any better Condition than Sir Abraham Dawes the first Mortgagee.

[88] CRISP *contra* BLUCK.

25 Car. 2, fo. 357 [1673-74].

Bond and Judgment after upon it, and the Principal and Interest far surmounted the Penalty when Judgment was entred; how Payment of Monies shall be applied in such Case.

This Case comes to be heard upon a Bill of Review, and an Appeal from a Decree made by the Lord Chancellor Shaftsbury; the Plaintiff's original Bill being to be relieved against a Bond of £1600 Penalty, for Payment of £1000 and Interest, entred into by the Plaintiff's Father, the Testator and others, to William Bluck the younger, in 1642. The Defendant commenced Suit on the said Bond in 1662, and had Judgment thereupon against the Plaintiff's Father only; and the Principal and Interest due on the said Bond far surmounting the Penalty when Judgment was obtained; and the Defendant being twenty Years kept out of his Money, but having received several Sums in Part since the Action at Law brought, it was decreed, That whatever Monies were received before the Judgment actually entred, should be taken in Discharge of the Interest of the said £1000 original Debt, and that the Defendant should be satisfied, after the Judgment entred, the whole Money thereupon recovered with Damages from the Time the Judgment was actually entred, deducting what he had received since the actual Entry of the [89] Judgment, and allowing his Costs at Law, and moderate Costs in this Court: And it was found, that the Judgment was not actually entred till the Vacation after Michaelmas Term 1662, and so only £250 paid in November 1662 was accounted Interest of the original Debt, and not towards the Money recovered by the Judgment, and the Account was so settled and decreed, and the Money paid accordingly. Yet for Reversal of the said Decree, the now Plaintiff for Error assigns, that the same tends to the invalidating of the Course of the Court of King's Bench, it being by the Decree admitted, that the said Judgment was entred in the Vacation after Michaelmas Term 1662, and not before. Whereas it is evident by the Records of the King's Bench, the said Judgment was entred on Record in Michaelmas Term 1662, and by Construction of Law is supposed and presumed to be recorded the first Day of that Term, against which Record no Evidence or Averment ought to be admitted, and all Monies paid after the first Day of that Term ought in Equity to be applied towards Satisfaction of the Judgment, and so the £250 paid in November 1662, in Part of a Debt in Question ought not to go to satisfy the Interest, but in Part to discharge the Principal.

[90] The Lord Chancellor Shaftsbury was of Opinion, That no Notice could be taken of any actual Entry of any Judgment at Law, but that every Judgment whensever entred, if before the Essoin Day of the subsequent Term, ought to be accounted a Judgment of the first Day of the Term before, and allowed and held the said Error to be good, and decreed the £250 paid in Nov. 1662, should go and be applied as Part of Satisfaction of the £1600 and Damages due on the Judgment, and what other Monies were paid by any other of the Obligors, their Heirs, Executors, Administrators or Assigns, since the 20th of Octob. 1662, if not paid on other Account, shall be applied in further satisfaction of the said Judgment, first to discharge the Interest, and then to sink the Principal, and as to so much did reverse the said Decree: and the Defendant appealed from this said Decree to the Lord Keeper Finch, and insisted, that by his Answer to the original Bill, said, when the £250 was paid, the Judgment was not entred, and presently after hearing the original cause, the late Lord Keeper Bridgman calling to his Assistance the Master of the Rolls, who declared, that the Defendant should not account for any Money, as received on the Judgment, until the said Judgment

(which was his Security) was really and [91] actually entred, if the plaintiff insisted as before, which was overruled; and the Plaintiff then brought a Bill of Review; to which the Defendant pleaded and demurred, and thereupon the Lord Bridgman declared the Decree to be just, as to the £250, and the Decree made by the Lord Shaftsbury is to unravel the Account settled, and to charge the Defendant with £4000, when by the original Bill or Bills of Review, they do not charge him with above the Penalty of the said Judgment.

This Court now declared, That the examination of the Time of the actual Entry of the Judgment in this Case, did not impeach the Judgment, but only to guide the Conscience of the Court in the Application of the Payment of the Money, and therefore (as this Case is) the whole Money having been decreed and settled as aforesaid, the Examination of the Time of the actual Entry of the said Judgment tended not to the invalidating thereof, but only to inform the Court, when and how it came to be recorded, which in Cases of Originals filed, to prevent the Statutes of Limitation, and other Cases of like Nature, are usually examined in Courts of Law, the Court saw no Cause to relieve the plaintiffs on their Bill of Review, and dismissed their Bill of Review.

[92] DETHICK *contra* BANKS.

25 Car. 2, fo. 143 [1673-74].

A Freeman of London disposeth an Adventure to his Son. No Breach of the Custom, as to the Wife's third Part.

A Freeman of London did assign over an Adventure to the Defendant his Son, against which the Plaintiff complains, and insists, It is contrary to the Custom of London, and tends to defeat the Plaintiff his Wife of a full third Part of the personal Estate: This Court with the Judges held the Disposition to be good, and could not relieve the Plaintiff.

HARMER *contra* BROOKE.

25 Car. 2, fo. 648 [1673-74].

Bill to perform a Marriage Agreement.

The Bill is to have an execution of a Marriage Agreement: the Plaintiff Harmer, with the Encouragement of Thomas Hamling, was to marry the Plaintiff Elizabeth, the only Daughter and Heir of the said Thomas Hamling (the Plaintiff Harmer being a Man of a great Trade), and in Consideration thereof, the said Thomas Hamling was to pay to the Plaintiff Harmer £500 at Christmas following, and to settle on the plaintiff and his Heirs a House in Sussex, and at his Death, to give to the Plaintiff Elizabeth his Daughter, all his Estate real and personal, except £400, which he intended to the Defendant his [93] Brother's Son: whereupon the Plaintiff Harmer married the said Elizabeth; but now the said Thomas Hamling the Plaintiff's Father refuses to perform his Agreement and Promise aforesaid, the Plaintiff marrying without his Consent and liking, as is pretended, and died without performance thereof, and made a Will, and the Defendant his Executor, which Will the Plaintiff insists was voluntary, and ought in Equity to be set aside, the Plaintiff being disinherited thereby; and to have the said Marriage Agreement performed, is the Plaintiff's Bill.

The Defendant insists, That the said marriage was had by Surprise, and without the Consent of the said Thomas the Father, and that he did never approve of it, but when told of it was in great Passion, and said his Daughter was undone, and then made his Will in these Words, viz. I give and bequeath unto Elizabeth my only Daughter, lately married against my Consent and good liking to Francis Harmer, the Sum of £20, over and above the sum of £500 which I intend to pay her myself in full for her Portion; and the said Thomas the Father, being afterwards moved to alter his said Will, declared he would not alter the same, and that he would not be a Precedent to disobedient Children, and the Defendant [94] claims the said Estate real and personal by Virtue of the said Will.

This Court ordered it to be tried at Law, Whether Thomas the Father did agree to give the Plaintiff Francis Harmer, with the said Elizabeth, any other or further Estate real or personal at any Time, over and besides the said £500.

That a verdict passed for the Plaintiff, That Thomas the Father did agree to give

the Plaintiff Francis Harmer, with the said Elizabeth, a further Estate real and personal, besides the £500.

This Court was satisfied there was such a marriage Agreement, and that the same ought to be made good, and decreed accordingly.

TREGONWELL *contra* LAWRENCE.

25 Car. 2. f. 582 [1673-74].

An Injunction to restrain Ploughing or Burn-beating of Pasture.

The Bill is to restrain the Defendant (being Tenant for Life) from ploughing up, or converting into Tillage Pasture Ground, to the Damage of the Plaintiff's Inheritance.

The Defendant insisted, that the said Land was very full of Bushes and Furz, and that the Ploughing and Burn beating was an Improvement of it.

The Plaintiff insisted, That the Lands are Sheeps-strete or Sheeps-slight, the [95] Surface or Soil being so thin, that if the same be ploughed up two Years together, the Lands will yield no profit in many Years after.

This Court, on reading an Order 20th Feb. 25 Car. 2 [1673] and a Certificate of Referees, doth Decree, That a perpetual Injunction be awarded, to restrain the Defendant from Ploughing up or Burn-beating of the said Lands above two Years.

SUTTON & UXOR EJUS *contra* JEWKE.

15 [?] 25] Car. 2, fo. 178 [1673-74].

Sum left for a Portion. But if she marry without Consent, then a Part to be to another.

That £1500 was to be put out at Interest for the Use and Benefit of the Plaintiff Anne, and then the said £1500 and the Proceed thereof to be paid her at her Age of Twenty one, or Marriage; but if the Plaintiff Anne should marry without the Consent of the Defendant Jewke and his Wife, being her Father and Mother, or one of them, or the Survivor of them, then £500 Part of the said £1500 to be paid to such Person as the Detendant Jewke his Wife, by Writing under her Hand, and without her Husband, should appoint.

That the said Defendant Jewke his Wife died in 1668 without making any appointment, so that the Plaintiff Anne is thereupon become intitled to the whole [96] £1500 and the Proceed thereof: That the Plaintiff Anne married in 1671, and this Suit is to be relieved for the £1500 and Interest.

The Detendant Jewke insists, that Mary his Wife died in 70, but before her Death in 1696, by Deed Parcel directed, that in Case the Plaintiff Anne married without the Consent of her the said Mary, or the Defendant Jewke her Husband, then £500 Part of the said £1500 to be paid to her and the Defendant, or the Survivor of them, and that the said Deed was made upon mature Deliberation, to keep the said Plaintiff in due Obedience, and that the Plaintiff Sutton having in a clandestine Manner married with the Plaintiff Anne, without the Detendant Jewke his Privy or Consent, and after he had forbidden his Daughter to marry with him on the Forfeiture of his Blessing, at what otherwise she might expect from him the said Detendant Jewke by Means thereof and by being Administrator to his late Wife, became entitled to £500 Part of the said £1500.

So the chief Point now controverted is, Whether the Plaintiff Anne be entitled to the whole £1500, or whether she had not forfeited £500 thereof by her Marriage without her Father's Consent and Privy, and Contrary to his Direction and Advice.

[97] His Lordship was fully satisfied, That the Plaintiff's said Marriage was without the Defendants Privy and against his Consent, and that therefore the Plaintiff Anne cannot have the said £500, but decreed the Defendant to have the same with Interest from the Plaintiff's Marriage.

WALL *contra* BUCKLEY.

26 Car. 2, fo. 178 [1674-75].

Guardian takes Bond in his own Name, for Arrears of Rent ; by this the Guardian hath made it his own Debt.

That the Plaintiff's Father, as his Guardian, takes Bond for £100 Arrears of Rent due from the Tenants, and takes it in his own Name.

This Court is of Opinion, that the Plaintiff's Father hath by that Means made it his own Debt.

STRICKLAND *cont.* GARNET & AL'.

26 Car. 2, f. 340 [1674-75].

Legatee dies before the Time of Payment of the Legacy ; yet payable to his next of Kin.

The Bill is for a Legacy of £20 given to the Plaintiff's late Husband, by the Will of George Coker deceased, to be raised and paid upon the Sale of customary Land, mentioned in the said Will ; which said Lands are by the Will devised by the said Coker to Jennet his Wife for Life, with Remainder over to the said Defendants in Trust, that after the [98] Death of Jennet the said Trustees, should sell the same, and with the Money thereby raised, to pay the Legacies in the Will, and the Trustees to be accountable over for the Surplus to other Persons ; and the said John Strickland the Legatee dying before the said Jennet, and before the Time the said Lands out of which the said Legacy was to be raised, were appointed to be sold.

The Defendants crave Judgment of the Court, whether the said Legacy of £20 was due to the Plaintiff, or determined by the Death of the said John Strickland. This Court was of Opinion, that the £20 did, notwithstanding the Death of the said John Strickland, continue payable to the Plaintiff.

BROND *contra* GIPPS.

26 Car. 2, fo. 763 [1674-75].

Lands decreed to be sold, to supply the personal Estate.

This Court declared, that the Plaintiff's Legacies ought to be paid out of the whole Estate of the Testator, viz. out of the personal Estate, so far as that will extend ; and if that will not satisfy the same, then the Testator's Manors and Lands undivided and unsold shall in the next Place come in Aid of the personal Estate for Satisfaction thereof ; and that if it be not sufficient, then the whole Manors, Lands and Tenements, though sold and divided, [99] shall, notwithstanding such Sale and Division, come in Supply thereof in Proportion, to be refunded and paid by the Person or Persons in whose Hands soever the same shall be found.

BOWYER & AL' *contra* BIRD.

26 Car. 2, fo. 769 [1674-75].

Estate decreed to the Residuary Legatee, and not the Administrator.

The Suit is to have an Account of a Legacy of £500 given by George Dale, Father of the Plaintiff Anne, to George his Son also deceased, to whom the Plaintiff Anne was Administratrix, and to have an Account of the Residuary Estate of George the Father after his Debts and Legacies paid, the Bill charging, that George the Father made his Will in Writing, and thereof his Son Thurston Dale, and one Dakin Executors ; and upon publishing of his Will declared Dakin only to be Executor in Trust for his Children, and to take no Benefit thereby ; but the Estate to go to the Children, and died, leaving the Plaintiff Anne, and three Sons, viz. the said Thurston, George and Robert Dale, all deceased, and that Thurston made the said Dakins his sole Executor, and the Plaintiff Anne is the only surviving Child of the said George Dale the Father, and claims the said £500 and the Residuary Estate.

[100] This Court (it appearing by the said Will, that the said Thurston, who was named Executor without any Trust, was Residuary Legatee of the said George Dale his Father, who had given, by the said Will, considerable Legacies to every one of his

Children) was fully satisfied, the Plaintiff was not intitled to the said £500 nor the Residuary Estate; but that the said Thurston, as Residuary Legatee, was well intitled to the Residue of the said Estate, and that the said Trust in Dakins ought to be construed, as is most Consistent with the Will in Writing, and dismiss the Plaintiff's Bill.

DOM. LEECH *contra* LEECH.

26 Car. 2, fo. 369 [1674-75].

[S. C.] 1 Chan. C. 249. A Deed tho' cancelled, yet good, and the Estate shall not be devested out of the Trustees.

This Court declared though the Deed appeared cancelled, yet it was a good Deed, and that the Cancelling thereof did not devest the Estate of the Trustees therein named, and that the Trust thereby created ought to be performed.

[101] FEAKE *contra* BRANDSBY.

26 Car. 2, fo. 74 [1674-75].

Who shall be said to be a Servant living with the Testator at his Decease.

That William Crowe by Will devised to every one of his Servants, living with him at the Time of his Death, £10 apiece, and that the Plaintiff was Servant to the Testator at his Death; so the Plaintiff's Suit is for the £10 Legacy.

The Defendant insists, that the Plaintiff was not Servant to the said Crowe at his Death, or lived with him as a Servant; but the Plaintiff at the Testator's Death, and long before and after, was the Servant of Mary Brandsby, the Testator's Mother.

This Court was satisfied, that the Plaintiff was a Servant to the Testator, and intrusted in his House keeping, and employed in Washing his Linen, and tended him in his Sickness; and therefore decreed the Defendant, the Executor, to pay the Plaintiff her £10 Legacy.

WINCHCOMB *cont.* WINCHCOMB.

26 Car. 2, f. 654 [1674-75].

Judgment upon Bonds of long standing ordered to be paid.

That in Michaelmas Term 2 Car. 1. John Carter obtained a Judgment against John Winchcomb, the Defendant's Grandfather of £400 upon two several Bonds, both dated 17 June 1623, for the payment [102] of £100 each Bond, one payable the 1st of May then next, and the other the 1st of May 1625. That the said Carter made Humfrey Coles his Executor, and died, and the said Humfrey Coles died, and his Son John Coles took Administration *De bonis non* of the said John Carter, who produced the Bond payable the 1st of May 1625 whole and uncanceled, and thereupon insisted to be a Creditor for the said £400 on the said Judgment.

But the Defendant Winchcomb produced one of the said Bonds cancelled, and insisted, that the same was satisfied, for that Humfrey Coles 12 Car. 1 [1636-37] had in Elegit returned, and Lands delivered by the Sheriff which being near forty Years since, the same would not have slept so long, had not the said Debt been satisfied, one Bond being cancelled. And the said Coles insisted, that the said Carter was kept out by prior Incumbrances, and that he exhibited a Bill against John Winchcomb the Father, to discover the same, who by Answer acknowledged the said Debt.

This Court declared, that the said Debt of £400 and Costs ought to be paid, and ordered the same accordingly, and that the same be paid by Philip Innelt, Esq., who purchased the Premises liable thereto.

[103] HODKIN *cont.* BLACKMAN & AL'.

26 Car. 2, f. 773 [1674-75].

Agreement to settle £100 in Money, Goods or Lands, upon Marriage for £500 Portion, £200 of the said £500 not paid. Bond of £3000 to perform the said Agreement, and Judgment thereupon pleaded in Bar of other Debts and Goods.

The Bill is to discover the Estate of the Intestate, Maurice Blackman, which came to the Hands of Elizabeth his Relict, and to make the same liable to the Satisfaction of

a Debt of £300 lent to the said Intestate, for security whereof the said Intestate gave a penal Security of £1000.

The Defendant Elizabeth, the Administratrix of the said Intestate, insists, she hath no Assets to satisfy the Plaintiff's Demands, for that in 1665 the Intestate Blackman, her late Husband (before Marriage with her) and her Father Doctor Argoll came to this agreement, viz. That her said Father should give with her in Marriage to the said Blackman £500, and in Consideration thereof, and of such Marriage, the said Blackman shall enter into one Obligation to the said Doctor Argoll, of £3000 Penalty, conditioned for the settling of £1500 upon the said Defendant Elizabeth and her Heirs, in Monies, Lands, or otherwise within one Month after the Marriage; that accordingly the said Blackman in August 1665 entred into such Bond, and the said Marriage was had, and the said Blackman received £300 of the Portion, and the remaining £200 was in the Hands [104] of the Defendant, Serjeant Brampston; that the said Blackman never made such Provision for the said Defendant Elizabeth, and her Children, as by the Condition of the said Bond he was to do, and the Defendant Mary, after the Death of Doctor Argoll her Father, whose Executrix she is, finding the said £3000 uncanceled, and the Condition thereof not performed, did in August, before the Time of putting in the Defendant Elizabeth's Answer, commence an Action of Debt against the said Defendant Elizabeth as Administratrix to Blackman her late Husband, and recovered a Judgment thereon, for £3000 Debt upon the Bond.

But the Plaintiff insists, that the remaining £200 in Serjeant Brampston's Hands, which is Part of the said Elizabeth's Portion, ought to be applied to satisfy the Plaintiff's Debt, as far as the same will go, and what the same falls short of, the rest of the Estate ought to supply.

This Court declared, they saw no Colour of Cause to give the said Plaintiff any Relief against the said £3000 Bond and Judgment thereon had, other than against the Penalty, and therefore the said Defendant ought to be first satisfied her said £1500 out of the personal Estate of the said Blackman, and decreed the same accordingly.

[105] MOSELY *contra* MOSELY.

27 Car. 2, fo. 521 [1675-76].

Clause in a Will, That if any Legatee should hinder or oppose the Execution of the Will, then such Person should lose the Legacy bequeathed.

The Defendant claims several Things devised to her in specie by the Will of Sir Edward Mosely, and the Plaintiff would bar her Claim and Right for the whole by a particular Clause in the Will, viz. That if any Legatee should hinder or oppose the Execution of his Will, then such Person should lose the Legacy bequeathed.

This Court, as to the Clause of Forfeiture in the Will, which the Plaintiff would have the Benefit of, by Reason of the Defendant's contesting and opposing of the Execution of it, declared its opinion to be, That no Advantage ought to be taken thereof, but that the Defendant ought to have her specifick Legacies bequeathed by the Will.

The Court also declared their Opinion of the Rent demanded by the Defendant of £880, that notwithstanding the Defendant's Opposition of the Will, the said Rent was not forfeited or suspended, nor ought in Equity to be so deemed, and ordered the Defendant's Demand thereof to stand good, and be allowed as a good Demand.

[106] PLUMMER *contra* STAMFORD.

27 Car. 2, fo. 74 [1675-76].

An ancient Recognizance not set aside to let in a Mortgage.

That Edward Stamford entred into a Recognizance of £800 to John Stamford his Brother, in 22 Car. the Plaintiff having a Mortgage on Edward Stamford's Estate, and in Respect of the Antiquity of the said Recognizance would have it set aside, presuming the Money to be satisfied, that the Plaintiff may come in with his Mortgage: This Court would not relieve the Plaintiff against the Recognizance.

TWIFORD *contra* WARCUP.
27 Car. 2. fo. 749 [1675-76].
Articles, Conveyance.

The Plaintiff and Defendant entered into Articles for Purchase of the Lands in Question by which Articles the Plaintiff covenanted, That the said Lands did fully and compleatly contain the Quantities of Acres in a Particular to the said Articles annexed, and in Pursuance of the said Articles and Particular a Conveyance was executed to the Defendant.

[107] Now the Defendant insists, That the Plaintiff hath not performed the Covenant in the said Articles, for that the Lands are short of what the Particular mentions them to be; and insists, they ought to be made good by the Plaintiff.

This Court, on reading the Articles, Particular and Conveyance, declared, That although the Covenant in the Articles were, that the Lands did fully and compleatly contain the Quantities in the Schedule, yet in that Schedule, and likewise in the Conveyance, it is mentioned to contain so many Acres by Estimation, and if there were four or five Acres more the Plaintiff cannot have them back again; so on the other side if less, the Defendant must take it according to the Conveyance, and that the Articles being only a security for a Conveyance, and the Defendant having afterwards taken a Conveyance, the Defendant shall not Resort to the Articles, or to any Particular, or to any Averment or Communication after the Conveyances executed, which ought not to be admitted against the Deed; and therefore saw no Cause to make any Allowance for Defect of Acres.

[108] NEWTON *contra* LANGHAM.
27 Car. 2, fo. 563 [1675-76].

Mortgages—Adventure in the East India Company mortgaged, redeemable.

The Plaintiff having an Adventure of £1700 in the East-India Company, mortgaged the same fifteen Years since to Sir William Vincent, who died and made the Defendant Executor, who hath possessed the said £1700 Adventure, and refuses to reassign the same to the Plaintiff, the Money being paid for which it was a Security.

The Defendant insists, That the said Adventure is not redeemable, it being contingent and hazardous and cost much Money to insure, and Fourteen Years since it was assigned from Hand to Hand by a Decree, for the Assignment to the Defendant's Testatrix.

This Court declared, That notwithstanding the Hazard and Contingency of the said Adventure mortgaged, and the Length of Time since the Mortgage, the Plaintiff ought to be admitted to a Redemption of the said Adventure.

SOWTON *con.* CUTLER & CLERKE.
27 Car. 2, f. 676 [1675-76].

Foreign Attachment.

The Bill is to call the Defendant Cutler to an Account for Wares delivered him, and Monies paid to and for him, [109] amounting to £3000, and to be relieved against an Attachment in the Lord Mayor's Court by the Defendant Clerke, whereby he attached £2000 in the Plaintiff's Hands, supposing the Plaintiff to be so much indebted to the Defendant Cutler, and that Cutler is indebted to Clerke in a greater sum: So the Plaintiff exhibited an English Bill in the Mayor's Court for Relief therein, upon which Bill the Plaintiff could not proceed, his Witnesses living out of the Jurisdictions of that Court; so the Plaintiff prays a *Certiorari* to remove the said Proceedings into this Court.

The Defendant Clerke hath pleaded, That by the Custom of the City of London, any Creditor, in the Name of any other Person, may make an Attachment of his own Money in the Hands of his Debtor, it not being material whether such Creditor be really indebted to the Person so attaching.

And the said Clerke further pleaded, That the said English Bill was to the same Effect with this Bill, and is not dismissed, and demurred to that Part, which prays a

Certiorari to remove the said Proceedings on the Attachment and English Bill, for that it is not practicable to Remove Records out of a Latin Court to an English Court which cannot hold the plea [110] thereof, nor for the Plaintiff to remove his own Bill by *Certiorari*.

This Court held the said Plea to be insufficient, and over-ruled the same; and the Defendant Clerke to answer that Part of the Bill: But as to that Part of the Bill which requires the *Certiorari*, held the Demurrer to be good, and ordered a *Procedendo* to the Lord Mayor, &c., that they may proceed upon the same Attachment; but at the same Time an Injunction to Issue, to stay the Defendant's Proceedings on the said Attachment in Question.

NEWPORT *contra* KINASTON.

27 Car. 2, fo. 517 [1675-76].

Upon the Construction of the Words of a Will, two £500 Legacies to one Person decreed.

The Point in Difference arising upon the Will of the Lady Katherine Leveson, the Question being, Whether £500 mentioned in her Will be thereby devised to Mrs. Katherine Newport, or Mrs. Snead, who were both their Granddaughters, it being thus expressed in the said Will, viz. To my Kinswoman the Lady Diana Newport, Wife to my Lord Newport, I bequeath my Diamond Pendants which cost £400, and to her Daughter Mrs. Katherine Newport my God-daughter, a Jewel set with Diamonds, wishing her all Happiness, and £500 to my God-daughter Mrs. Katherine Snead, I give and bequeath a [111] Diamond Bodkin and an Emerod Border; I also give her, as a Token of my Love to her self, a Power to alter or add to her said Will, and by a Codicil annexed to her Will, and made Part thereof; And after a Legacy given to Mr. Richard Newport of £400 in Gold, it follows thus, viz. Also I give unto his Sister Mrs. Katherine Newport my God-daughter £500 in Silver: And after two other Legacies intervening it is thus express'd; viz. Also I give unto my God-daughter Katherine Snead £100 more than I have given her in my Will; by which said Will and Codicil, the said Mrs. Katherine Newport doth conceive that there is two £500 devised unto her, £500 by her Will, and £500 in Silver by the Codicil, and the Executors scruple to pay the same, for that the said Mrs. Katherine Snead doth claim the said £500 given by the Will to belong unto her, so that Mrs. Katherine Newport seeks to have the two £500 by the Will and Codicil.

But Mrs. Snead insists, That the £500 given by the Will as aforesaid, belongs to her, and is so intended, and not to Mrs. Newport, by the most grammatical and reasonable Construction of the Will and Codicil.

[112] This Court, upon reading of the said Will, was fully satisfied, both by Construction of the said Will, and by the Intention of the said Lady Leveson, that both the £500 given by the said Will, and the £500 given by the Codicil, were given and do belong to the said Mrs. Newport, and decreed the said Executors to pay her the £1000 accordingly.

WYRAIL *contra* HALL.

27 Car. 2, fo. 516 [1675-76].

A good Will, tho' no Executor named.

The Testator made his Will, but named no Executor.

This Court declared the Will to be a good Will in Equity.

PRICE *contra* EVANS.

27 Car. 2, fo. 460 [1675-76].

Title under an Occupant demurred to and allowed.

The Plaintiff's Title is under an Occupant: The Defendant demurred.

This Court allowed the Demurrer; for that a Title under an Occupant this Court will not Countenance nor give any relief thereof.

[113] LAMBERT *contra* GREENE.

27 Car. 2, fo. 122 [1675-76].

Lease not a customary Chattel.

The Defendant Carly Greene demandeth an Allowance for a third Part of a Tenement and Ground, for the Remainder of a Term of ninety-nine Years. The Case is thus; viz. For 280 the same were assigned in 1655, to Henry Hall, for Remainder of a Term of ninety-nine Years, in Trust for the Defendant's Testator William Greene, and the Remainder expectant, upon the said Term conveyed to the said Testator and his Heirs; which Demand is submitted to the Judgment of this Court.

This Court declared, That the said Lease was not a customary Chattel, and would not allow the Defendant's Demands.

LUCKING *contra* RUSHWORTH.

28 Car. 2, fo. 801 [1676-77].

After a Statute acknowledged, and a Mortgage, the Conusor's Trustees renew the Leases in their own Names, yet decreed liable to the Statute.

That John Pincheon deceased borrowed of the Plaintiff's Father £4000, for which he mortgaged Freehold and Copyhold Lands, and also for farther Security entred into a Statute; but the Terms in [114] the Leases being expired, the Defendants as Trustees have renewed the said Leases with the College in their own Names, in Trust for the Children of Pincheon, and so deny the same are liable to the Plaintiff's Debt.

This Court was satisfied, the Plaintiff's Debt being secured by Statute, as well as by Mortgage, ought to be satisfied out of all the Estate of the said Pincheon, in Law or Equity, and that the Renewals of the said Leases in the Names of the Trustees, ought not to shelter or protect the Estate against the Plaintiff's Debt; for that tho' the Plaintiff's Mortgage did bind but a particular Part of the Estate, yet the Statute did bind the whole Estate, and the Statute binding the whole Estate in its own Nature, though no Mention were made of subjecting the same by the Will to the said Debt, nevertheless that Debt ought to be made good out of the said Pincheon's Estate whatever; and decreed accordingly.

[115] RAMSDEN *con.* FARMER & AL'.

28 Car. 2, f. 516 [1676-77].

Lands conveyed to Trustees for Payment of Debts.

That Simon Carill was seised in Fee of Lands, conveyed the same to Trustees to sell and dispose thereof for Performance of his Will, who by his Will devised the said Premises to the said Trustees and their Heirs, to pay his Debts, and made Elizabeth his Wife his Executrix, who afterwards married Mr. Barnes; and the said Trustees, with the Consent of the said Elizabeth, conveyed the Premises to Sir John Carill and others in Trust in the said Will, and the said Barnes after died, and the said Elizabeth married one Machell, and by Deed 22 Car. 1, the said Trustees, Carill, &c., with Elizabeth, conveyed the said Premises to the said Machell and his Heirs; and in 1646 the said Machell with the like Consent conveyed to Duncombe, Heath and Baldwin, and their Heirs in Trust, that they, after the said Simon's Debts and Legacies paid, should convey to the said Elizabeth and her Heirs, or to such as she by Deed or Will should appoint: That the said Elizabeth raised Monies, and paid the said Simon's Debts and Legacies, and performed the said Will; and after the said Machell's Death, Elizabeth by Will 1650, devised [116] all the said Premises to her Son John Carill for Life, and after his Decease, to the first Son of the Body of the said Son lawfully begotten or to be begotten, and to his Heirs. And if her said Son should not have a Son, but one or more Daughters, then she devised the Premises to the first Daughter of the Body of her said Son, and to her Heirs: That the said John Carill in the said Elizabeth's Life-time had a Son, whose name was John, who died in her Life-time, and soon after Elizabeth died, and her said Son John Carill survived her, and never had any other Son after Elizabeth Machell's Death; and the said John Carill died, and left the Plaintiff Lettice his eldest Daughter, and the Defendant Elizabeth his second Daughter, and the Defendant Margaret his third Daughter; and the said Lettice the Plaintiff claims the Premises as eldest Daughter.

But the Defendants, Elizabeth and Margaret, insist, They ought to have their equal Parts with the Plaintiff Lettice in the Premises, and that the said Simon had not Power to make such settlement or Will, but say, he was only seised for Life of the Premises, and that Elizabeth Machell joined in the Settlement at her Son John Carill's Marriage; and if there were such a Will of the said Elizabeth Machell, yet the said John Carill had a Son named [117] John Carill, who was born after the Death of the said Elizabeth Machell, and lived some Time after her Death without Issue, and by the Words of the Will the Trust is determined.

This Court not being satisfied, as to the Birth and Death of the said John Carill, directed a Trial on this Issue, whether John Carill, Grandson of Elizabeth Machell, died during the Life of the said Elizabeth Machell, or after her Decease.

That upon a Trial on the said Issue, it was found, that the said John Carill the Grandson outlived the said Elizabeth, and therefore the Defendants insist, that the Trust limited by the Will of the said Elizabeth Machell is fully determined.

This Court declared, they saw no Cause to relieve the Plaintiff's Bill in this Matter, and so dismissed the Bill accordingly.

SALTER *contra* SHADLING.

28 Car. 2, fo. 66 [1676-77].

Will.

That Bryan late Lord Bishop of Winton, being possess'd of the Manor of Pottern by Lease from the Bishop of Salisbury (made to Sir Richard Chaworth, in Trust for the said late Bishop of Winton), by his Will devised £200 per Annum should be paid out of the Profits of the said Lease, to William Salter, the [118] Plaintiff's late Husband's Nephew, during his Life; and that the Estate in Law in the said Lease should continue in Sir Richard Chaworth, during his Life; and the Surplusage of the Profits he devised to the said William Salter, to whom he also devised the Lease after Sir Richard Chaworth's Death, and made Sir Richard Chaworth and others Executors, who consented to the said Devise, and about 16 Car. 2 [1664-65], William Salter made his Will, and as to his Interest in Pottern, he devised the same to Trustees, that they should permit the Plaintiff to receive the Profits during her Widowhood, on Condition she renewed the Term to twenty-one Years, once in seven Years; and if the Plaintiff should marry or die, then he declared the Profits of the Premises to go to his two Daughters Anne and Susanna, and the Survivor of them and their Heirs, and after their Deaths, without Heirs of their Bodies, then to his right Heirs, and devised all the rest of his personal Estate should be to his Executors and Trustees, for the Benefit of his said Daughters, and made the Plaintiff and the said Trustees Executors.

That the said two Daughters are since dead Intestate, and the Plaintiff being their Administrator is intitled to the whole Term and Trust of the said Lease of Pottern, as Administrator to her said [119] two Daughters, according to the said William Salter's Will, and the true Exposition thereof, the same being devised in Manner as aforesaid.

The Defendant Charles Clever the Infant, being eldest Son and Heir of Dame Briana Cleaver deceased, who was one of the Sisters and Coheirs of the said William Salter, and the Defendant Stradling's Wife being his Sister and Coheir, insist that according to William Salter's Will, and for that no present Interest in Pottern was devised to his two Daughters, but only contingent possibility of Interest, in case the said Plaintiff should marry or die, neither of which having since happened, and the said Daughters being since dead, the Interest and Term in Pottern ought to come to them, as Heirs to the said William Salter, and not to the Plaintiff, as Administratrix to her two Daughters, the rather for that they consented to a Decree for Sale of Lands, which would have come to them as Heirs at Law, to preserve Pottern from Sale, for the Payment of William Salter's Debts.

This Court declared, that according to William Salter's Will and the Disposition therein made of Pottern, the whole Interest of the said Term and Trust therein was well passed in the Plaintiff, and that the Heirs of Salter can have nothing to [120] do therewith, nor have any Interest therein, and decreed the Plaintiff to enjoy the same against the Defendants.

STILL *contra* LYNN & AL.

28 Car. 2, fo. 195 [1676-77].

Bill is to be relieved for 123 Acres of Land.

That Philip Jacobson deceased, being possess'd of a capital Messuage or Tenement and Lands by Lease from the Crown, Dat. 13 Car. 1 [1637-38], for the Term of sixty Years, did by Deed in 1639, in Consideration of a Marriage with Elizabeth his then Wife, and for that she had parted with her Interest in Goods, &c., which by Agreement she had the Disposition of for her own Use, and other Considerations therein mentioned, did assign over the said Premises and all his Term therein, to Rumbald Jacobson, and Abrah. Beard on Trust, that the said Eliz. should have the Profits during Life, and after to James, Paul, Jane and Mary, her Children, or such of them as the said Elizabeth should appoint by her will, and for Want of such Appointment, to the said James, Paul, Jane and Mary, or so many of them as should be living at her Decease, share and share alike; and after Elizabeth died, Paul the Son being [121] dead in her Lifetime. Afterwards by Deed in 1643, in Consideration of a Marriage between the said Philip Jacobson, and Frances Earnely, and for a Jointure for the said Frances, and for Provision for such Children as he should have by her, the said Philip Jacobson, and James his Son, assigned over the said Premises, for the Remainder of the said Term of sixty Years, and all his Goods and Houshold-stuff unto William, Daniel, and Alexander Staples, their Executors, &c., on Trust, to permit the said Frances and Philip, and such Children as they should have between them, to receive the Profits during the said Term, and after the Decease of him and his said Wife without Issue, then on Trust as to Part, to suffer the Executors of the said Frances, and as to the Residue, the said James Jacobson, his Executors, &c., to receive the Profits during the Term: Afterwards by Deed in 1646, reciting all Assignments and Indentures aforesaid, he the said Philip Jacobson assigned over the said Premises, and his Term therein, to Alexander Staples and Jeffery Daniel, their Executors, &c., on Trust, as to the said Frances Jacobson for the Premises limited to her by her first Jointure: and as to several other Parcels of Land named, as in the said Deed is recited, which said last Premises, contain 123 Acres, which are in Trust [122] for the said James Jacobson, from the Death of his Father, during the Residue of the Term, and in case the said James should remain unmarried, or being married should die without Issue, and his Wife being a Widow, then the Rents and Profits thereof to remain and be to his younger Brother and Sister, and afterwards James and Thomas Earneley, Son-in-Law of the said Philip, having married Jane one of the Daughters of the said Philip, did 22 Car. 1 [1646-47]. Release to Staples and Daniel, and to the said Philip, and Johanna Jacobson, Executrix of Rumbald Jacobson, who survived Beard, all and all Manner of Trusts and Demands whatsoever, and Suits in Law or Equity, which they or either of them, their Executors, &c., had from the beginning of the World unto the Date thereof, in all the Lands and Tenements, with the Appurtenances then, or theretofore in the Tenure of Philip Jacobson aforesaid, in the County of Wilts, and by another Release in Jan. 1647, the said James and Thomas Earneley, released unto the said Philip Jacobson, and Johanna Jacobson, all Manner of Trusts and Demands whatever, in all Lands in the County of Wilts, as in the former Release, and afterwards by Deed in 1653, reciting, that there was a Marriage then shortly to be had, between the said James Jacobson, [123] Son and Heir of Philip Jacobson, and one Margaret Still, the said Philip did assign over unto John Still and Nicholas Still, their Executors, &c., the said 123 Acres for the Residue of the Term, to the Use of James and Margaret, for their Lives; and after their Deceases, to the right Heirs of the said James, begotten of Margaret, and if Margaret should survive James, and have no Child by him, and he die before the end of the Term, then she should have Power to sell fifty one Acres of the Premises, and the Residue to the Executors of Philip; and if Margaret die in the Lifetime of James, not having any Issue of her Body by him begotten then living, then to the Use of the said James Jacobson, his Executors, Administrators and Assigns, for the Residue of the Term, which Marriage took Effect, and Margaret died without Issue in the Life-time of James, after whose Decease, the said James being in Possession by Deed, in 1661 for £400 mortgaged the 123 Acres to Elizabeth Brinley, and yet enjoyed the 123 Acres till he died, and the said Elizabeth assigned over the said Mortgage, which now by mean

Assignments is come to the Plaintiff, and James is dead without Issue or Brother, and the Defendants Zenobia, Frances and Rachell do him Survive.

This Court was fully satisfied, that the [124] Deed in 1653, by which the said James derived his Title, and afterwards made the said Mortgage, under which the Plaintiff claims, was a good Conveyance, and well executed in James, and that the Conveyance in 1646 was a voluntary Conveyance, and the Estate thereby claimed by the Defendants created, being an Estate in Remainder, after a Limitation of a Term for Years, to an Issue in Tail, was void in Law, and decreed the Plaintiff to the Possession of the 123 Acres or the Money due on the Mortgage, and to enjoy against all the Defendants, and decreed that the Plaintiff and Defendant Hopkins who is Administrator of the Mortgager James Jacobson, to come to an Account.

OLIVER *contra* LEMAN & AL'.

29 Car. 2, fo. 106 [1677-78].

A Trial at Law directed to be within a precise Time.

A Trial at Law is directed for the Plaintiff to try his Right to a Reversion of Lands after the Death of the Defendant Wainwright, so the Plaintiff desires he may try the same when he shall think fit ; but the Defendant insists, that the Plaintiff ought to be confined to a convenient Time, which was prayed might be the Rule in this Case, and that the Defendant might not be kept in Suspence, and to wait on the Plaintiff's Convenience, when he shall think fit to try the [125] same. This Court ordered it to be tried in Easter Term next, or the Issue be taken *pro confesso*.

STAWELL *contra* AUSTIN.

29 Car. 2, fo. 579 [1677-78].

Construction of a Will.

That George Stawell Father of Ursula and Elizabeth Stawell, being seised in Fee of Lands, by Deed and Recovery thereon, settled all the said Lands on the Defendant Sir John and Robert Austin and their Heirs, to the said George for Life ; Remainder for such Estates and Charges, as he by Will or other Writing should appoint, Remainder to the Heirs Males of his Body, with Remainders over, and by Will, pursuant to the Power reserved by the said Deed, devised the Premises settled by the said Deed to the said Defendant for ninety-nine Years after his Death, upon Trust, in case he left no Son, or such as should die before twenty-one without Heirs Males, and should leave one or more Daughters, for raising of £12,000 if but one Daughter, for such Daughter, and if two or more Daughters, then £20,000 to be raised for their Portions, to be equally divided between them, and to be due and payable at their respective Ages of twenty-one Years or Days of Marriage, and the said George died leaving no Son, and having only three Daughters, viz. Ursula, [126] Elizabeth, and one Anne Stawell, who died since her Father, and that the said Testator George his Relict married the Defendant Seymore, and she on the Death of her Daughter Anne, took the Administration of her Estate, and also soon after died, leaving the Portion of the said Anne in the said £20,000 Unadministered, and Administration of the said Anne's Estate was granted to the said Ursula, and Elizabeth her Sister, who are intitled to the said Anne's personal Estate, and that the said £20,000 ought to be raised by the said Trustees, out of the Lands settled as aforesaid ; but the Defendants the Trustees insist, That by the Words of the Will, it is dubious whether the whole £20,000 ought to be raised, or any more than £12,000, the said Anne being dead unmarried, and before twenty-one. And the Defendant the Heir insisted, That as the Case is, the Portions of the said Anne ought not to be charged on the said Lands ; so the only Question before the Court being, whether the Trustees shall raise £12,000 or £20,000 for the said Plaintiffs Ursula and Elizabeth.

It appearing plainly to this Court, that by the Words of the said Will, that if the said Testator George had two or more Daughters, then £20,000 should be raised.

[127] This Court is of opinion, and declared, That the Lands ought to be charged with the £20,000, and the Payment thereof to the Plaintiffs Ursula and Elizabeth.

LAWRENCE *contra* BERNEY.

29 Car. 2, fo. 156 [1677-78].

Where no Ordinary Process upon the first Decree will serve, but there must be a new Bill, to pray Execution of the first Decree by a second Decree.

This Case is on a Bill of Review: This Court declared they would not make Error by Construction: and where a decree is capable of being executed, by the ordinary Process and Forms of the Court, and where Things come to be in such a State and Condition after a Decree made, that it requires an original Bill, and a second Decree upon that, before the first Decree can be executed: in the first Case, whatever the Impiety of the first Decree may be: yet, till it be reversed, the Court is bound to assist it with the utmost Process the Course of the Court will bear: for in all this, the Conscience of the present Judge is not concerned, because it is not his Act, but rather his Sufferance, that the Act of his Predecessor should have its due Effect by ordinary Forms: But where the common Process of the Court will not serve, but a new Bill and a new Decree is become necessary to have the Execution of a [128] former Decree, is in its self unjust: there this Court desired to be excused, in making it its own Act, to build upon such ill Foundations, and charging his own Conscience with promoting an apparent Injustice: and to this Condition hath the Plaintiff Lawrence brought himself, for he forbore to apply himself to this Court to support him, as one that claimed under the Decree in 1650, or to pray an Injunction, to stop Berney's Proceedings at Law, but stayed till Berney had recovered the Land by a Trial at Bar, and been put into Possession by the Sheriff: and now no ordinary Process upon the first Decree will serve, but he is drawn to a new Bill, to pray Execution of the first Decree, by a second Decree, and this obligeth the Court to examine the first Grounds of the Decree before they make the same Decree again. And this Court was not of this Opinion alone, but it was also the Opinion of others that were before him, who had made several Precedents in like Cases, and would not enter further into Arguments of the Errors.

Lawrence's Bill was an original Bill, to execute two Decrees in 1650 and 1651, and the Defendant Berney now also Plaintiff, it being cross Causes, brought his Bill of Review, to reverse the said Decree, &c., as unjust and erroneous, That [129] the first Decree by the Lord Coventry, in 30 Car. 1 [?], decreed a Sale of the Premises for a Performance of the Trust, that in 1650 a Decree was made to frustrate the Lord Coventry's Decree.

PRISKE *contra* PALMER.

29 Car. 2, fo. 323 [1677-78].

Want of a Surrender aided.

This Court was satisfied the Plaintiff had a quiet Enjoyment for a long Time, and declared, That notwithstanding a Surrender is wanting, yet the Plaintiff's Title ought to be supplied in Equity, and decreed the Plaintiff to enjoy the Premises, and a perpetual Injunction to stay all Proceedings at Law.

WOOLSTENHOLM *con.* SWETNAM.

29 Car. 2, f. 146 [1677-78].

£100 to be raised and divided amongst five Children, one dies before Distribution, the Survivors shall have his Share, and not the Devisee of him that is dead.

That Thomas Swetnam deceased, being possessed of a personal Estate, and making Provision for his Grandchildren, being the Children of Thomas his eldest Son, being five in Number, whereof Peter Swetnam was one, did by Deed authorize the Defendant William Swetnam, who was his second Son, and the Defendant Thomas Swetnam, who was his Grandchild, to receive £32 Rent, which was an Arrear of £16 per Annum Annuity of Foster's Farm, [130] in Trust to be divided amongst his said five Children at the Age of twenty-one; and the said Thomas the Grandfather by some other Deed charged his whole Lands on a Settlement thereof on the Defendant Thomas, with the Payment of £1000 equally amongst his said five Grandchildren, whereof the said Peter was one, and in further Kindness to the said Peter, in 1657, by Will gave him £100 to be paid out of the personal Estate, and made the Defendant William his

Executor; and the said Peter's Father to increase his Fortune, put out several Sums of Money in the said William's Name, and deposited other Money in the said Defendant's Hands, for the said Peter's Use, and by his Will further gave to Peter £30, and Peter married the Plaintiff Martha, and by his Will devised all his Estate to the said Martha, whereby the Plaintiff is intitled to the said Devise, and to the said Peter's Share in the £1000, so to be relieved for the Sum, is the Bill.

The Defendant William insists, That Thomas the Father of Peter died possessed of a personal Estate of £266, and the Defendant as his Executor possess'd it, and paid his Debts, being £100, and says that the £1000 was given to be divided as [131] aforesaid, and as the Defendant William should think fit, and that Peter dying before any Distribution was made to him thereof, the Defendant William ought not to distribute the same amongst the other four, and no Part of it ought to come to the Plaintiff.

This Court declared, That no Part of the £1000 doth belong to the Plaintiff in Right of the said Peter, or otherwise, and dismissed the Bill.

NANCE *con.* COKE.

29 Car. 2, f. 64 [1677-78].

Release pleaded against the Redemption of a Mortgage, and allowed.

The Plaintiff seeks Redemption of a Mortgage made the 17th of Jac. 1 [1619-20]. The Defendant pleaded a Release of the Mortgagor's Interest in Anno 1620.

This Court, after so long Time and such Release, could not admit the Plaintiff to redeem, tho' the Premises were mortgaged for £376, and worth now to be sold £1500.

BURGRAVE *con.* WHITWICK & AL'.

29 Car. 2, f. 173 [1677-78].

Will.

That George Whitwick deceased, having Issue George his only Son, and Elizabeth, and Martha the Wife of the Defendant Curtis, by Will bequeathed to [132] the said Elizabeth £600 to be paid unto her as therein after is expressed, and to the said Martha £600 in like Manner, and gave the Residue of his personal Estate to the said George his Son, to be employed as should be afterwards expressed in his Will, and also gave to his said Son and his Heirs all his Lands whatsoever, and willed, That if either of his said Children should die in their Minority, that the surviving should be Heirs to the deceased in equal Portions; but if all should die without Issue, then he gave his Lands to George the Son of Humfrey Whitwick, with Remainders over, and ordered the said Portions in convenient Time to be laid out in Lands for his said Children, and till Lands purchased the Executors to retain the Money so long as the Overseers should see good, at £5 per Cent., and made the Defendant Humfrey Whitwick Executor.

That George the Son died Intestate under Age unmarried, that no Land hath been purchased by the Executor: That Martha attained twenty-one and received her Portion, and also the Moiety of the Residue of the personal Estate bequeathed to George the Son, but refuses to pay Elizabeth her £600, and Moiety of the said Residue of the personal Estate, she being yet a Minor under twenty-one; yet she is married to the other Plaintiff Burgrave, who can give a Discharge.

[133] The Defendant insists, according to the Meaning of the Will, he ought not to pay Elizabeth till the Age of twenty-one Years, for in case she die before, the said Martha ought to have the other Moiety of the Residue of the personal Estate, and he is advised there is a Possibility of Survivorship of the Plaintiff Elizabeth's Portion, and Moiety of the Residuary of the personal Estate, and that if he should pay it to the said Elizabeth, and she should die before twenty-one, the Defendant Martha may compel him to pay it again.

But the Plaintiff insists, That the Moiety of the residuary personal Estate devised to the said George, not being out laid in Lands, falls to the Plaintiff within the Words [of] that Clause in the Will, that gives the Residue by equal Portions to the Surviving, and so no further Survivorship intended.

This Court was of Opinion, and declared the residuary Part of the personal Estate is not subject to any Contingency of Survivorship, but that the Interest of that pre-

sently vested in the Plaintiff, upon the Death of the said George the Son, and ordered the Defendant, the Executor, to pay one Moiety of the residuary personal Estate : and in case Elizabeth die before twenty one, then the £600 to be paid to Martha, which in the mean Time is to be kept in the Defendant's Hands.

[134] MORGAN *contra* SCUDAMORE.

29 Car. 2, f. 658 [1677-78].

Renewing Copies upon reasonable Fines.

The Plaintiffs being customary Tenants of the Manor, in which Manor the Tenants hold Estates by Copy to them and their Heirs, by the Words (*Sibi & Suis*) for ninety-nine Years, yielding a Rent, paying a Heriot, and doing of Suit and Service, &c. And by the Custom of the said Manor, the Lords, upon Expiration of every Estate, ought to renew upon reasonable Fines, and which said Estates, by the Custom of the Manor, do descend from Heir to Heir, and their Estates to be renewed for reasonable Fines, they being expired, which the Lords of the Manor refuse, demanding more than the Fee for a Fine, whereas two Years Value was as much as ever was, or ought to be given or demanded.

The Defendant the Lord of the said Manor insists, that there was such a Custom to renew for ninety-nine Years, but the Fines always at the Will of the Lord, and such as the Plaintiffs could agree with him, for there being no Benefit to come to the Lord during the ninety-nine Years, so the Question is, whether the Lord shall be at Liberty to set what Fine he please, or be restrained therein by this Court, it appearing, that the Fines are arbitrary.

[135] The Plaintiffs insist, that though the Fines are arbitrary, yet the same are by Law supposed to be reasonable, and that in some Cases, the Law had adjudged above two Years Value to be an unreasonable Fine, and the Defendant had demanded ten and twelve Years Value for a Fine, which is very Extravagant, and the Will of the Lord in this Case ought to be limited.

The Defendant insists, that the Plaintiffs Estates and Terms for ninety-nine Years expired many Years before the Bill exhibited, some of them thirty, and others eleven or twelve Years since, in the Life time of the Defendant's Father, and some of the Plaintiffs Estates have been granted to others, and Fine levied thereon, and that the Tenants of the said Manor do not, during the ninety-nine Years, pay any Fines upon Death or Alteration, so nothing is due to the Lord for ninety-nine Years together ; wherefore the Defendant insists, nine or ten Years Purchase is a reasonable Custom.

This Court declared, the Will of the Lord ought to be limited, and that the Plaintiffs on Payment of two Years Value shall be admitted to their said Estates, and hold the same against the Defendant and all claiming under him, and that the Plaintiffs shall renew such Estates within one Year after the Expiration of their Term, [136] in case they be of Age, or within the four Seas at such Time, or otherwise within one Year after such respective Tenant shall attain the Age of twenty-one or return from beyond the Seas, or else such Tenant shall be for ever foreclosed of any Help or Benefit, and then the Lord is at Liberty to dispose thereof.

[See *Fraser v. Mason*, 1883, 11 Q. B. D. 574.]

WARWICK *contra* CUTLER.

30 Car. 2, f. 285 [1678-79].

Will—Lands devised to be held by Executors, till his Son attain 22 Years, Son dies before 22, Executors decreed to hold the Lands till the said 22 Years.

The Testator deviseth Lands to be held by his Executors, till the Testator's Son attained twenty-two Years of Age, for Maintenance of the Executrix and her Children, that the said Testator's Son died before twenty-two Years of Age.

This Court decreed the Executrix to hold the Lands against the next Heir, until the said Son's Age of twenty-two Years, as if the said Son had lived to twenty-two Years, and the Plaintiff's Debt on Bond to be paid by the next Heir, or the Reversion to lie liable and charged therewith.

[137] JOLLY *con.* WILLS.

30 Car. 2, f. 523 [1678-79].

Will—Devise of Goods to J. S. for 11 Years, the Remainder over, J. S. decreed to deliver the Goods after the 11 Years.

That Roger Garland, elder Brother, by Will did give unto John Wills, the Defendant's late Husband, the Use of all and singular the Goods, Plate, &c., whatsoever then in his House, for Term of eleven Years from his Death, and after the eleven Years expired, he gave the same to his two Nephews, Robert and Roger Garland, and to his Niece Elizabeth the Plaintiff, to be equally divided amongst them, and after the eleven Years, the said Wills was to deliver them to the Plaintiff.

The Defendant Wills insists, that by the Bequest of the said Goods for the eleven Years, she and her Husband, to whom she is Executrix, are well intitled to the Property of them, and that the Devisor is void in Law and Equity.

This Court decreed the Defendant's Will, to deliver the Goods to the Plaintiffs, to be divided according to the Will, the said eleven Years being expired.

GERMAN *con.* DOM. COLSTON.

30 Car. 2, f. 741 [1678-79].

Legatees to refund to make up Assets.

This Court decreed, that in case hereafter any Debt of Sir Joseph Colston should be discovered and recovered against his Executors, the Legatees of Sir Joseph Colston are to refund in Proportion to what [138] they have received for or towards their Legacies, to make up Assets for Satisfaction thereof.

COTTON *con.* COTTON.

30 Car. 2, f. 71 & 282 [1678-79].

Devise.

That Nicholas Cotton being seised in Fee of Copyhold and Freehold Lands in Middlesex and Surry, of £500 per Annum, in 1676 died without Issue, whereby the same descended to the Plaintiff, as Couzen and Heir to the said Nicholas, but the Defendant Katherine Cotton, pretends that the said Nicholas Cotton made his Will in Writing twenty-five Years since, viz. in 1650, having first surrendered the said Copyhold Land to the Use of his Will, and bequeathed the same to the said Defendant, Mrs. Katherine Cotton his Relict, and her Heirs; but if such Will were, the said Nicholas purchased some Lands since, which descended to the Plaintiff, and that the said Nicholas a little before his Death contracted with Sir Thomas Lee and his Trustees, for certain Copyhold and other Lands in Sunbury, and was to pay £1110 for the same, and paid most of the Money in his Life-time, and had Possession.

The Defendant Mrs. Cotton insists, that Nicholas Cotton her late Husband, deposited in the Hands of the said Sir Thomas Lee or his Trustees, £600, designing to [139] purchase the said Land in Sunbury; but her said Husband Cotton was to have Interest for the said Money, and he only rented the said Sunbury Lands, and not purchased them, because a good Title could not appear, but insist, that after the Death of her Husband she purchased the Premises, and paid £320 more than the £600 paid into the said Sir Thomas Lee's Hands, and that her Husband by the said Will devised to her all his real and personal Estate, and made her Executrix.

This Cause being now heard by Mr. Justice Windham, who on reading the Articles between the said Nicholas Cotton and the said Sir Thomas Lee, whereby the said Nicholas contracted with him for the Purchase of his Free and Copyhold Lands in Sunbury, in Fee-simple for £920, is of Opinion, that the said Nicholas died before any Conveyance made by the said Sir Thomas Lee of the said Premises to the said Nicholas, and the said Sir Thomas paying Interest for the said £600, and the said Nicholas paying Rent for the said Premises, the said £600 at the Death of the said Nicholas was Part of his personal Estate, and as to that £600 could not relieve the Plaintiff, but dismiss'd the Bill.

And as to the Mortgage made to Perkins by the said Nicholas and the Defendant

his Relief, it appearing, that Part of the [140] mortgaged Lands was, before that Mortgage made, settled on the said Nicholas and Katherine in Jointure, or otherwise, so as the same came to her as Survivor; this Court is of Opinion, that the Equity of Redemption belongs to her as Survivor, and not to the Plaintiff.

But as for the other Part of the mortgaged Premises, and other Matters in the Plaintiff's Bill, for which he seeks Relief as Heir; the Question being, whether any Republication were of the said Nicholas's Will, and whether the same Lands do belong to the Plaintiff as Heir, or to the Defendant Katherine as Devisee, by force of the said Will.

This Court referred that Point to a Trial at Law upon this Issue, whether the said Nicholas Cotton did by his said Will devise the said Lands in Shepperton, in the Defendant's Answer mentioned to be purchased by the said Nicholas Cotton of one Rowfell in Fee in 1659, to the said Katherine, or not.

A Trial at Law having been had upon the Point aforesaid, a special Verdict was by the Lord Chief Justice North's Direction found, and on a solemn Argument before all the Judges of the Common Pleas, they unanimously gave Judgment for the Defendant, that the Lands in Question, did [141] belong to the Defendant Katherine, as Devisee, by the said Will.

This Court confirmed the Judge's Opinion.

CIVIL *contra* RICH.

30 Car. 2, f. 338 [1678-79].

A general Trust in a Will for Children, and not a fixed Trust to create a Certainty of Right. [S. C.] 1 Cha. C. 309.

That Sir Edwin Rich made his Will, whereby he after some Legacies gives and bequeaths all the Residue of his Estate both real and personal, to Sir Charles Rich, his Heirs and Assigns for ever, and makes him Executor of his Will, and in his Will says, he left his Estate as aforesaid, in Trust with him, wherewith to reward his Children and Grandchildren according to their Demerit.

This Court declared, That as to Sir Edwin's Estate, taking the Words of the Will of the said Sir Edwin as they were, they could amount to no more than a general Trust in Sir Charles, to reward such of his Children and Grandchildren as they should demerit, and as Sir Charles should think fit, and not an absolute fixed Trust, to create a Certainty of Right or Interest as to any certain Proportion, in any of the Children or Grandchildren; much less in the Plaintiff Civil, who Demands the greatest Part of the Estate, and that it was in the Grandfather's Power, to give the said Estate, or what Proportions [142] thereof as he pleased, to any of his Children or Grandchildren, but whatever of the real Estate of Sir Edwin was disposed, or settled by the said Sir Charles by Act executed in his Life-time, or was devised, or given by the Will of the said Sir Charles, the Plaintiff not to be relieved, but dismiss'd the Bill.

[See *M'Gibbon v. Abbott*, 1885, 10 App. Cas. 661.]

BOEVE *con.* SKIPWITH.

30 Car. 2, f. 140 [1678-79].

A Supplemental Bill, for a further Discovery.

The Bill is a Supplemental Bill, to have a further Discovery from the Defendant by Way of Evidence, for the better clearing the Matters depending on the Account, which the Defendant hath not answered in the former Cause.

The Plaintiff pleaded the former Bill, to which the Defendant answered, and the Cause heard, and the Account directed.

This Court ordered the Defendant to answer to all Matters in this Bill, not answered to in the former Cause, but the Plaintiff not to reply, nor to proceed further.

[143] DOM. GREY & AL' *con.* COLVILLE & AL'.

30 Car. 2, f. 397 [1678-79].

Lands purchased in Trust decreed Assets to pay Judgments.

The Plaintiff the Lady Grey's Bill is to be relieved for a Debt of £1500, and Interest on Bond, wherein John Colville did bind himself and his Heirs, to repay the same unto the Plaintiff her Executors and Assigns, that the same might be paid out of the Lands which were purchased by the said John Colville, with his own proper Money, in the Names of himself and the Defendant's Wife, to hold to them two for their Lives, and then to the Heirs of Colville, and the rest were purchased in the Names of the said Defendants Morris and Saunders, in Trust for the said John Colville and his Heirs; that soon after, and before the £1500 was paid, the said John Colville died, and the Right and Equity of the Premises, during the Life of the said Defendant's Wife, is in Josia Colville, and the Reversion in Fee, after the Death of the said Wife, will descend to the said Defendant Josia Colville, as Son and Heir of the said John Colville, and the Profits are received by him or for his Use; that the said John Colville dying Intestate, Administration is granted to Dorothy his Relict, who pleads she hath no personal Estate. [144] whereupon the Lady Grey commenced a Suit at Law, by filing an Original for her said Debt against the Defendant Josia, as Son and Heir of the said John Colville, and hath got Judgment thereon to have Satisfaction for the said Debt, out of the Reversion of the Lands of John, which descended in Fee to the said Defendant Josia Colville, and ought to have Satisfaction accordingly; but the said Defendant Josia pretendeth he hath nothing by Descent in present, but the Reversion of the Lands purchased in the Names of John Colville and his Wife, after the Death of his Wife; whereas he and the other two Defendants were only Trustees for John Colville and his Heirs; and their Trust being now come to the Defendant Josia, they are liable as Assets, in Equity, for Satisfaction of the Plaintiff's Debts, and the Plaintiff ought to be let into the immediate Possession, and the said Josia also insists, That the Premises are incumbered by a former Judgment of one Lease for £800, and the Plaintiff's Creditors, and others the Creditors in their Suit, seeking Relief against the same Defendants, upon the same Trust and Equity, and to have their Debts paid out of the said Lands, they insisting they are Creditors by Judgment, grounded on Original of the same Day and Date with the said Lady Grey, and [145] ought to be satisfied, in equal Degree and Time.

The Plaintiff Creed and the other Creditors insist, That they for so much as the Estate in Law of Wise is in the Heir, that their Judgments ought to attach the Lands according to Priority of Originals, and though the said Leke hath obtained a Decree, prior to the Creditors in these Suits, yet the same is to be subject to the Direction of this Court, and ought not to take Place, but according to the date of their Originals.

This Court (it being admitted by all, that the Original on which the said Leke's Judgment is grounded, is prior to all the other Creditors Originals, and that the Plaintiff the Lady Grey's and Creed's Originals are next in Priority, and bear the same Date one with another, and ought next to be satisfied with other Judgments, who originally bear the same Date) declared, that the Estate purchased in the Names of the Defendant's Wife as aforesaid, was a Trust for Life, attending the Reversion, and so liable to make the several Plaintiffs Satisfaction for their Debts, and should be enjoyed by the Plaintiffs, against the said Wise and Josia Colville the Heir; and the Court decreed, that if the Estate of Wise, as aforesaid, was not sufficient, then the said Reversionary Lands, purchased in [146] the Names of the said Morris and Sanders, after the Death of Sir John Tufton, who hath an Estate for Life in the said Lands, should go towards Satisfaction of the said Debts.

CARR *contra* BEDFORD.

30 Car. 2, fo. 64 [1678-79].

Devise after Debts and Legacies paid, the Residue amongst his Kindred, according to their most Need; this to be extended according to the Act for better Settlement of Intestates Estates.

The Bill being, that Edmund Arnold having no Child, by his Will, whereof he made the Defendant Bedford Executor, gave several Legacies to several Persons and Uses,

and gave all the rest and residue of his Monies and Personal Estate, after Debts paid, to and amongst his Kindred, according to their most need, to be distributed amongst them by his Executors, saving such Legacies as he should by his Will or any Codicil further dispose of, and the Testator afterwards by Codicil gave other Legacies, and desired that a Care and Regard should be had to the Plaintiff, John Buncher.

The Defendant the Executor insists, that he not knowing to what Degree of Kindred the Bequest of the said Residue ought to extend, had annexed two Schedules of remotest Kindred, and is advised, until their several Claims were examined and settled by this Court, he could not safely make a Distribution.

[147] This Court, taking into Consideration to what Degree of Kindred the Testator's Bequest of the Residue of his personal Estate to his Kindred of most need could extend ; that the Act of Parliament for better settling Intestates Estates was the best Rule that could be observed, as to the limiting the Extent of the Word Kindred, and that it should extend only to the Testator's Sister, Anne Carr and her Children, and to the Testator's Nephews and Nieces now living ; and that no Kindred out of the Degree of a Brother or Sister to the Testator, or a Child of such Brother or Sister, ought to come in or have any Share of the said Residue, and that amongst those that are to come into the Distribution, the Executor ought chiefly to consider those that have most need, that so they, that have more need, may have more than they that have less, and decreed the same accordingly ; And as to the said John Buncher, who was his Sister's Son, and so to have Share, and was particularly recommended to the Executor, who the Court declared had a Power to give some more than other, this Court ordered the Executor to give him somewhat considerably out of the Residue of the said Estate, and the Executor to distribute the Remainder to such of the Kindred, as are to come into the distribution, as shall appear to the [148] said Executor to have most need, and in such Manner and Proportion as he shall think fit ; and Sir Samuel Clark, one of the Masters of this Court, is to see Right done in this Case, and the Bill of the Plaintiffs, which are beyond the Degrees of Nephews of the said Testator, is to stand dismiss'd.

BOURNE *contra* TYNT.

30 Car. 2. f. 636 [1678-79].

Portion and Interest devised upon a Contingency of dying or Marriage, decreed to be paid into Court for the Benefit of the Heir, according to the Will, in case of the Devisee's Death.

The Case is, that Roger Bourne the Plaintiff's Brother, by his Will in 1671, devised to Executors in Trust, all Lands as before that Time were mortgaged to him, and all Money due thereupon, that they should lay out so much of his personal Estate, as remained after Debts, and Legacies paid, in a Purchase of Lands of Inheritance, to be settled on the first Son of his Body, and the Heirs Males of the Body of such first Son, and so to all Sons in Tail Male, and for Want of such Issue, on the Plaintiff for Life, Remainder to the Plaintiff's eldest Son in Tail, Remainders over to the Plaintiff's Children in Tail, and by his Will declared and devised, that in case the Child, his said Wife was then big withal, should be a Daughter, then he gave to her £1000 to be paid to her at twenty one or six Months after Marriage, and in Case she [149] married with Consent of the Trustees, then the said Portion to be £3000, and it was provided by the said Will, that the Trustees out of the Interest of the said £3000 should pay for the Maintenance of the said Child, £80 per Annum ; and it was also provided, that in case such Daughter should die before such Marriage or Age of twenty-one, then her Portion and Money so devised to her should go and be for the Use and Benefit of such Person or Persons as should at any Time enjoy his Lands of Inheritance according to the Will ; and thereby declared the same Money to be laid out in a Purchase of Lands, to be settled as aforesaid, and also declared, that the rest of the personal Estate, not given or disposed of by his Will, should all be bestowed in Lands of Inheritance, and settled as aforesaid ; and the said Roger Bourne died without Issue Male of his Body, and about three Months after the said Defendant Florence his only Daughter was born, and the Trustees have not, pursuant to the Will, laid out the personal Estate in Lands, so that the Plaintiff ought to have the Interest of such Money as should have been laid out in Lands.

The Question in this Case being, Whether the £3000 and the Interest thereof,

over and above the £80 per annum Maintenance of the Defendant Florence, should [150] be paid to the Defendant or to the Plaintiff who claims the same by Virtue of the Will, in case the said Defendant Florence had not happened to be born, the Will being made before she was born, and the Plaintiff claiming the £3000 and Interest over and above the said £80 per Annum, in case she should die or not be married, or incapacitated to dispose thereof.

The Defendant insists that the Plaintiff having a very considerable Estate from the Testator, by the said Will, which would have descended to the Defendant Florence, in case she had been born and living at the Time of the Death of her said Father, and that the Plaintiff cannot have any Pretence to the Interest of the said £3000 as aforesaid, for that there is not any Clause or Direction in the Will touching the same.

This Court declared, the £3000 and Interest over and above the said £80 per Annum, belongs to the Plaintiff, in case the said Florence die before she receive the same by the said Will, and decreed that the Interest of the £3000 be paid into Court, and not to be taken out without good Security given by the said Helena, to make good the Benefit thereof to the Plaintiff in case the said Florence die before twenty-one Years or married as aforesaid, as the Will directs.

[151] ELVARD *con.* WARREN & AL^l.

31 Car. 2, f. 350 [1679–80].

Prisoner by Habeas Corpus brought from Bristol and turned over to the Fleet, for that he was in Contempt. Sequestration.

The Defendant being in Contempt for Disobeying a Decree, and being a Prisoner in Bristol, a *Habeas Corpus cum causis* was ordered to bring him to the Bar of this Court, who was brought up, and turned over to the Fleet, who is there a Prisoner, and refuses to obey the said Decree.

The Court ordered a Sequestration against his real and personal Estate.

WARNER *con.* BORSLY.

31 Car. 2, f. 629 [1679–80].

Devise of a personal Estate in Remainder after the Death of J. S. is a void Devise, and vests only in J. S., she being Executrix.

The Question being, whether a Devise of the Plaintiff's Father by his Will of his personal Estate and Debts to the Plaintiff in Remainder after the Death of his Mother and the Devise thereof to her in the first place, she being Executrix to the said first Testator, and the Defendant her Executor, were good or not.

The Plaintiff insisted, That the Devise of the personal Estate by the Will of the Testator to his Wife was an absolute Devise to her by Operation of Law, and was vested in her, and so consequently in the [152] Defendant, who is Executor of the said Alice, by Virtue of the said Executor, and the Devise or Limitation over to the Plaintiff, after the Death of his said Mother, who was Executrix of the first Testator, was absolutely void in Law; and the said Defendant, as Executor to the Plaintiff's said Mother, is well intitled to the said personal Estate devised by the Testator's said Will.

The Plaintiff insisted, That the Devise to the Plaintiff in Remainder, after the Death of his Mother, was a good Devise, and ought to be countenanced, the rather, in Regard such Devise in the Life-time of the said Testator and Testatrix was consented and agreed to by the Relict and Executrix, and so decreed at the former Hearing.

This Court declared, That the Devise of the personal Estate to the Plaintiff in Remainder was a void Devise, and the said Estate to the Testator immediately thereupon did attach and vest in the said Alice, his Relict and Executrix, and the Defendant, as her Executor, was and is well intitled thereto, and decreed accordingly.

[153] BRODHUST *con.* RICHARDSON.

31 Car. 2, f. 695 [1679-80].

£540 to be divided amongst 3 Daughters, and if one or two dies without Issue, the Daughters to inherit each other; one marries the Plaintiff and dies sans Issue, the Plaintiff is intitled to the £180 as Administrator to his Wife.

That Samuel Russel by his Will gave to his three Daughters, Sarah, Christian and Elizabeth £540 to be divided amongst them, viz. For each of them in particular £180, but if any one or two of them should die without leaving a Child, that the Daughters should inherit one another's Goods, Monies, Lands and Chattels, which the deceased should leave behind them, and that the Plaintiff intermarried with the said Elizabeth, and that she died without leaving a Child, before payment of the said £180.

The Plaintiff insists, That he, as Administrator to the said Elizabeth his Wife, is intitled to the said £180 and her Share of the said Goods.

The Defendant insists, That by the Words and true Intent of the Testator and the said Will, the same doth not belong to the Plaintiff, but came or in Equity belongs to the Defendants, as surviving Sisters.

This Court declared, the Plaintiff is well intitled to the said £180, and decreed accordingly. (For a Sum of Money cannot be entailed.)

[154] TURNER *contra* TURNER.

31 Car. 2, f. 102 [1679-80].

The Heir is decreed to have a Right to a Mortgage in Fee, and not the Executor :
But now see Max. Eq. 21, this settled *contra*.

That the Plaintiff's Father lent to Ayloff £700 and at another time £200, for which Ayloff mortgaged Lands to the Plaintiff's Father and his Heirs, with Proviso, that on payment of £600 to the said Plaintiff's Father or Heirs, then the Premises to be conveyed to Ayloff; that the Plaintiff is Executor to his Father and Brothers, and so claims the Mortgages, as vesting in the Executors of his Father, and not in his Heirs.

The Defendant, being the Son and Heir of the Plaintiff's eldest Brother deceased, and Grandson and Heir to the Plaintiff's Father, insists, That the Plaintiff and Defendant, and others who claimed several Shares and Part of the Plaintiff's Father's personal Estate, agreed to a Division thereof amongst themselves; and a Division was made, and Releases given of each one's Demands in Law or Equity to the said Estate, and the Plaintiff in particular released, and the said Ayloff's Mortgage, with the Money due thereon with other Things, was set out and allotted to the Defendant by Consent of all the Parties, and received by the Defendant in Part of his Share, and the Plaintiff accounted to [155] the Defendant for the Profits of the said Ayloff's mortgaged Premises received by him, and afterwards in 1664 the Defendant had a Decree for the Mortgage Money against Ayloff's Executor, and received the same, to which proceedings the Plaintiff was Privy, and the Defendant says it is unreasonable that the Plaintiff should now make a Demand to the said Mortgage, to unsettle Matters so settled by his own Consent; but the Plaintiff insists, he looked on the Premises at that Time to come to the Defendant as Heir, and knew not his own Title thereto, and the Shares set out came but to £250 apiece, and Ayloff's Mortgage was worth £8000.

This Court is of Opinion, that the Plaintiff ought to be relieved, and had an undoubted right to the said mortgaged Premises, and decreed the Defendant to re-pay all the Money received by him thereon to the Plaintiff.

BOIS *con.* MARSH.

31 Car. 2, f. 441 [1679-80].

Land Legatees and Money Legatees decreed to abate in Proportion notwithstanding an Agreement to the contrary.

This Court declared, That all the Legatees, both Land Legatees and Money Legatees, ought to abate in Proportion, notwithstanding the Agreement to the contrary, and that the said Agreement be set aside.

[156] AUDLEY *con* DOM. AUDLEY.

31 Car. 2, f. 848 [1679-80].

Power to make Leases if well pursued.

The Bill is to set aside a Lease made by Sir Henry Audley, the Plaintiff's Father, to the Defendants, as Trustees for the Defendant the Lady Audley, for ninety-nine Years, if Henry, Francis and Anne Audley, Children of Sir Henry by the Defendant the Lady Audley, should so long live, paying yearly so much Rent as amounts to two Parts in three of the yearly Value of the said Houses, according to the best improved Value.

But the Plaintiff insists the said Lease is not made pursuant to the Power reserved to the said Henry by a Deed of Settlement made by one Packington in 4 Car. 1 [1628-29], in consideration of a Marriage between the said Sir Henry and Anne, one of the said Packington's Daughters and Coheirs: by which it was declared, That the Benefit of such Power in the said Sir Henry to make Leases, was to be for the younger Children of the said Sir Henry by the said Anne his first Wife, and the said Lease was not well gained from Sir Henry.

The Defendant insisted, it was made pursuant to the Power, which was, That Sir Henry should have Power to make [157] Leases, for a Provision of any Thing he should have, or otherwise as he should direct. Which Matter was referred to the Lord Chief Justice Hale, who declared the Power good, and that Sir Henry had pursued that Power.

The Plaintiff insisted, That the Rent reserved is altogether uncertain, and lies only in Averment, and that if the Value averred by the Plaintiff should in the least be disproved, the Plaintiff would be nonsuited in any Action: And so insisted, That it was proper for this Court to fix and establish that for a standing Rent, which can be made out to have been two Parts of the best improved Value at the Time of making the said Lease, and that the Rent so to be ascertained, the Defendant might covenant for constant Payment thereof.

This Court on Perusal of the said Lease and Power, and of the Lord Hale's Opinion, declared the said Lease to be good and sufficient, and that unless Proof be made of a greater Value than the Sum of £290 which hath been constantly paid by the Defendant the Lady Audley, and accepted of by the Plaintiff, that the said Sum must be taken as two Parts of [158] the full Value of the Premises at the Time of making the said Lease, which, or the greater Value, if so proved, is to continue to be paid, whether the said Premises rise or fall in Value; and decreed accordingly.

HETHERSELL *contra* HALES.

31 Car. 2, f. 845 [1679-80].

£2000 allowed a Trustee for Charges and Expenses in managing a Trust.

The Question in the Case is touching £2500 demanded by the Defendant for his Charges and Expenses in managing the Trust in Question, which began in 1668, and continued till this Defendant's Answer was put in, in which Time the Defendant received £20,000, and paid the same all away to the Creditors, and the Plaintiff had not surcharged the Defendant 6d.

This Court took all this Day to consider what was fit to be allowed in a Matter of this Nature, and having considered that the Defendant was a Friend to the Family, and undertook the Trust at their great Importunity, he having a considerable Estate when he undertook the Trust, and considering the Charges of surveying the whole Estate, setting and letting the same, looking after Tenants, adjusting their Accounts, calling in their Rents, returning Monies to Creditors, [159] and treating with and stating their Debts, and procuring and agreeing with Purchasers, and for Law-charges, and for keeping Servants and Horses, and employing others in Journeys to London and elsewhere, and his Care there (lying from Home a long Time) was of Opinion, That the Defendant might well deserve the whole £2500 yet doth allow but £2000, which the said Defendant is to have.

RAY & UX' EJUS *con*. STANHOPE.

31 Car. 2, f. 809 [1679-80].

Trust.

The Bill is, that Sir Edward Stanhope, the Plaintiff Elizabeth's Grandfather, by Deed demised Lands to Trustees for ten Years after the said Sir Edward's Death, upon

Trust that they should out of the Profits pay to the Plaintiff Eliz. for her maintenance, £20 per Annum, until her Age of twenty-one, and should further pay to the Plaintiff Elizabeth at her Age of twenty-one, if she so long keep unmarried, 1000 Marks for her Portion. That the said Sir Edward died, leaving Issue Edward Stanhope, the Plaintiff Elizabeth's Father, his Son and Heir, she being then twelve Years of Age: That after Sir Edward's Death the Trustees did not intermeddle, but left all to the Management of the said Plaintiff's Father, who received all the Profits, and on that [160] Consideration, Edward Stanhope the Plaintiff's Father demised to Trustees the said Premises, the Reversion of which he was seised in Fee expectant upon the said Term of ten Years, and other Lands, whereof he was seised in Fee, to hold for twenty Years upon Trust, to pay the Plaintiff Eliz. £20 per Ann. until her Marriage, and £500 after her Marriage, in such Manner as in the said Deed for twenty Years is expressed, and the same was said to be made in consideration of the Preferment the said Sir Edward intended for the Plaintiff Eliz. his Grandchild: that the Plaintiff received the Profits of the Premises, in the said former Lease, during the ten Years, and Profits of the Premises in the said latter Lease so long as he lived, and maintained the Plaintiff, and in 1658, the Plaintiff Elizabeth's Father died without Issue Male: but in his Life, after the said Lease for twenty Years, settled the Premises, with other Lands of £500 per Annum, upon the Defendant his Brother, without any Consideration, save natural Affection, and the Defendant hath since received the Profits: that the Plaintiff Elizabeth was unmarried at her Father's Death, and was his only Child, and about nineteen Years before the Bill exhibited, she married George Stanhope, who died, and about seven Years since, she married the Plaintiff Ray, so to have [161] Satisfaction of the £20 per Annum from her Father's Death, to the Time of her Marriage with George Stanhope, and the £500 and Interest from her said Marriage: but the Defendant refuseth to pay the same: pretending the said several Terms are expired, and that the Lands of £60 per annum descended unto the Plaintiff Elizabeth, by her Father's Permission, in Satisfaction of the said Money: but the Plaintiff insists, the Lands that descended to her from her Father were charged with £500 which she hath paid, and she had no other Provision made for her out of her Father's Estate, and that the Defendant had an Estate of £500 per Annum come to him by a voluntary Settlement from the Plaintiff's Father.

The Defendant insisted, That if the Plaintiff Elizabeth's Father did make such Demise for twenty Years, he had no Power so to do, being but Tenant for Life, by a Settlement made by the said Sir Edward, and so the Defendant not liable to pay the Monies, and the Defendant claims the Lands and Premises by Virtue of a Fine and Settlement made by the said Edward Stanhope the Plaintiff's Father, wherein the Defendant and his Brother George Stanhope joined, and though the said Defendant is the Heir Male of this Family, yet he received but little out of the said Estate, [162] the same being charged with £86 per Ann. and the Plaintiff hath not only enjoyed the said £62 per Ann. charged only with £500, but also, as Administratrix to her said Father, received out of his personal Estate £600, and if she should have the £500 in Question also, she would have a greater Share out of the Estate than the Defendant.

This Court, upon reading a Letter from the Defendant, wherein he owns the £500 to be due to the Plaintiff Elizabeth, on her Marriage, and £20 per Annum in the mean Time, or to that Effect, declared the Defendant ought to pay the Arrears of the said £20 per Annum, from the Death of the Plaintiff's Father to her Marriage with her first Husband, and also the £500 with the Interest thereof from the Time it was raised out of the Profits; and decreed the same accordingly.

DOM. BLOIS & AL' *contra* BLOIS & AL'.

31 Car. 2. f. 723 [1679-80].

Will.

The Bill of the Plaintiff Dame Jane Blois, and of Jane her Daughter, by Sir William Blois is, viz. That the said Sir William Blois, Father of the said Jane the Infant, being seised of Lands, by his Will gave all his real and personal Estate to the Defendant Dame Elizabeth, to the Plaintiff Dame Jane, and to the Defendant Mary Brook and Abigail Hodges, provided [163] that his Son Charles Blois should have £300 per Annum thereof, and all his Goods should be equally divided amongst his four Children, as soon as the said Charles should by a Match, raise £9000 to be paid to his Sisters, and made the four Children Executors, and died, whereby the Plaintiff Dame Jane, and the rest of the

Executors, were intitled to all the real and personal Estate, to them and their Heirs as Jointenants, in Trust nevertheless for the said Elizabeth and Mary, and the Infant Plaintiff, until the Sum of £9000 should be raised and paid unto them, and secured unto them by the Defendant Charles, the only Son and Heir of the said Sir William.

The Defendants, Charles, Elizabeth, Mary Brook, and Abigail Hodges, insist, that Sir William in his Life-time, upon his second Marriage with the said Plaintiff Dame Jane (the Defendants Charles, Elizabeth and Mary Brooke, being the Issue of the said Sir William by a former Venter) by Deed, settled a great Part of his Estate in Trust for the said Dame Jane as her Jointure, wherein Provision was made, whereby the said Plaintiff Jane his Daughter was to have £3000 out of his Estate for her Portion, and that Sir William declared, he intended her no more, and that the Defendants Elizabeth and Mary [164] Sisters of the whole Blood to the Defendant Charles, should have their Portions out of his Estate made equal with the Portion provided for the Plaintiff Jane the Infant, as aforesaid, and that the £9000 to be raised by the Defendant Charles, was for all his Sisters Portions, including the said Plaintiff Jane the Infant, but over and above the said £3000 provided for her by the said Settlement, and hope this Court will not think it reasonable, that the Estate of the Defendant Charles shall be charged with the Payment of £6000 for the Plaintiff Jane's Portion, which Sir William never intended to be above £3000, and insists, that the Plaintiff Jane, being Sister by the second Venter, ought not to have two £3000, and they but one £3000, who are Sisters of the whole Blood to the said Charles, and insist, that the said Will was only in Affirmation of the said Settlement, and that the said Sir William had no great Fortune with the said Dame Jane.

The Plaintiff Dame Jane, and Jane her Daughter, insist, that by the said Settlement, on Marriage with Dame Jane to Sir William, there was a Provision for Issue Males; and if more, then a Provision for £3000 for Issue Females, by which the Plaintiff Jane the Daughter claims £3000. And then Sir William by his Will, devising [165] £9000 to be raised out of his Lands for his Daughters Portions, viz. £3000 apiece, not excluding the said Jane, she is as much thereby intitled to a Third Part of the Estate devised, as her Sisters are to £3000 apiece; and there was a good Reason for such double Portion for Jane the Daughter, in Respect the said Dame Jane did bring to Sir William £500 per Annum Jointure, and £1000 in Money, and although Dame Jane had before her Marriage a separate Maintenance of £250 a Year out of the said £500 per Annum, yet it was paid to and received for the Use of the said Sir William, and Sir William often declared, it should be made up to her Child or Children.

This Court, on reading the Marriage Settlement and Will, by which it appeared that the said Will did operate as well upon those Lands in Possession, as those in Reversion, declared there was no Proof of any Intention of Sir William the Father to make a double Portion for Jane his Daughter by a second Venter, and therefore the Plaintiff Jane the Daughter ought to have but one £3000, but that she ought to have it in the first place, whether the Lands in present Possession devised, and the said Reversion, which are liable to the said Will, be sufficient or not to raise the whole £9000, viz. £3000 to the [166] Plaintiff Jane, and £6000 to the Defendant by the first Venter: and decreed accordingly.

STEWKLEY *contra* HENLEY.

31 Car. 2, f. 567 [1679–80].

A Rent-charge in Fee (subject to Redemption) devised, the Mortgage Money is paid. Decreed, the Administrator to have it, and not the Heir.

That Sir John Trott deceased, being seised in Fee of a Rent charge of £200 per Annum, but subject to a Redemption on Payment of £3400 by his Will in 1670, devised the said Rent to Trustees and their Heirs, and all Benefit thereof on Trust, that they should suffer Katherine his Daughter (then the Plaintiff's Wife, and since deceased) her Heirs and Assigns, to receive the same to her and their own proper Use: That shortly after the Grantor of the said Rent charge redeemed the Rent charge by Payment of the £3400 to the Plaintiff Stewkley and his said Wife Dame Katherine, whereupon they came to an Agreement by Deed touching the said £3400 viz. as to £1400 thereof should be paid to the Plaintiff, he conveying Lands to Trustees to answer to the Interest of the said £1400 to the said Dame Katherine his Wife, in such Manner as the said Rent-charge was payable by her Father's Will, and with further Power of Appointment in Dame Katherine, to direct the Payment of any [167] Part of the said £1400 by her Deed

or Will, or other Writing under her Hand and Seal, to the Plaintiff or Children of the Plaintiff and the said Dame Katherine; and as to the remaining £2000 it was agreed it should be put out at Interest, which Interest and Principal was to be paid by the Trustees as the said Dame Katherine should by Writing under her Hand and Seal appoint, and for want of such Appointment, or as to so much as should not be appointed, in case she did not survive the Plaintiff her Husband, then to their Heirs and Assigns in such Manner as the said Rent-charge of £200 per Annum was demised to her as aforesaid, which £2000 was put out accordingly; That about 1679, Dame Katherine died without making any Demise or Appointment at all, she knowing the Defendant Charles Stewkley her Son was well provided for; so to have the said £3400 out of the Trustees' Hands is the Plaintiff's Suit.

The Plaintiff insisting, That the said £3400 was a personal Estate, or a Chose en Action, belonging to the said Dame Katherine, and so belongs to the Plaintiff as her Administrator: But the Defendant, the Trustees and the Heir, insist, That the [168] said Money belongs to the Heir, the said Dame Katherine making no Appointment thereof.

This Court declared, That the Matter in Demand was originally a Mortgage, and if it had not been redeemed in the Lady's Life time, it would have gone to her Administrator, and the Lady having made no Appointment other than the said Deed as to the £1400, and having only appointed, that the £2000 should go as the Rent-charge of £200 per Ann. by Sir John Trott's Will should have gone, which being once a personal Chattel and not descendible, the Operation of Law could not be controlled, but that it ought (being a personal Estate) to go according to the Course of Law to the Plaintiff, he being Administrator: the rather, for, that the Heir is amply provided for, otherwise his Lordship declaring, that the Lady Stewkley not having made an Appointment, it ought to be taken for her Intention, that the Plaintiff should have the Money, and therefore decreed the Defendants the Trustees to convey to the Plaintiff and deliver to him £1400 and the Securities for the £200.

[169] GREEN *contra* ROOKE.

31 Car. 2, f. 351 [1679-80].

Devise to Father for Life, Remainder to the first Son, &c., Remainder to Trustees for 99 Years to support the Remainders, it is a good Term to support the Remainders, notwithstanding the same is limited and inserted after the Limitation to the first Son (it being in the case of a Will).

That Lawrence Rooke, Father to the Defendant Heyman Rooke and to the Plaintiff Mary, being seised in Fee or Fee tail or other Estate of Lands, by Deed of the 26th of Aug. 1659, granted the Premises to Edward Scott and others for eighty Years, if he so long lived, and afterwards conveyed the same on the 27th of the same Month unto Sir Henry Heyman and Peter Heyman and their Heirs, for the Term of his Life, and by Deed the 26th of October then next following, and by a Recovery in pursuance thereof the said Premises were settled on the said Sir Henry and Peter Heyman, and their Heirs, for the Life of the said Lawrence, Remainder as to Part to the Use of Barbary, Wife of the said Lawrence for her Life, for a Jointure, and after as to Part to the said Sir Henry and Peter Heyman for ninety nine Years, in Trust to raise £1000 for the Portion of the eldest Daughter of the said Lawrence, and then to the Use of the first Son of the said Lawrence in Tail Male, with the Remainder over: That the said Lawrence and Barbara are dead, and the Defendant Heyman Rooke is his first Son, and the Plaintiff Mary is his eldest Daughter, and [170] the Portion of £1000 is due to her, and the same being unpaid, Peter Heyman the surviving Trustee assigned the Term of ninety-nine Years to the Plaintiff Greene, to enable him to raise the Money; and the Defendant Heyman Rooke hath mortgaged the same Premises to the other Defendants; so the Question is, Who hath the Right or Equity of Redemption, and the Bill is also to have the Plaintiff Mary's Portion paid, or the Equity of Redemption foreclosed.

The Defendant Heyman Rooke by Plea insisted, That George Rooke his Grandfather, by Will in 1617, devised the Premises unto Lawrence Rooke his eldest Son, and Father to the Defendant Heyman Rooke, for Life only, Remainder to the first, second, third and fourth Sons of the said Lawrence in Tail, Remainder to John Browne and others for their Lives in Trust, for the better Securing and Preservation of the several Remainders limited unto the several Sons of the said Lawrence Rooke, with

Remainders over : That the said George Rooke died without revoking or altering the said Uses limited in his Will, and so Lawrence Rooke could not, by the said Deeds or Recovery, bar or cut off the Remainder limited in and by the said Will ; in regard the said Browne, and the [171] other Trustees for preserving of the contingent Remainders, were living since 1650, in which Year the Term of ninety-nine Years was created.

This Court declared, That the Term limited to the Trustees in the Will for their Lives, for the Preservation of the contingent Remainders to the several Sons of the said Lawrence Rooke, was a good Term and a State to support the said contingent Remainders, notwithstanding the same is limited to the said Trustees, and inserted in the said Will after the Limitation to the first and other Sons of Lawrence Rooke in Tail Male, for the same being in the Will, and the Intent of the Testator plainly appearing so in the Will, they held the said Plea and Demurrer to be good ; and so dismiss'd the Plaintiff's Bill.

[172] TRETHERVY *contra* HOBLIN.

26 Car. 2, f. 114 [1674-75].

Bill to discover a Title.

The Plaintiff being a Purchaser of the Premises calls the Defendant to discover his Title, who insists on a long Lease of 1000 Years, which was found by Verdict for the Defendant.

And the Defendant insists for Costs, for that the Plaintiff's Suit in this Court was causlessly and vexatiously brought by the Plaintiff.

The Plaintiff insists, That he was not able to try the Validity of the said Lease at Law, during the Life of Oliver one of the Defendants.

This Court is satisfied, That the Plaintiff had good Ground to bring this Suit for a Discovery and Relief, and to preserve the Testimony of his Witnesses, it falling out to be a severe Case upon the Plaintiff, so no Reason for the Plaintiff to pay any Costs, either at Law or in this Court.

BOUGHTON *contra* BUTTER.

32 Car. 2, f. 379 [1680-81].

Certificate ordered to be filed, though not delivered in the Life of the Certifier.

This Cause was referred to Serjeant Rainsford, to certify touching the Inclosure, whether advantageous, and whether the Parties had consented thereunto, [173] who had drawn up a Certificate, all written with his own Hand ; but he dying before he had declared the same.

It was prayed by the Plaintiff, that the said Certificate might be filed, and taken to be authentick, as if he had delivered the same to either Party.

The Defendant insisted, That the said Certificate had no date, and that the Serjeant never intended to deliver the same.

This Court ordered the said Certificate to be filed, notwithstanding the Objections made thereto by the Defendant.

TUCKER *contra* SEARLE.

31 Car. 2, f. 423 [1680-81].

Marriage Settlement.

That John Bassano, the Plaintiff Frances's Father, by Deed 20 July 1640, in Consideration of a Marriage between him and Elizabeth, the Plaintiff Frances's Mother, and a Marriage Portion, covenanted to stand seised of Lands to the Use of the said John and Elizabeth, for their Lives, and after to the first Son of the said John and Elizabeth, and so to the second, third and other Sons, and the Heirs of their Bodies, Remainder to the right Heirs of the said John Bassano the Elder for ever, on Condition and Limitation, that if the said John Bassano should have Issue Female, and not Issue Male by [174] Elizabeth, then his right Heirs to pay the first and second Daughters of the said John by the said Elizabeth, £300 apiece, to be chargeable on the said Lands ; and if more than two Daughters, then the said Lands for the full Value of them to

be sold, should equally be divided amongst such Daughters; that the said Bassano had no Issue Male by Elizabeth, but had Issue Female, (viz.) Elizabeth their eldest Daughter, the Plaintiff Frances the second, and another Elizabeth their youngest, that Elizabeth the eldest died in the Life of her Father and Mother, and that at the Death of John the Father, there being only the Plaintiff Frances living, but the said Elizabeth the Mother being ensient with Elizabeth the youngest Daughter of the said John Bassano, by Will (John Bassano taking notice of the aforesaid Deed) provides, that in case Elizabeth his Wife were with child of a Son, then his Executors to pay to the Plaintiff Frances £300, but if a Daughter, then he had otherwise provided for the Plaintiff Frances, and such Daughter by Deed, and shortly after died, leaving John Bassano his Son and Heir by a former Venter, and shortly after the said Elizabeth the youngest Daughter was born, and died in a Month after, and in 1666, Elizabeth the Mother died, leaving the Plaintiff Frances; [175] whereupon John Bassano, the younger, took the Plaintiff Frances in Guardianship, and having the said Will and Deed in his Custody pretended to her she had but £300 Portion left her by her Father. That in 1669 the Plaintiff Tucker and the Plaintiff Frances intermarried, and John Bassano still concealed the said Will and Deed, that the Plaintiff Tucker, and John Bassano the younger agreed, that the £300 left to the Plaintiff Frances by her Father should be laid out on Security or Purchase, for the Benefit of the Plaintiff Frances for Life, in case she survived the Plaintiff Tucker, and accordingly the Plaintiff Tucker sealed a Deed the 10th of December 1661, whereby the Plaintiff released the said £300 to the said Bassano the younger, upon Trust, and the said Bassano covenants with the Plaintiff, that he, his Executors or Administrators, should either continue the said £300 in his or their Hands at Interest, or lay out and dispose of the same upon Security or Purchase, and permit the Plaintiff Tucker during his Life, and the Plaintiff Frances during her Life, to receive the Interest and Benefit thereof, and to the Plaintiff Tucker and his Heirs, Executors, &c. That in 1671, Bassano the younger died, and made the Defendant Searle his Executor, and the said Searle refused to pay the said £300 pretending the Want of Assets. [176] And the Plaintiff Tucker insists to have the said £300 and Interest to be chargeable out of the Walthamstow Lands, in regard the said Lands were originally charged therewith; but the Defendant the Executor says, the said Lands are sold by him to one Woots; and the Plaintiff Tucker insists, that such Sale was without Notice of the Plaintiff's Title, and Charge of the said £300 on the said Lands, and that Woots had collateral Security to secure him against the Plaintiff; wherefore in regard the said Lands were originally charged with £300 and the Plaintiff's were drawn in to accept of the said Covenant, which is but a personal Security by the Contrivance of Bassano the younger, who kept the Plaintiff ignorant of the said Deed and Will, for that the Plaintiff's Release is only upon Trust for Payment of the said £300, the Plaintiff's do insist, that in Equity the said Land ought still to be chargeable with the said £300 and Interest, and ought not to rely on the said Covenant.

The Defendant Searle insists, that Bassano junior by his Will devised the Walthamstow Lands to be sold for Payment of his Debts and Legacies, which were sold to Woots as aforesaid, for £1260, and gave him collateral Security, by Bond of £1500 to secure him against the Plaintiff's Demands, and that the whole personal [177] Estate of the said Bassano junior, by Sale of Lands and otherwise, fell short to the Plaintiff's Demands, the said Searle the Executor, having paid Debts of a higher Nature, and says that the Plaintiff's cannot have their whole Demands, but must come in Proportion with other Creditors.

And the Defendant insists, that the Walthamstow Lands ought not to be charged with the said £300, for that on a Bill in this Court, exhibited by the Plaintiff against Bassano senior, whereby the Portions of the two Elizabeths, Sisters of the Plaintiff Frances, were demanded to be chargeable on Walthamstow Lands, and alledged, that Bassano junior had secured the £300 being the Plaintiff Frances's Portion, by the said Deed of Covenant, and prayed to have the said two Elizabeths Portions or the Value of the Lands, deducting the £300 secured to the Plaintiff Frances; and in October, 25 Car. 2, it was decreed, that the Plaintiff should have the £300 which belonged to the youngest Elizabeth, and the said Lands to be chargeable therewith. But the Court then declared, they could not Decree the £300 claimed by the said Plaintiff Frances in her own Right, but that she must rely on the said Deed of Covenant, for that they did not complain thereof by their Bill: And the Defendant insists, that the said Decree being signed and inrolled, [178] the said £300 ought not to be charged

on the said Lands, but that they ought to rely on the said Deed of Covenant, they having thereby released the said Lands.

That the Defendant Searle's Cross Bill is for Relief against a Bond of £600 on which he is sued at Law, and for Equity did insist. That he was sued here by the Plaintiff Tucker and his Wife, for the £300 aforesaid, and that there was a Decree against him in this Court, at the suit of one Whitton, one of the Defendants to that Bill for £700, so that if the Plaintiff Tucker and other Creditors should recover their Demands, there will not be Assets; and therefore prayed, that the Plaintiff Tucker and Callwall might take their proportionable shares of what Assets was left, but the Plaintiff Tucker insisted, that the said £300 was originally charged on Walthamstow Lands by the said Marriage Settlement, and was not discharged by the said Covenant or Release.

The said other Creditors, Callwall, &c. insist, That they have a Verdict against Searle the Executor, for the Money due on the said Bond, upon Evidence of Assets in Hand, and had taken him in Execution, and he had paid the said Money thereon, and the said Creditors had released the said Debts, and therefore ought not to be farther troubled for the same.

[179] This Court declared, the said Walthamstow Lands were originally charged with the Plaintiffs £300, and that the said Deed of Release and Covenant being made only in Trust for Payment of the said Money; and when the Plaintiffs were told the said Deed and Will did not discharge the same, but the said Lands ought to make it good without Damages, altho' there were not Assets in the Executor's Hands, in regard the said Lands were sold under Notice of the Plaintiff's Demands; and further declare, he could not relieve the said Searle as against the said Callwall, for that he by Coertion of Law had paid the Money recovered against him, and the said Callwall had released the same to him; and dismissed Searle's Bill.

ANNAND *contra* HONYWOOD.

32 Car. 2, f. 430 [1680-81].

The Custom of London for Orphanage Part. [S. C.] [1] Eq. Abr. 153, c. 7.

The Bill is to have a Discovery of the Estate of Bennony Honywood, the Plaintiff Sarah's Father, whereby the Plaintiff Annand, in Right of his wife, might have an equal dividend thereof, according to the Custom of London, the said Bennony Honywood being a Freeman of the said City, who having only two Children, the Plaintiff Sarah by his first Wife, and the Defendant John by his second Wife, he [180] married the Plaintiff Sarah to one Brown in 1657 and gave her but a small Matter at that time, saying, That when he died she should come in for a customary Part of his Estate, and nine Years after the said Marriage made his Will, in 1666, and thereby devised all his personal Estate, to be divided into three equal Parts, according to the Custom of London (viz.) one to his Wife, and another between the Plaintiff Sarah and the Defendant her half brother, and thereby declared, that what the Plaintiff Sarah had in Marriage with the said Brown, should be accounted as Part of her Share of that third Part, and out of the other third Part, which he had Power in himself to dispose of, and thereby declared to be only reserved to himself, he appointed his Executor, which was his Wife and the now Defendant, to pay to the Plaintiff Sarah for her Support for her Life, and to be in no Part of her Husband Brown's Estate, and £30 per Annum, and £300 in Money. That the Plaintiff Sarah's Husband died in 1670, and she, with the Testator's Consent, married the Plaintiff Annand, in 1672, and in 1678 the Testator died, and the Testator's Wife died before, so the Plaintiff became intitled to a full Child's Part and Share of the personal Estate, being £10,000.

The Defendant insists, That the [181] Testator did, on the Plaintiff Sarah's first Marriage, give her a considerable Marriage Portion in present, and promised to leave her £200 more at his Death, which was to be her full Advancement, and did not intend she should come in for her customary Share; and insists, That in 1675 the Testator made his last Will, and thereby gave the Plaintiff Sarah a Legacy, and Legacies to her Children, reciting, That he had already advanced her at her first Marriage, and that he had then promised to leave her £200 more at his Death, and that the Legacies were given to the Plaintiff Sarah, in full of all such Share and Claim, as she might after his Death have Right to, or Claim in any of his Estate, by Virtue of the Custom of

London or otherwise ; and insists, That the Plaintiff by the said Advancement on her first Marriage, her Father the Testator having not declared his Will or other Writing under his Hand, that she was not fully advanced, but declared the contrary by the last Will, she is thereby barred and excluded, by the Custom of London, from any other Claim out of his Estate, than what is bequeathed by the last Will, being £500 which the Defendant will pay, she giving a general Release, which said last Will provides she shall do.

The Plaintiff's Counsel insists, That the [182] said Declaration in the Will of 1666 was the Testator's first Declaration of his Intent, upon the Marriage of the said Sarah, and that it was, being still under his Hand in Writing, as sufficient and valid, as if it had been any other Writing, and that it was produced, not as a Will but as an Evidence, and is still a Writing under the Testator's Hand, declaring, That his first Wife's Daughter the Plaintiff Sarah, was by him but partly advanced, and that she was, by the Custom of London, to have an equal Child's Part of his personal Estate, with his second Wife's Son, and then, that he could never by a subsequent Will oblige her to £500 Legacy in full of all that is due to her, by the Custom of London, without her Consent, and the Words of the last Will, by forbidding the Plaintiff Sarah to sue for the customary Part of his Estate, or upon the Account of not being fully advanced, do strongly imply the Intent at the Marriage was, that what his said Daughter had in Marriage, was but Part of her Advancement.

The Defendant insists, That by the Custom of London, a Declaration to let in a Child for a customary Part ought to be by the Testator's last Will, or by some other Writing under Hand, remaining in Force and unrevoked, and that it ought to be an express Declaration, which the [183] Will in 1666 is not, and the Testator declared by his last Will, that the Plaintiff Sarah was already advanced upon her first Marriage, and that the Testator promising to leave her £200 more at his Death, implies, that it was agreed that she should have no more, and the Will in 1666 is revoked and cancelled, and the Testator's Hand, remains only to the middlemost Sheet thereof.

The Court declared, they would be certified by the Recorder of London, whether a Declaration by a Will, revoked, be such a Declaration in Writing, to let a Child have a customary Part of her Father's Estate.

The Lord Mayor and Aldermen, by the Recorder, certified this Court, That by the Custom of the said City, a Declaration made by a Citizen and Freeman of the said City by Writing, with his Name or Mark subscribed thereto, though such Writing were made for his last Will and Testament, and the same afterwards by him revoked, is such a Declaration as will let in a Child of such a Freeman to have his or her customary Part of his or her Father's personal Estate.

The Defendant insists, That the Lord Mayor, &c. were surprised in making the Certificate, they conceived themselves straightened in the Words and Directions of [184] the Order : for that although the Will of 1666 had never been revoked, yet the same had never been a sufficient Declaration, according to the Custom, to let in the Plaintiff to have a customary Part, and they by the Order being restrained to certify, whether a revoked Will were a good Declaration, they did apprehend they were to take it, That the Testator had by his Will of 66 made a sufficient Declaration—according to the Custom, to let in the Plaintiff, which he hath not done ; for the Custom of London in this Case is, That the Sum certain, that any Child, had in Part of such Advancement, ought to be expressed in such Writing or Declaration, or else the same is not of any Avail ; and produced Precedents for that Purpose, that the same ought to be mentioned, to the end that in case such Child should be admitted to such customary Part, it may be known what the Sum is, to the end it may be brought into Account with the rest of the Estate of the Testator.

Whereto the Plaintiff insisted, That the Custom of a Sum certain to be mentioned, appeared only by a By-Law called Judd's Law, in 5 Ed. 6, the which is no established Law in the City to bind the Right of any ; and there is a great Difference in the By-Laws of the City, which [185] ought to respect their Government, and not bind the Right of any Person which is governed by the general Custom of the City, and which is paramount to any of their By-Laws, and by the Custom the Right of a Freeman's Child is as much preserved to him, as any Man's Right by the Common Law of the Kingdom ; besides the naming of the Sum is no more than in order to the settling the Accounts of the said Estate, which may be done before a Master in this Court.

This Court, upon reading several Precedents on both Sides, declared, That the

said Certificate was conclusive, and that the Plaintiff must be let in for a customary Part of her Father's personal Estate : and decreed the same accordingly.

The Defendant was ordered to account for all the personal Estate of Bennony Honywood, and the Plaintiff thereout to have her customary Part, her Marriage Portion being brought into Account with the rest of the personal Estate, and the Plaintiff to discover the said Portion on Oath, and the Defendant to do the like as to what Provision he had.

The Defendant insists, What Provision he had was Money deposited by his said Father in the Hands of Mr. Colville and others, to purchase Lands or Houses in or near London, in pursuance of Articles [186] between the Defendant's said Father and the Defendant's Wife's Father, which were made before the Marriage of the Defendant, which Lands and Houses so to be purchased, is by the said Articles covenanted to be settled on the Defendant and his Wife for Life, and for her Jointure, Remainder in Tail, and was in Consideration of the Defendant's Wife's Portion, and Houses were purchased therewith in Bennony's Life, and the Defendant is his Son and Heir.

And the Defendant insists, That what was so deposited as aforesaid, is to be taken as if the Defendant's Father himself had purchased Lands and settled the same to the Uses aforesaid, and ought not to be accounted a personal Estate of the Defendant's Father, but as Land.

This Court declared, what was deposited by the Defendant's Father to purchase Lands in pursuance of the said Articles, is to be taken as Lands, and not as personal Estate of the Defendant's said Father ; and also declared, what was deposited as aforesaid, shall not be brought into Hotspot, but the Defendant is to discover what he had from his Father upon his said Marriage.

[187] PRIGG *contra* CLAY.

32 Car. 2, f. 198 [1680-81].

Legacies of £50 apiece to two, and if either die before twenty-one, the Survivor to have all. One dies before the Testator, yet the Survivor decreed to have all.

That John Clay by his Will devised £100 to the Plaintiff Philip Prigg junior, and Deborah Prigg his Sister, (viz.) £50 to be paid each of them at their respective Ages of twenty-one Years or Day of Marriage, which first should happen, by the Defendants his Executors, and in the mean Time the whole £100 to be secured and improved by his Executors for their Use, and in case either the said Philip or Deborah should die before Payment of their Legacies, the Survivor to enjoy the whole £100, and if both die before Payment of their said Legacies, then the Testator decreed the whole £100 to his Sister the Plaintiff Eleanor their Mother, besides £100 to her to be paid within six Months, after his Death.

That the said Deborah Prigg died unmarried and before twenty-one, and before she had received the £50 Legacy, so that the whole £100 became due to the Plaintiff Philip junior.

The Defendants insist, That Deborah died before the Testator, and her Legacy of £50 became void.

[188] This Court was fully satisfied, tho' Deborah died before the Testator ; yet the said Devise of £50 to her did not become void, and being devised over to her Brother Philip the surviving Legatee, it belonged to him, according to the Devise in the Will, the rather for that it being a contingent Remainder, and might vest after the Death of the Testator, so long as there was a Survivor, it did not belong to the Executors, and for that the Testator, who lived for some Time afterwards, did not alter the Devise thereof by his Will, nor otherwise dispose thereof in Writing, and decreed the Defendants to pay the Plaintiff the two fifty Pounds : This Order was confirmed by the Lord Keeper.

SANDERS *contra* EARLE.

32 Car. 2, f. 102 [1680-81].

Will.

That the Plaintiff's late Husband Daniel Earle, or some in Trust for him, was at his Death seised in Fee, and also intituled to the Trust of a long Term of the Manor upon a Sore and Lands in Com' Nottingham, which said long Term was in Being and subject

to be disposed as he should appoint, so that he had full Power to settle, devise or charge the same by his Will, and the said Daniel, in [189] Consideration of a Marriage with the Plaintiff and £2000 Portion, in 1676, by Will devised it to the Plaintiff, besides a Jointure of £1200, and if she were with Child of a Son, he gave all his Lands and Tenements to such Son in Tail; but for Default of such, he gave them to the Defendant his Brothers and then Heirs, and if he had a Daughter, he devised to such Daughter £500 to be paid when she attained her Age of sixteen, and the same to be secured out of his Lands aforesaid, and made his said Brothers Executors: That the Plaintiff had no Son, but a Daughter who lived some Time, and is since dead, and the Plaintiff is her Administratrix, whereby she is intitled to her £500 presently.

The Defendant insists, That the Plaintiff's said Husband devised to the Plaintiff £1200, and devised to her all her Plate, Jewels and Goods, and Stock in and about the House at Normanton, and made the Plaintiff Executrix till the last Day of August after the Will, and if she (who was then with Child) had a Son by that Time, then she to continue Executrix, otherwise the Defendants to be joint Executors, and made such Devise to the Daughter, and the rest of his personal Estate he devised to his Executrix or Executors: That the Plaintiff Margaret having a Daughter, [190] the Defendants proved the Will, and are intitled to the Legacies therein to them devised, and the Residue of the personal Estate; and insist, That if the Plaintiff, as Administratrix to her Daughter, be intitled to the £500, yet she is not to receive it till such Time as it is payable to the Child, if it had not died; neither is the Plaintiff intitled to any of the ready Money in the House of Normanton, which was £407 by any general Words in the Will.

But the Plaintiff insists, That by the general Words in the Will, [I devise all my Goods, Chattels and Household stuff in and about my House at Normanton] will carry the said £407 to the Wife as a particular Legacy, and it ought not to be brought into the Account of the personal Estate.

This Court declared, That as to the £407, though the Words were general, yet considering the Intention of the Testator, who by his said Will having before given to the Plaintiff Margaret a Legacy of £1200, if that he had intended to have given her £407 over and above the £1200 he might in the same Place of [191] the Will have given her £1600 as well as £1200, and therefore conceived that the Plaintiff ought not to have the £407, but this same ought to come in to the Account of the personal Estate, and decreed the same accordingly; and as to the £500 claimed by the Plaintiff, as Administratrix to her said Daughter, whether the same ought to be paid presently or not, till such Time as the said Daughter might have come to the Age of sixteen Years, if she had lived, being the next Question.

This Court declared and decreed, That the same shall not be paid until such Time as the said Daughter might have attained her Age of sixteen Years, if she had lived, but the same to stand charged on the Estate, subject to the Sum by the Will unto that Time, and then the Sum to be paid to the Plaintiff, her Executors, Administrators, or Assigns, by the Defendants, their Heirs and Assigns.

[192] ELVARD *contra* WARREN.

32 Car. 2, f. 255 [1680-81].

Sequestration.

The Plaintiff having a Sequestration against the Defendant's real and personal Estate for Non-payment of £536 decreed to the Plaintiff, the Plaintiff prayed the same might be paid him out of the Defendant's Estate, so far as it will extend, and out of the Security given by the Defendant for abiding the Order on hearing; and also prayed, for that some Part of the Defendant's Estate, now under Sequestration, is a contingent Term, which will determine upon the Death of one Person, whereby the Plaintiff may lose his said Debt. That the Commissioners of the Sequestration may be empowered to sell the said Estate; and prayed also, in regard the Defendant's Estate is not sufficient to satisfy the Plaintiff's said Demand, that a Recognizance given by the Defendant, to abide the Decree, may be produced and inrolled.

This Court ordered the said £536 Interest and Costs, to be paid by the said Defendant, or out of the sequestered Premises, or the Security before mentioned, and that the Commissioners of the [193] Sequestration do sell such of the sequestered Premises

as are held for any Term for the best Price, and the Money thereby raised to pay the Plaintiff towards Satisfaction of his Demands.

The Question is, Whether the Defendant, being charged in Prison in Bristol with a Decree of this Court, can be discharged without satisfying the Decree, it being insisted on, that a Decree in this Court is not a Judgment to detain the Defendant.

This Court declared, That a Decree in this Court is as effectual to charge the Person of the Defendant, as an Execution at Law; and the Defendant being charged with the Decree, the Court declared, if the Warden of the Fleet let him go it shall be at his Peril.

GLENHAM *contra* STATVILE.

32 Car. 2, f. 755 [1680-81].

Bill of Revivor dismiss.

These being cross Causes, the Defendant Charles Statvile exhibited his Bill to be relieved against the Plaintiff and his Wife touching a Rent-charge, for which the Plaintiff and his Wife by their Bill claim; and the Defendant Judith Statvile exhibiting her Bill against the Distresses, pretending the Lands out of which the Annuity issues, is her Jointure: Which [194] Causes being heard, a Trial at Law was directed: to try whether the Arrears of the Annuity was paid, upon Trial the Plaintiff obtained a Verdict for £475, and the Causes coming again to be heard, it was decreed, that the Defendant should pay the £475 with Interest and Costs, which Costs were afterwards taxed to £226, and that Report confirmed, and a Writ of Execution of the said Decree and Report left at the Defendant's House, and Money demanded, and for Non-payment an Attachment issued against the Defendant Charles Statvile, who appeared and was examined and certified, not in Contempt, but upon arguing the Exceptions to the Certificate, the Defendant was ordered to pay the £475 and the said Costs, except £100 thereof, which was remitted: But the Defendant did not pay the Money, and the Plaintiff's Wife being since dead, he hath Administration, and is intitled to the Monies: But the Defendants refuse to pay the same, insisting, that the said Decree and Proceedings are abated: so that the Plaintiff now by his Bill seeks Relief in the Premises, and that a Subpœna ad Revivend', Respondend', or such other Process as the Matter should require, might be awarded.

[195] The Defendant by Demurrer insists, That in Case the Plaintiff's Bill shall be taken for an original Bill, then it contains no Equity, he having Remedy at Law, and that the Plaintiff was a Defendant in former Suits, and by the Course of the Court, no Defendant, or any that represents him, in case of an Abatement before the Decree or final Judgment be signed and inrolled, can or ought to revive; and the Bill does not say, that any Decree or final Judgment is signed and inrolled; and it is contrary to the Rules of the Court, to make a Decree against the Plaintiff upon his own Bill; and it would be merely Vexatious if the Plaintiff should revive his former Proceedings, which if revived the now Plaintiff can have no final Judgment, contrary to the Prayer of his Answer to the original Bill, which was, that he might be dismissed, and the Plaintiff's Demands by the new Bill are chiefly for Costs of Suits, which are extinguished by the Death of the Plaintiff's Wife, and if he were intitled to a Bill of Revivor he could not revive for Costs, there being no Decree inrolled.

This Court allowed the Defendant's Demurrer, and dismiss'd the Plaintiff's Bill of Revivor.

[S. C. Dick. 14.]

[196] RAYMOND *contra* PAROCH. BUTTOLPHS ALDGATE IN COM. MIDD.

32 Car. 2, f. 517 [1680-81].

Privilege.

The Plaintiff being one of the King's Waiters in the Port of London, and yet used the Trade of a common Brewer, and executed his said Place by a Deputy: Defendants insist, He is not to be exempted from bearing the Office of Overseer of the Poor in the Parish.

The Plaintiff insists, that the King's Officers, who serve his Majesty in Relation to his Revenue, ought to be exempted from Parish Offices, though they executed their Places by Deputy, and use another Trade, they being still liable to answer any Mis-

demour committed by their Deputies; and if their Deputies should be absent at any Time, they are bound to execute the same themselves, which often falls out; and Precedents of this Nature have often been found, and hopes this Court will not take away any the Privileges such Officers ought to enjoy in Right of their Offices, and that a Supersedeas of Privilege be allowed the Plaintiff, and his Writ of Privilege stand.

The Defendants insist, That the Plaintiff driving a Trade of a common Brewer, and getting Money in the Parish, he ought to bear the Offices of the Parish, [197] notwithstanding his said Office; and if any Privilege were due, it ought to be granted by the Court of Exchequer, and not by this Court.

This Court declared, That the King's Officers ought to have the Benefit of their Privilege, and the Execution thereof by a Deputy, or his Dealing in another Trade should not in any sort be prejudicial to him, he being to answer for any Neglect or Misdemeanour committed by his Deputy, for that it is not reasonable that the King's Servants or Officers should have nothing else to subsist on but their immediate Services or Places under his Majesty, and take no other Employment on them; and although a Privilege of that Nature be granted in the Exchequer, a Writ of Privilege under the Great Seal was, and ought to be taken in all Respects as effectual; and therefore allowed the Plaintiff his Privilege.

DOMINUS BRUCE *contra* GAPE.

32 Car. 2. f. 723 [1680-81].

Deed. Will. Revocation.

The Question in this Case is, whether the Manor of Mudghill is within the Devise of the Duke of Somerset, by his Will in August 1657, of the Residue of the Estate unsold, for the Benefit of his three Daughters, and the Lady Bruce his [198] Grandchild, or whether it belongs to the Lady Bruce only, as Heir at Law, and whether the same be liable, and comprehended in the Trust, together with other Manors and Lands, to satisfy the £19,100 Debts only, or is subject with the other Lands in the said Deed and Will for Satisfaction of all the Debts of the said Duke William.

The Case is (viz.) that the Plaintiff the Lady Elizabeth, Wife of the Lord Bruce, is Grandchild and Heir of William late Duke of Somerset, and Sister and next Heir of William also late Duke of Somerset, who was the only Son of Henry Lord Beauchamp, the eldest Son of William Duke of Somerset the Grandfather, which said Duke William the Grandfather, did by Deed the 13 Nov. 1652 convey to the Lord Seymour, Sir Orlando Bridgman, &c. and their Heirs, the Manor and Lands in Trust for Payment of Monies to the Lord John Seymour, and the Lady Jane Seymour: Then upon further Trust to pay Debts, amounting to £19,100, and after in Trust for raising £10,000 for the Lord John Seymour, and £60,000 for the Lady Jane Seymour, and Trustees to account yearly to the right and next Heir of the said Duke, with a Power of Revocation in the said Deed, as to all but the said £19,100 Debts; and that the said Duke [199] William the 19th of April 1654, as to further Provision for the Payment of the Debts, by Deed conveyed to the Earl of Winchelsea, and the Defendant Gape and others, and their Heirs, the Lands in Wilts and Somerset, (worth £30,000, and sufficient to pay all his Debts) to himself for Life, and after for Payment of Annuities, and after his Death, then to the Use of the last Trustees and their Heirs, upon special Trust, that they should lease out the Premises, and with the Money thereby raised, and otherwise with the Profits, pay all such Debts for which the Plaintiff stood engaged for the said Duke, and that the Overplus of the said Money and Profits to be paid, and the Lands unsold to be conveyed to the right Heirs of the said Duke, wherein was a Power reserved in the said Duke by Deed or Will, to revoke the said Uses or Trust: That the said Duke by Deed, the 20th of April 1654, reciting that the Lord Beauchamp the eldest Son, died since the Deed of the 13th of November 1652, and had left only one Son, and the Plaintiff Lady Bruce, and that the Lady Bruce was left unprovided for, and reciting the Deed of the 19th of April 1654, made an additional Provision for the Payment of his Debts, which made the Lands by the Deed of 1652, of a greater Value than would satisfy the said Trust, and therefore [200] appointed the last Trustees in the Deed of 1652, should, out of the Money to be raised by Sale of those Lands and the Profits thereof, pay the Plaintiff Elizabeth Lady Bruce £100 per Annum, till her Age of seventeen, and after £300 per Annum, and then after the

Debts in the Deed of 1652, and Portions to the Lord John, and Lady Jane Seymour, then to pay Elizabeth Lady Bruce £6000 Portion also, with Power of Revocation.

That afterwards the said Duke by Will, 15th of Aug. 1657, having, as aforesaid, secured the said £19,100 Debts, devised to his Son, the Lord John Seymour, and the Heirs Males of his Body, the said Manor of Mudghill, and because the Lady Anne Beauchamp his Sister-in-Law had the same as Part of her Jointure, and the same was leased out for the Life of Pleydall, his Will was, that till the same fell in Possession to the Lord Seymour, the Trustees in the Deed of 1652, should pay him Maintenance, and they to convey to him, when they thought fit; and by the said Will, taking Notice of the Deed in 1652, and of that of the 19th of April 1654, and also of his Power of Revocation, appointed and declared the Trusts in those Deeds for his Grandson William Lord Beauchamp, and the Plaintiff the Lady Elizabeth Bruce, or for the Benefit of his right Heirs, should [201] cease, and the same was thereby revoked, and appointed the Trustees in those Deeds to convey the said Premises to the Lady Frances his Wife, and the Earl of Southampton, and the Earl of Winchelsea, and Sir Orlando Bridgman, and the said Gape and others, and their Heirs, upon Trust as to Mudghill, as he before had declared; and as to the rest of the Manors and Lands on Trust for Payment of all such Debts in the said Indentures to be paid, and unpaid at his Death, and for freeing his personal Estate and Executors from the Payment thereof, and of the Trust in the Deed of 1652, for the Lady Jane Seymour, and after these Trusts performed, all the Lands unsold and the Reversion thereof be disposed by the Lady Dutchess of Somerset his Wife, and the Trustees by his Will and their Heirs for twenty-one Years, from the Death to such as the said Lady Dutchess should appoint, and in Default of such Appointment, for the raising such Sums of Money for the Plaintiff Elizabeth's Portion and Maintenance, as the Deed of the 20th of April 1654, appoints; or in Default of such Appointment by the Dutchess, to go to such Person to whom the Trust of the Inheritance of the Premises, after the twenty-one Years, is limited by the Will, and the Conveyance so to be made to the said Dutchess, and [202] the other Person named in his Will, should be upon further Trust, that the said Dutchess and the other Person should stand seised of the said Lands unsold, and the Reversion of such Part thereof as should be leased out for Lives or Years, in Trust for William Lord Beauchamp, and the Heirs Males of his Body, and for Want of such Issue for the Benefit of John Lord Seymour for Life, and after for the Benefit of the first, and every other Son of his Body, and the Heirs Males of their Bodies respectively, and for Default of such Issue for the Benefit of all his Daughters, and the Plaintiff the Lady Elizabeth Bruce his Grandchild, and all the Daughters of John Lord Seymour and their Heirs, equally as Tenants in Common, and not as Jointenants; which Will the said Duke in 1660, ratified, by new Publishing thereof, and all the Trustees in the Deed of 1652, being dead, except Sir Orlando Bridgman and Gape, and the Interest in Law being in them by Survivorship, Sir Orlando Bridgman knowing the Debts in the Deed of 1652 to be paid, conveyed all the Lands therein mentioned to the said Dutchess of Somerset.

That in 1671, the said William Lord Beauchamp Duke of Sommerset died without Issue, whose Heir the Plaintiff the Lady Bruce is, and after the Lord John Seymour became Duke of Somerset and [203] died without Issue, by whose Death the Plaintiff the Lady Bruce is intitled as Heir to Duke William her Grandfather, to the Reversion in Fee of Mudghill, Duke John being only Tenant in Tail thereof, and ought to enjoy the same, it not being liable to pay any Debts, but is discharged thereof by her Grandfather's Will, and not disposed from her by any Act, the £19,100 being all paid.

So that the Questions now before the Court were, whether the Reversion of Mudghill, expectant upon Pleydall's Estate for Life, as well as the Residue of the Estate, be liable to all the Debts which Duke William owed at his Death, or only to the £19,100 Debts.

And Secondly, Whether the Reversion of Mudghill, as well as the Residue of the Estate, after Satisfaction of all the Debts of Duke William, ought to be for the Benefit of all Duke William's Daughters, and the Plaintiff Lady Bruce and their Heirs equally, or the said Reversion to go intirely to the said Lady Bruce, as right Heir to Duke William.

As to the first Question, the Defendant insisted the said Reversion, as well as the other Estate, is liable to all the Debts, for that by the Deed of 1652, Mudghill was conveyed for raising of Money for the Payment of £19,100 Debts, and all other Debts

that he should owe at the Time of [204] his Death, in which Deed it is provided, that after the said Debts be paid, he might, by any Deed or his last Will, revoke all or any of the said Trusts, other than as concerning the £19,100 Debts, yet made no Revocation, other than by his last Will, and therein he revoked only those Trusts that were for the Benefit of the Lord Beauchamp, or the Lady Elizabeth Seymour, or his own right Heirs; and by the said Deed, the legal Estate in Mudghill is settled in the Trustees and their Heirs; and the Duke had no Power to revoke the Uses or Estates, till after the £19,100 was paid, and the said Duke directing his Trustees to convey Mudghill to his Son John, he did thereby dispose of an equitable Interest only of the Reversion of Mudghill, and the £19,100 was not paid in the said Duke's Life-time, but great Part remains unpaid, and he hath contracted several new Debts, since the 20th of April 1654, which the Defendants since paid upon the Securities of the said Land, and Mudghill is one of the Manors conveyed by the Deed of 1652, for the Payment of £19,100 and all other the Debts he should owe at the Time of his Death; and although the same be directed by the last Will of the said Duke, to be settled upon the Lord John Seymour, and his Heirs Males, yet the said Duke by Deed of 1652, had no Power to [205] revoke the same for the Payment of his Debts, or if he had, he did not revoke the same by the said Will, but left Mudghill and other the Premises subject to the Payment of his Debts; and the Trustees, understanding such to be the Duke's Intention, never settled Mudghill on the said Lord John Seymour, who being lately dead without Issue, the same is subjected to the Payment of the said Duke William's Debts; and when Debts are satisfied, the Overplus of the Monies and the said Mudghill, and all other the Premises, ought to be divided according to the Intent of the said Duke's Will; and by the said Duke's Death, and the Releases of the said Trustees, the Interest in Law became vested in Sir Orlando Bridgman, and he conveyed Mudghill, &c. unto the said Dutchess, and the said Gape and other the Trustees and their Heirs, that they might therewith pay the said Debts; and though there be sufficient besides Mudghill to pay all the Debts, yet by the Will upon which this Question doth arise, that thereby the Trust for the right Heirs of the said Duke are revoked in express Terms, so that by any Deed preceeding the said Will, the Plaintiff the Lady Bruce cannot claim any Advantage as Heir, the rather, for that by the Will it doth appear, that Duke William had an equal Regard to his own Daughter, and the Plaintiff the Lady [206] Bruce his Grandchild and Heir; and it cannot be presumed, that he would more concern himself for the Welfare of a Granddaughter, than his own Daughters; nor was the said Reversion of Mudghill disposed to the Plaintiff by any Words in the Will, though he did, by express Words in his Will, revoke all Trusts for the Benefit of his Heirs in Mudghill, as well as the other Lands, and made other particular Provisions further, which shews he did not intend that for her; for if he had, he would not have revoked the former Trusts, as to that by which she would have been intitled as Heir, especially when he hath devised all the surplus of his Estate, which involves Mudghill as well as the rest, amongst his own three Daughters, and her equally; nor doth it any where appear, that Mudghill is in any Sort exempted from Satisfaction of the Creditors; nor could it so be by the said Deed made by Sir Orlando Bridgman, who best knew the Intention of all Parties in this Matter.

But the Plaintiff insisted, That the said Duke could not intend Mudghill should be conveyed to the Uses declared in the Will, for that the same is to be conveyed to the said Lord John and the Heirs Males of his Body, which is an Estate of Inheritance, and he had Power [207] by a common Recovery to have bound the Remainder, and the Reversion after the Estate tail is not Assets in Law; and therefore cannot be conveyed for the Payment of his Debts, and the rather, for that he recites Deeds in 1652 and April 1654, and directs the Trustees therein to convey all his Lands and Manors in those Deeds, to his Dutchess and others, as to the Manor of Mudghill, as before he declared by his Will; and as to all the rest of the Manors, he declared for the Payment of his Debts, so that (all the rest) excludes the Manors of Mudghill, and upon the whole Will it doth appear, the Duke intended no Reversion should pass, but Reversions after Estates for Life or Years, and therefore this Reversion of Mudghill, which is after an Estate tail doth not pass; and if it had been intended to pass, he would have limited it to the said Lord John for Life, without Remainder to his first or other Sons in Tail, for he had before given him a better Estate in Mudghill to him and the Heirs of his Body, and the Trustees were not to settle Mudghill accordingly, until the same fell in Possession, the same being yet for Pleydall's Life.

This Court, on reading the several Deeds and Will, declared, That although the Lord John might possibly have an Estate-tail in him, and dock'd it; but he not doing [208] it, this Court can take no Notice of it, though probably he did forbear to do it, because Duke William had signified his Desire, that he should not have an Estate executed to him, till it should fall in Possession, and not before, except the Trustees pleased: But the Case must be taken as it doth appear before the Court, that is, Mudghill was once liable to the Payment of the Debts of Duke William; and though 'tis pretended that the Will hath taken out Mudghill, yet the said Will doth only take out an Estate-tail, but the Reversion thereof, when the same falls in Possession, is subject to the same Trust, and goes in Company with the other Reversions, and the same is legally conveyed, and doth pass in the general Words; and therefore this Court is of Opinion, that the Reversion of Mudghill is Part of the unrevoked Estate, and that the Lord Bridgman did well when he made the said Conveyance to the Lady Dutchess, and that when the £19,100 and the said other Debts are paid, to which Mudghill is as well liable as the other Manors and Lands, then the Trustees ought to convey all the Premises in Fourths; and decreed accordingly.

[209] MADDOCKS *contra* WREN.

32 Car. 2, f. 22 [1680-81].

The prior Mortgagee upon Redemption by the second Mortgagee, shall be charged with the Profits, by whomsoever received after the second Mortgage.

The Question in this Cause is, with what Profits the Defendant Wren shall be charged in Case of the Plaintiff, who claims the Premises in Question, by Virtue of a second Mortgage, and is admitted to a Redemption, on Payment of what shall appear due to the Defendant Wren, who hath the prior Mortgage?

The Plaintiff insists, That the said Mortgage being of a Lease, and the Defendant Wren having Possession by Attornment of Tenants, he ought to have received the Profits, whereby his Mortgage would have been fully satisfied; yet he permitted the other Plaintiff Dorothy, Wife of the Plaintiff Maddocks the Mortgagor, to receive the same; and therefore the said Wren ought to be charged, whereby the Plaintiff may be let in to have Satisfaction of his Debt.

This Court declared, That the Defendant Wren ought to be charged with the Rent, whether received by the Wife or any other Person, after the Plaintiff's second Mortgage made, but all received by her, before the said second Mortgage, he ought not to be charged with.

[210] COLES *contra* HANCOCK.

32 Car. 2, f. 112 [1680-81].

Revocation of a Will.

That Benjamin Coles the 11th of June 1678, made his Will in Writing, and thereby gave to and amongst his then Children, naming them (viz.) Benjamin, Samuel, Mary and Hannah, Portions; and appointed his real Estate, and added to his personal Estate to be sold, and made Elizabeth his Wife his Executrix; and the Testator being a melancholy Person, and fearing he might forfeit his Estate, by making himself away, to prevent a Forfeiture, by Deed the 14th of June 1678, made over all his personal Estate to Trustees, first to pay his Debts, then to pay some Legacies, and all the rest of his Estate to be divided amongst the aforesaid four Children: That the Testator afterwards died a natural Death; but before his Death had another Child, viz. Sarah, who is not provided for, either by the said Will or Deed.

The Question is, whether the said Will be revoked by the said Deed of Trust; that if it be revoked, then the said Sarah insists to have her Share of her Father's Estate, and that he ought to be looked upon as dying intestate; and at least the personal Estate ought to be distributed by [211] the Act for distributing Intestates Estates, and the Deed ought not to stand in her Way, for that great Part of the Estate did consist in Debts which were made after the said Deed, and did not pass to, or was vested in the said Trustees, and that it is against natural Right and Conscience, that her Father leaving a very considerable Estate, she should have nothing of it.

This Court, on reading the said Deed and Will, is of Opinion, that the said Deed of Trust, is no Revocation of the said Will, being not made with Intent to revoke the same,

but only to prevent the Forfeiture, in a Case which never happened, and decreed the same to be set aside, and the personal Estate to be distributed according to the Will, and the Remainder to be divided amongst the four Children, Benjamin, Samuel, Mary and Hannah, the same being given to them by Name; and as to the real Estate, it being ordered by the Testator to be added to his Personal for Increase of all his Children's Portions; and the said Sarah being born before he died, the same to be sold and divided amongst the five Children, viz. Benjamin, Samuel, Mary, Hannah and Sarah equally.

[212] SALE *contra* FREELAND.

32 Car. 2, f. 272 [1680-81].

A Settlement with Power of Revocation by Will in Writing, executed in the Presence of three Witnesses, but one of them did not subscribe his Name; yet decreed a sufficient Revocation.

That Thomas Freeland the Defendant's great Grandfather, being seised of the Premises, did by his Will in Writing devise the same to Nicholas his Son for Life only, and afterwards to his Grandson John, late husband to the Defendant Frances, and Father of the Defendant John, and his Heirs for ever; That the said Thomas and Nicholas being dead, John the Grandson entred, and for £300 mortgaged the Premises to the Plaintiff and not long after the said John, on Confidence of the Power he had to dispose of the Premises, made his Will, and the Defendant Frances Executrix, and devised the Premises to be sold for Payment of his Debts.

But the Defendant insists, That the said Thomas the great Grandfather had no Power to dispose of the said Premises, and if he had, he did not pursue it regularly, for that he had made a Settlement of the Premises in 1651, upon one Henry Weston and his Heirs, to the Use of him the said Thomas for Life, and after to Nicholas his Son for Life, and after to the Use of the said John his Grandson, and the Heirs of his Body, with Remainder over; and that the Defendant John the Grandson, by [213] Virtue of the said Deed as Heir in Tail, claims the Premises; whereas (if any such Deed were) it was with a Power of Revocation by any Writing, or Will in Writing, to be executed in the Presence of three Witnesses, and was revoked by his making his said Will, in the Presence of three Witnesses, tho' one of them then present did not subscribe the same; That the said John the Grandson, had the full Power of the Estate, and the Grant made to the Plaintiff ought to be supported in Equity, being for valuable consideration, though the Power was not literally pursued in the Circumstances of three Witnesses, the Intent of the Person appearing as sufficiently by two Witnesses, as if there were three, and submit to the Judgment of this Court.

The Plaintiff further insisting, That the said Thomas the great Grandfather, takes Notice, in the Preamble of his Will, of the Power by him reserved upon the said Settlement, to make any Alteration thereof during his Life; and then by the said Will deviseth the Premises to the said John his Grandson in Fee, and he Mortgages to the Plaintiff; and there is no Colour, but the Defendants ought to redeem, or be foreclosed.

[214] This Court (it appearing that there was more than two Witnesses present at the publishing the Will, though two only subscribed their Names thereto, and upon hearing the Words of the Power, and also the Will of the said Thomas Read) declared, that as this Case was circumstanced, there ought to be a Redemption or a Foreclosure, and that the Will, although but two Witnesses to it, did sufficiently revoke the said Deed of Entail.

ROSE *contra* TILLIER.

33 Car. 2, f. 435 [1681-82].

Copyhold surrendered on condition to pay £200 to Katherine, at twenty-one Years of Age, and if she die before twenty-one, without Heirs of her Body, then to the Surrendree. Katherine dies before twenty-one leaving a Son, decreed the £200 to be paid to the Son, and the Lands to stand charged therewith.

That William Tillier deceased, 14 Car. 2 [1662-63], surrendered Copyhold Lands of Inheritance to the Use of the Defendant J. Tillier, his Heirs and Assigns for ever, upon Condition that the Defendant should pay, or cause to be paid to Katherine Tillier, the Daughter of the said William Tillier £200 when she should accomplish the Age of twenty-one; and if the said Katherine should die before twenty-one, without Heirs

of her Body, then the said £200 to be for the Use of the said Defendant ; but if Default should be made by the said Defendant, then the said [215] Copyhold Lands should be to the Use of the said Katherine, her Heirs and Assigns, and the said Surrender to be void ; and the said William Tillier, after the said Surrender, and before he died, by Writing appointed the said Defendant not only to pay the said £200 to the said Katherine, but also £6 per Cent. till such time as the same became due : That the Plaintiff married the said Katherine, and had by her one Son named George ; that after Katherine died, and then George and the Plaintiff took Administration to them both, whereby he is intitled to the said £200 with Damages.

The Defendant insists, That Katherine died before the Age of twenty-one, and so he is not liable to pay the said £200 or to give any Account of the Lands or Profits in the Surrender.

This Court decreed the Defendant to pay the Plaintiff the said £200, and that the said Lands so surrendered stand charged therewith.

[216] THOMPSON *contra* ATFIELD.

33 Car. 2, f. 412 [1681–82].

Marriage Settlement.

The Bill is to discover a purchase Deed of Frogpoole, purchased by Henry Atfield, the Plaintiff's Great Grandfather, to him and his Heirs, and that William Thompson the Plaintiff's Grandfather, married Mary the eldest Daughter of the said Henry Atfield, who declared, that he had made the Purchase aforesaid, for the Benefit of the said William and Mary his Wife, and for the Heirs of the said Mary, and that he would settle the same accordingly, but the said Henry Atfield dying before any such Deed was executed ; yet the said William and Mary were in Possession long before the Death of the said Henry, and paid no rent, and the said Henry leaving a Son at his Death (viz.) John Atfield the Defendant's Father, who having a great Affection for Anthony Thompson the Plaintiff's Father, who was the Son and only Child of the said William and Mary his Aunt, a Match was proposed between the said Anthony and Elizabeth Smith the Plaintiff's Father and Mother, which took Effect ; but before and in Consideration of the said Marriage, the said John Atfield the Defendant's Father settled the said Premises on the said [217] Anthony the Plaintiff's Father and his Heirs for ever ; and the said Anthony had by the said Elizabeth the Plaintiff his eldest Son and Heir. But the Defendant pretends the said Deed is defective in Law, to have which Deed made good, and supply the Defect thereof by Equity by the Defendant, according to the Intent of the original Settlement made by John Atfield, the Defendant's Father, is the Bill.

The Defendant insists, There could be no such Marriage Agreement for settling the Premises as aforesaid, for that Mary sued her Mother, and had her Portion out of the personal Estate ; and though the Defendant's Father might intend to give the Plaintiff's Father the Premises, and sealed a Deed for that Purpose ; yet he altered his Mind and never perfected it, and there was no Consideration for his so doing.

And the Defendant insists, he ought to enjoy the Premises, for that by the Plaintiff's own shewing his Title is defective, and therefore ought not to receive any Countenance in a Court of Equity against the Defendant, who is Heir at Law to his Father and Grandfather, and comes in and ought to have the Aid of the Court to protect his Title.

[218] But the Plaintiff's Counsel insisted, That the Defendant's detaining of the said Deed is a Fraud, and the Consideration of making the said Deed is valuable, and there is no Defect therein, but Want of Livery and Seisin, which Defect this Court hath often supplied, when no Fraud appears in gaining the Deed.

This Court (the said Deed appearing to be fairly executed by the Defendant's Father, and that there was no Defect therein, save only the Form of Livery and Seisin, and made on such valuable Consideration as Marriage) decreed the Defendant to execute Livery and Seisin in the said Deed, and made farther Assurance of the said Premises to the Plaintiff and his Heirs, and the Plaintiff is decreed to enjoy the same against the Defendant.

BARKER contra HILL.

33 Car. 2, f. 278 [1681-82].

Upon a Contract for Copyhold Estate, and purchase Money paid, the Bargainor dies before Surrender, his Heir decreed to surrender.

The Plaintiff having contracted with the Defendant's Father for the Purchase of a Copyhold Estate, the Plaintiff paid the Purchase Money, and the Defendant's Father agreed to surrender the Premises at next Court, and said, he had made a Surrender lately to the Use of his [219] Will, which would enure to the Benefit of any Purchaser; but before next Court Day, and any Surrender made, the Defendant's Father died: so the Bill is to have the Defendant his Son and Heir to confirm the Plaintiff's Purchase by Surrender or otherwise, as this Court shall direct.

This Court decreed the Defendant, when he came of Age, to surrender effectually the Premises to the Plaintiff; and the Lord of the Manor presently to admit the Plaintiff Tenant to the Premises.

BONNINGTON contra WALTHALL.

33 Car. 2, f. 37 [1681-82].

Annuity not being demanded in forty Years Time, conceived to be a Trust.

The Defendant Walthall claims an Annuity of £100 per Ann. and Interest, out of the Estate in Question, ever since August 1642 with Interest; by Virtue of a Deed of that Date made by himself to Mr. Serjeant Willmot and others, whereby it is appointed, that the Trustees in the said Deed should dispose of the Monies by them raised by Profits and Sale of the Premises, for Payment to the said Defendant and his Assigns, during his Life and the Life of Peter Bonnington, the yearly Sum of £100, and the said Demand of the said £100 per Annum and Interest, [220] being a Matter of great Value and Moment in the Cause, it is referred to the Judgment of the Court, whether all or how long the said £100 per Annum shall or ought to be allowed in this Point, as also the original Cause which was heard 19 Nov. 1679 coming now to be heard again.

The Plaintiff insisted, That the £100 per Annum, if it was created, the same determined by the Death of Peter Bonnington.

But the Defendant Walthall insists to have allowance for the said Annuity of £100 and Interest for the same for forty Years past; whereas the Plaintiff insists, That the £100 per Annum never was nor ought to be allowed to the Defendant, for that the Deed of August 1642 under which the Defendant claims the said £100 per Annum, the same was to be paid in the first place before Debts, and there being a Debt due to one Chambers, which the said Defendant brought in, against which Debt, if the said Annuity had been real, the Defendant would have opposed the Payment of his said £100 per Annum, being to be paid in the first place, and the Defendant not demanding the said Annuity in forty Years, and suffering Debts to be paid before it, it ought to be adjudged a Trust for Peter Bonnington, and [221] the rather for that no Consideration appears for such Annuity.

The Defendant insists, That the Plaintiff admits it a Trust, and seeks Relief only for the Surplus after Trusts satisfied and determined, and this Trust being continuing, the same with arrears and Interest ought to be paid to the said Walthall.

This Court, on reading the said Deed, saw no Consideration for granting the said Annuity, and it never being demanded, this Court conceived it was a Trust for Bonnington, and would not charge the Estate therewith; and decreed the Estate to be discharged thereof.

RING contra HELE.

33 Car. 2, f. 270 [1681-82].

The Plaintiff Ring's Bill is for the Writings and Estate of Sir Henry Hele, which he claims by Virtue of an Agreement made by the said Sir Henry and him, wherein it was agreed, that the said Sir Henry should settle his Lands in Wigborough and Bridges, in Com' Sommerset, on himself for Life, after to the Heirs of his Body, with Power to make his Wife a Jointure of Wigborough, and to grant Estates thereof for three Lives, with a Remainder to the Plaintiff Ring and the Heirs of his [222] Body if he survived; and if Sir Henry died without Issue, with Remainder to Sir Henry's

right Heirs, with Power to Sir Henry to sell Pooles Tenement, Part of the Premises ; and Sir Henry was forthwith to suffer a Recovery to dock the Intail of the Premises ; and in Consideration thereof, the Plaintiff Ring was to settle his Estate in Dorset and Sommerset, to the Use of himself in Tail, with Remainder in Tail to Sir Henry Hele, with Remainder in Fee to the Plaintiff, and that if either Party leave Issue, to be at Liberty to make new Dispositions as he pleased : That Sir Henry employed one Chubb and Patten, to assist the Plaintiff Ring in surveying Sir Henry's Estate, and after both the Plaintiff Ring and Sir Henry went to Counsel, who advised a Deed of Bargain and Sale of the said Estate, from Sir Henry to the Plaintiff Ring, which was executed between the said Sir Henry and the Plaintiff Ring, and inrolled, and bears Date the 26th of March 1673. That before the said Recovery, the Plaintiff Ring prepared another Deed, dated the 6th of May following, to lead the Uses thereof according to the said Agreements, and a Draught of a Settlement of the Plaintiff Ring's Estate on Sir Henry, both which being perused and approved by Sir Henry were also executed ; and the Deed to lead the Uses of the [223] Recovery recited the said Agreement and inrolled Deed to make the Defendant Tenant to the Precipe, and Sir Henry declared the said Recovery to be to the Uses in the said Agreement ; and the Plaintiff Ring by his said Deed covenants with the said Sir Henry to stand seised of the Parsonage and other Lands in Yeovel in Com' Sommerset, and also in Com' Dorset, being all the Estate he was then seised of in Fee in the said Counties, and settles them to the Uses in the said Agreement ; That the said Sir Henry declared himself well satisfied with what he had done, and paid the Charges of the Writings : That the Plaintiff Ring two Years after had Issue Male, and Sir Henry after married and died without Issue, and without making any Jointure, or suffering any other Recovery, and doing any other Act but selling the Inheritance of one Farm : so the Premises came to the Plaintiff Ring who entred, but the Defendant Hele the only Son of Richard Hele, who was Uncle of the said Sir Henry, wrought on Sir Henry to make a Will, and to devise the Estate to the Defendant Hele and his Heirs, which Devise the said Sir Henry would not make.

The Defendant insists, That the Settlements on the Plaintiff Ring were forged and that the said Ring never made any [224] Settlement of his Estate on the said Sir Henry ; or if he did, that nothing passed thereby but only by Way of Covenant to stand seised, and that if the Plaintiff Ring hath got any such Deed to lead the Uses of the said Recovery, he got it by Fraud : and that if there was such a Deed of May 1673, which was after the Recovery, to declare the Uses thereof, it would not alter that of the 26th of March, for that the Plaintiff is a Stranger in Blood to the said Sir Henry, and it doth not appear that any Inrollment or due Execution was made of the Plaintiff Ring's Settlement, so that the Pretended Deeds on both sides are void, and not to be supported in a Court of Equity ; but the Plaintiff Ring may bring an Action at Law where it is proper to be tried, and where the Defendant, having a good Title under the Will of Sir Henry, will make his Defence.

The Plaintiff insisted, That the Defendant objected two Matters against the Plaintiff Ring's Demands (viz.) Forgery and Fraud : and if he will insist on the Fraud, he must admit the Deeds to be executed, and the Defendant admitting *de bono esse*, the Deeds to be executed, and to insist only on the Fraud and Circumvention.

[225] This Court, inspecting the said Deeds, declared, there was great Suspicion of the Reality of the said Deeds, but taking into Consideration the Inequality of the said Estates in the Value, though not material in this Case, yet it was a strong Presumption, that the said Sir Henry Hele did not knowingly leap into such a Bargain, and then the Inequality of Assurances is as bad, the said Sir Henry Hele's Settlement on Ring being a legal Estate, and mentioned to be in Consideration, that Ring had made a good Settlement of his Estate, which he had not, the same being void in Law and not to be made good by Equity ; and the subsequent inconsistent Acts of offering the Estate to be sold, and Ring's negotiating the Affair, were above all the rest bad and apparent Badges of Fraud and Circumvention in Ring, in obtaining the said Deeds from the said Sir Henry Hele ; and it is remarkable in the Case, that Sir Henry by his Will devised his Estate to the Defendant Hele a little before his Death.

This Court therefore dismissed the Matter of Ring's Bill, but upon Hele's Bill decreed the Agreement of April, and the two Deeds of May 1673, obtained by the said Ring from Sir Henry, be for ever hereafter damned and set aside, and Ring to re-assure to the Defendant Hele, [226] and a perpetual Injunction, not only to stay all

Suits at Law touching the Premises, but also for quieting the said Hele in the Possession.

COM' CRAVEN & AL' *con.* KNIGHT & AL'.

34 Car. 2, f. 732 [1682-83].

Bankrupts as to Partners.

The Bill is, that the Defendant George Widdows, being indebted to the Plaintiffs, became bound to them in several Bonds, and the said Widdows and the Defendant Berman, for several Years past were Copartners, and Widdows by Articles of Copartnership was intitled to two Thirds of the whole Stock, and the Defendant Berman to one Third : That the said Widdows and Berman the 25th of August last became Bankrupts, and a Commission of Bankruptcy being awarded against them, the Commissioners assigned all the Estate of the said Bankrupts to the Defendant Wright and others, and refuse to let the Plaintiffs creditors of Bankrupts to come in, and intend to divide the said Estate amongst the joint Creditors of Bankrupts, by Reason whereof the Plaintiffs Debts will be utterly lost.

The Defendants insist, it was agreed by Indenture of Copartnership, that all such Debts, as should be owing on the joint Account, should be paid out of the joint [227] Stocks, and at the end of the Partnership, each Copartner should take and receive to his own Use, his Share of joint Stock, and the joint Stock and Trade should not be charged with the private or particular Debts of either of the said Partners ; but that each should pay their private Debts out of their particular Estate, not included in the said joint Stock : that if both the said Partners should be living at the end of the first three Years of the six Years, that the said Berman should come in joint Partner accordingly ; and during the joint Trade, the said Copartners became jointly indebted to the other Defendants Wright, &c. in £6000, and that Widdows became indebted to the Plaintiff as aforesaid, without the Consent of Berman, and the Monies due on the said Bonds were not brought into the Account of that joint Stock : and the said Widdows, was only a Surety, and received none of the Money : and the Defendants insist, that the joint Creditors ought to be first paid out of the Estate in Partnership, and that the Commissioners have no Power to grant the joint Estate to pay the Plaintiffs, they being separate Creditors of Widdows ; and if a Surplus of the joint Estate, after the joint Creditors be paid, then the Plaintiffs can have but a joint Moiety of such Surplus towards their Satisfaction, the said [228] Berman's Moiety being not liable to pay the said Widdows separate Debts ; and the Debts then claimed were the proper Debts of the said Widdows ; and that after all the joint Debts are paid, there will be an Overplus, so that thereby the said Berman will be discharged, and have Money paid to him : but if the Plaintiffs and other separate Creditors of Widdows be admitted to the joint Estate, there will not be sufficient to pay the joint Creditors ; so thereby not only Berman's Estate will be applied to pay Widdows Debts, but will be liable to the joint Creditors : That there can be no Division of the joint Estate, whereby to charge any Part thereof with the private Debts of either Party, and till the joint Debts are paid, and till Division be made of the Surplus, both Parties are alike interested, and every Part of the said joint Estate ; that the Commissioners have no Power by the Commission, to administer an Oath to the Plaintiffs for Proof of their Debts, they claiming Debts from the said Widdows only, and the Commission is against Widdows and Berman jointly, and not severally, and therefore cannot admit of the Plaintiffs Creditors.

This Court declared, That the Estate belonging to the joint Trade, as also the Debts due from the same, ought to be divided into Moieties, and that each Moiety [229] of the Estate ought to be charged in the first place with a Moiety of the said joint Debts ; and if there be enough to pay all the Debts belonging to the joint Trade, with an Overplus, then such Overplus ought to be applied to pay particular Debts of each Partner ; but if sufficient shall not appear to pay all the joint Debts, and if either of the Partners shall pay more than a Moiety of the joint Debts, then such Partner is to come in before the said Commissioners, and be admitted as a Creditor for what he shall so pay over and above his Moiety ; and decreed accordingly.

CHARLES HOWARD *contra* LE DUKE DE NORFOLK & AL.

34 Car. 2. i. 722 [1682-83].

[S. C.] Select Cases in Chancery, 14; 3 Cha. C. 1, 2, &c.

Perpetuities or entailing a Term for Years, with Remainders over.

The Plaintiff by his Bill seeks to have Execution of a Trust of a Term of 200 Years of the Barony of Grostock; The Case was this—

The Earl of Arundel (the Duke of Norfolk's Father) by Lease and Release, Anno 1647, settled the Barony of G. and other Lands to himself for Life, then to the Countess Elizabeth his Wife for Life, and after her Decease, there is a Term limited to the Lord Dorchester, and other Trustees for 200 Years, under a Trust to be declared in a deed, of the same Date with the [230] Release; and the Limitation of the Inheritance after the Term of 200 Years, is first to Henry Howard, now Duke of Norfolk, and the Heirs of his Body, then to Mr. Charles Howard the now Plaintiff (Brother of the said Henry) and so to all his Brothers successively in Tale Male, Remainder over. Then by the said other Deed, the Earl declares the Trust of the Term of 200 Years, and that Deed in the reciting Part declares, that it was intended the said Term should attend the Inheritance, and the Profits should go to such Persons and in such Manner as was therein after limited (*viz.*) to Henry Howard now Duke of Norfolk, and the Heirs Males of his Body, so long as Lord Thomas, Lord Maltreviers, eldest Son of the said Earl of Arundel, or any Issue Male of his Body should be living; but in case he should die without Issue Male in the Life-time of Henry Howard, not leaving his Wife ensient with a Son, or in case, after the Death of Thomas without Issue Male, the honour of the Earldom of Arundel should descend to Henry Howard, then Henry Howard and his Heirs to be excluded of the Trust, and then it should be to Charles (the Plaintiff) and the Heirs Males of his Body, Remainder in like Manner to other Brothers. After this the Contingency doth happen; for Thomas Duke of Norfolk dies [231] without Issue, and the Earldom of Arundel, as well as the Dukedom of Norfolk, descended to Henry now Duke of Norfolk, by Thomas his Death without Issue; presently upon this, the Marquess of Dorchester, the surviving Trustee, assigns the Term to one Marriott, he assigns it to the now Duke of Norfolk, and the Duke suffers a Recovery to the Use of him and his Heirs; and the Plaintiff's Bill is to have Execution of the Trust of this Term, to the Use of himself and his Heirs Males of his Body.

The Defendants insist, That by the Assignment by Marriott to my Lord Duke Henry, the Term was surrendered, and quite gone; that the common Recovery which barred the Remainders, which the other Brothers had, would also be a Bar to the Trust of this Term; and that the Trust of a Term to Henry and the Heirs Males of his Body, until, by the Death of Thomas without Issue, the Earldom should descend upon him, and after that, to Charles and the Heirs Males of his Body, was a void Limitation of the Remainder to Charles.

The Plaintiff insists, Though the Term by the Survivor is gone, and merged in the Inheritance, yet the Trust of that Term remains in Equity; That this is not a Term that attends the Inheritance, but [232] it's a Term in Gross, and so not barred by the Recovery, and that the Limitation of the Remainder in Contingency is good in Law, and Relief ought to be had in this Court.

The Lord Chancellor Nottingham (the Case being of great Consequence) calls the Judges to his Assistance, (*viz.*) the Lord Chief Justice Pemberton, the Lord Chief Justice North, and the Lord Chief Baron Montague, and they made one single Point in the Case.

Whether this Contingent Trust of a Term limited to the Plaintiff Charles and the Heirs of his Body, upon the dying of Thomas without Issue Male, whereby the Honour did descend to Henry, be good in Point of Creation and Limitation; for as for the Recovery, if this be not a good Limitation in Point of Creation, the Recovery will do nothing, so that supposeth it to go along with the Inheritance; and if this take Effect, then it will suffer no Prejudice by the Recovery; And as for the Assignment by Marriott to the Duke, if this Court decree it for the Plaintiff, then it is a Breach of Trust, and then he must Answer for it, and so must the Duke; for it is a Surrender to a Person who had Notice of the Trust: If for the Defendant, then it is of no Weight. So that the whole rests upon the first single Point (*viz.*) whether [233] it be a good Limitation upon the Contingency to Charles, or as they call it a springing Trust.

And the said three Judges were all of Opinion, that it was a void Limitation, and that it ought to be decreed for the Defendant.

They said, there is great Difference as to the Limitation of Terms that are in Gross, and Terms that attend the Inheritance; as to Terms in Gross, they are not capable of Limitation to one after the Death of another without Issue: but in Terms attendant upon an Inheritance, there may be such a Limitation, if the Inheritance be so limited, and not else: Now the Term is capable of a Limitation to Henry and the Heirs Males of his Body, and for Want of such Issue, to Charles and the Heirs Males of his Body; because it hath an Inheritance to Support it: But now to put another Limitation upon it, that upon the dying of Thomas without Issue, whereby the Earldom shall descend, this shall go over to Charles, that cannot be, for it hath no Freehold to Support it, and so it's a Term in Gross; further, there cannot, by the Rules of Law or Equity, be a Remainder for Years of a Term limited after an Estate-tail, neither directly, nor upon Contingency, as in Burges's Case; but the Law will allow a Remainder [234] directly upon an Estate for Life; so likewise upon a Contingency, if that were to happen during the Continuance of the particular Estate: But this Case is a Step further and not to be allowed; they relied chiefly upon Child and Baylie's Case, which was put thus by Chief Baron Mountague: A Devise by A. of a Term to William his eldest Son and his Assigns, and if he die without Issue, then to Thomas his youngest Son: It was judged in the Exchequer Chamber, to be a void Remainder, because thereby a Perpetuity would ensue; though it was argued in that Case, that it was given upon a Contingency to the younger Son, which would soon be determined, and end in a short Time. Chief Baron Mountague put this for Law: A Term may be limited to one and the Heirs Males of his Body, upon a Contingency to happen first with Limitation over, if that Contingency do not happen, it is a good Limitation; as if a Term be limited to the Wife for Life, and then to the eldest Son, if he over-live his Mother, and the Heirs Males of his Body, the Remainder over to a younger Son, if the eldest Son die in the Life of the Mother, the Limitation to the second Son may be good; but if there be an Instant Estate-tail created of a Term, though there be a Contingency as to the Expectation of him in [235] Remainder, yet this is such a total Disposition of a Term, as after which, no Limitation of a Term can be; and so the Judges were of Opinion, that the Plaintiff had no Right to the Term, but the Decree ought to be for the Defendant.

The Lord Chancellor Nottingham differed from the Judges, and decreed for the Plaintiff. He put some Steps or Preliminaries, which he agreed with them, and which were clear.

1. That the Term in Question, though it were attendant on the Inheritance at first, yet upon the happening of the Contingency, it's become a Term in Gross.

2. That the Trust of a Term in Gross can be limited no otherwise in Equity, than the Estate of a Term in Gross can be limited in Law.

3. The legal Estate of a Term for Years, whether it be a long or a short Term, cannot be limited to any Man in Tail, with the Remainder over to another after his Death without Issue, this is a direct Perpetuity.

4. If a Term be limited to a Man and his Issue, and if that Issue die without Issue, the Remainder over, the Issue of that Issue takes no Estate; and yet because the Remainder over cannot take Place till the Issue of that Issue fail, that Remainder is void too. Reeve's Case.

[236] 5. If a Term be limited to a Man for his Life, and after to his first, second, and third Son in Tail successively and for Default of such Issue, the Remainder over; though the Contingency never happen, yet the Remainder is void, though there were never a Son born to him; that looks like a Perpetuity. Sir William Buckhurst's Case.

6. One Case more, and that is Burges's Case: A Term is limited to one for Life, with contingent Remainders to his Sons in Tail, with Remainder over to his Daughter; though he had no Son; yet because it was Foreign and Distant to expect a Remainder after the Death of a Son, to be born without Issue: that having a Prospect of a Perpetuity, was adjudged void.

7. If a Term be devised, or Trust of a Term limited to one for Life, with twenty Remainders for Life successively, and all the Persons in *Esse* at the Time of such Limitation; these are all good Remainders.

8. A Term is devised to one for eighteen Years, after to C. his eldest Son for Life,

and then to the eldest Issue Male of C. for Life, though C. had not any Issue Male at the Time of the Devise, or Death of the Devisor, but before the Death of C. it's good, being a Contingency that would speedily be worn out, Cotton and Heath's Case; for [237] there may be a Possibility upon a Possibility, and a Contingency upon a Contingency, and in truth every executory Devise is so; and therefore the contrary Rule given by Lord Popham in the Rector of Chedington's Case, is not Reason.

These Things were agreed by all.

But the Point is: The Trust of a Term for 200 Years is limited to Henry in Tail, provided if Thomas die without Issue in the Life of Henry, so that the Earldom shall descend upon Henry, then to go to Charles in Tail; and whether this be a Limitation to Charles in Tail is the Question.

My Lord Chancellor conceived it a good Limitation as a springing Trust, to arise upon a Contingency, and which is not of a remote or long Consideration.

As for the legal Reasons of this Opinion, they were these:

1. Many Men have no Estates, but what consist in Leases for Years. Now it would be absurd to say, that he, who has no other Estate than what consists in Leases for Years, should be incapable to provide for the Contingencies of his own Family, though they are directly in his immediate Prospect, he shall not make Provisions for Wife and Children upon Marriage.

[238] 2. It was the Opinion of the Lord Chief Justice Pemberton, That had it been thus penned it had been good: If Thomas die without Issue Male, living Henry so that the Earldom descend upon Henry, then the 200 Years limited to him and his Issue shall cease: but then a new Term of 200 Years shall arise and be limited to the same Trustees, for the Benefit of Charles in Tail. Now what Difference is there, why a Man may not raise a new springing Trust upon the same Term, as well as a new springing Term upon the same Trust? It is true, in 6 Ed. 6 in the Time of Lord Chancellor Rich, all the Judges delivered their Opinion: If a Term of Years be devised to one, provided if Devisee die, living J.S., then to go to J. S. is absolutely void. But in 19 Eliz. Dyer fo. 277, 328, it was held by the Judges to be a good Remainder, and that was the first Time that an executory Remainder of a Term was held to be good. As for Child and Bayles's Case, the Case is truly reported by Crook: A Term of seventy Years is devised to Dorothy for Life, then to William and his Assigns all the rest of the Term, provided that if William die without Issue living at the Time of his Death, then to Thomas, which is in Effect the present Case; but there was more in it; William had the whole [239] Term to him and his Assigns. Dorothy was Executrix, and granted the Lease to William: And the Record goes further, After the Death of Thomas without Issue, it was to go to the Daughter, which was a plain Affectionation of a Perpetuity; but however this Case is contradicted by other Resolutions. Cotton and Heath before cited, and Wood and Sanders in this Court, which was this, a long Lease is limited and declared thus: To the Father for sixty Years, if he lived so long, then to the Mother for sixty Years, if she lived so long, then to John and his Executors if he survived his Father and Mother, and if he died in their Life time, having Issue, then to his Issue; but if he die without Issue, living the Father or Mother, then the Remainder to Edward in Tail; John died without issue in the Life time of the Father and Mother: It was resolved by Lord Keeper Bridgman, assisted by two Judges, That the Remainder to Edward was good: The whole Term had vested in John, if he had survived; yet the Contingency never happening, and so wearing out in the Compass of two Lives in Being, the Remainder over to Edward might well be limited upon it.

[240] Object. Where will you stop if not at Child and Bayles's Case.

Resp. Every where, where there is apparent Danger of a Perpetuity: but so is not this Case.

The equitable Reasons were:

1. It was Prudence in the Earl to take Care, that when the Honour descended upon Henry, a little better Support should be given to Charles, who was the next Man, and trod upon the Heels of the Inheritance.

2. It was very probable and almost morally certain, that Thomas would die without Issue, he being not of a good State of Body or Mind, and while such, they were circumspect that he should not marry.

3. It's an hard Thing for a Son to tell his Father, That the Provision he has made for his younger Brothers is void in Law: But it is much harder for him to tell him so

in Chancery, for there no Conveyance is ever to be set aside, where it can be supported by a reasonable Construction. The Law doth in many Cases allow of a future Contingent Estate to be limited, where it will not allow a present Remainder to be limited : A Man hath an Estate limited to him, his Heirs and Assigns (this is a Fee-simple) but if he die without Issue, living J. S., or in such a short Time to J. D. this is [241] good. Though it be impossible to limit a Remainder of a Fee upon a Fee, yet it's not impossible to limit a contingent Fee upon a Fee. Pell and Browne's Case, If a Lease comes to be limited in Tail, the Law allows not a present Remainder to be limited thereupon ; yet it will allow a future Estate arising upon a Contingency only, and that to wear out in a short Time. The Limitation in Wood and Sander's Case is after an express Entail, and yet adjudged good ; because it was a Remainder upon a Contingency that was to happen during two Lives, which was but a short Contingency, and the Law might very well expect the happening of it : But our Case is stronger, because it is only during one Life.

It was decreed the Plaintiff should enjoy this Barony for the Residue of the Term ; and the Defendant's to make him a Conveyance accordingly, and to account with the Plaintiff for the Profits received since the Death of Duke Thomas, and which they or any of them might have received without wilful Default.

The Duke of Norfolk exhibited a Bill of Review in Chancery, to which Charles Howard put in a Plea and Demurrer, which was argued before Lord Keeper North, and he over-ruled the said Plea and Demurrer, and reversed the Lord Chancellor's Decree. [242] But afterwards this Decree was reversed in Parliament, and the first Decree affirmed in Behalf of Charles Howard.

TURNER *contra* CRANE.

34 Car. 2, f. 668 [1682-83].

Copyhold Mortgage.

That Robert Newell and his Wife, for £220 paid by the Plaintiff's Wife, Susan, then a Widow, did surrender the Copyhold Premises to the Use of the said Susan and her Heirs, on Condition that on the said Robert Newell and his Wife's paying to the said Susan, her Executors and Assigns £230 in March next, after then the Mortgage to be void, and the Money not being paid, the said Susan was admitted to the Premises, and afterwards married the Plaintiff, and they received the Profits of the Premises ; and afterwards Susan died Intestate, no Ways indebted, leaving Susan her Daughter by the Plaintiff her Heir an Infant ; and the said Susan the Infant was admitted by the Plaintiff her Guardian, as Heir to Susan the Mother, who received the Profits, and died, leaving the Defendant Jane Crane her Aunt as Heir, and she was admitted ; and the Plaintiff, on Susan the Daughter's Death, took Administration of Susan the Mother's Estate, and claims the mortgaged Lands ; insisting, That tho' the Defendant Jane [243] was Heir to Susan the Daughter, who was Heir to Susan the Mother, yet the Premises being a Mortgage belonged to him as Administrator to Susan the Mother.

This Court would consider of this Case, and of Cases of Mortgages in Fee where no Covenant is made for the Payment of the Mortgage Money to the Executor or Administrator, and no Debts owing by the Mortgagee ; whether the Heir or Administrator of the Mortgagee shall have the Lands.

This Court, upon reading Precedents, declared, That it was fully satisfied that the Plaintiff, as Administrator to the said Susan, ought not to have the mortgaged Premises from the Defendant Jane Crane, the Heir of the Heir of the said Mortgagee, but the said Jane ought to enjoy the same ; and dismissed the Plaintiff's Bill.

DOWSE *contra* PERCIVALL.

34 Car. 2, f. 186 [1682-83].

Lessee purchased the Inheritance in Trustees Names, and dies Intestate : This Lease shall attend the Inheritance.

The Plaintiff's Father, John Dowse, took a Lease of the City, and afterwards purchased the Inheritance in Trustees Names, for him and his Heirs, and the said Dowse died Intestate ; the Defendant his Wife (as Administratrix) claims his Lease to belong to his personal Estate. [244] This Court decreed it to attend the Inheritance.

MAGISTR', &c. UNIVERSIT' COLLEG' IN OXON' *contra* FOXCROFT.

34 Car. 2, f. 522 [1682-83].

A Decree and Sequestration against one who dies ; this shall not be revived against his Heir or real Estate, tho' it were for Money payable on the behalf of a Charity.

The Bill is to revive a former Decree made against the Defendant's Father, whereby the said Defendant's Father was decreed to pay the Plaintiff £2000 and Interest.

To which the Defendant demurs, for that the said Defendant's Father, against whom the said Decree and a Sequestration is had, is dead ; whereupon the Sequestration being granted purely for his Contempt of a Decree, which was for a personal Duty only, and determined by his Death, and therefore ought not to be revived against the Defendant his Heirs, nor is his real Estate, in the hands of his Heir, chargeable with the personal Duty, or Decree for a personal Duty.

The Plaintiff insisted, This is a Case of Extremity, being on the Behalf of a Charity, and the Defendant endeavours to deprive the Plaintiff of £2000 given for the purchasing £100 per Annum, for maintenance of two Fellows of a College.

[245] His Lordship declared, That the Decree being for a personal Duty, ought not to be revived against the Defendant as Heir, and allowed the Demurrer and dismissed the Bill.

DOMINA DACRES *contra* CHUTE.

34 Car. 2, f. 861 [1682-83].

Costs.

The Matter controverted is touching Costs ; the Plaintiff had a decree 15 Car. 2 [1663-64] against the Defendant's Father deceased, and that the Plaintiff should have her Costs of that Suit, and the said Costs being taxed, they became part of that Decree, as much as if they had been named in the Decree in Certainty.

The Defendant insisted, That upon the first Hearing, Costs were only reserved till after Report, and upon hearing Exceptions to that Report, nothing was said touching Costs ; but in the Order of confirming the last Report in that Cause, Costs are directed to be taxed, but the Defendant's Father by Name was to pay them, and by the Decree, as it is inrolled, the Reversion of the Lands in Question was directed to stand charged with the Debts and Damages, but not with the Costs ; and the Costs were given as a personal Thing, and died with the Defendant's said Father, and cannot affect the said Estate [246] which was the Grandfather's, and the Plaintiff could not have revived her Suit for the Costs alone.

This Court declared, That though it may be true, that a Suit cannot be revived for Costs alone, where there is no Duty decreed, because it is the Laches of the Party, not to get them taxed where there is nothing else in Demand ; yet when there is a Duty decreed, and Costs awarded by the same Decree which is signed and inrolled in the Life of the Party, it would be unreasonable, that, by the Defendant's delaying the Account, the Costs should be lost, which could not properly be taxed till the final Decree, and when the Charge of Suit is at an end : And this Court further declared, that the Costs when taxed may be recovered out of the Assets, as in the Case of Heirs and Executors at the Common Law ; and this Court looks upon the Wording of the Decree in that Manner, to proceed from the Difference between the Debt and Costs, the Debt not being chargeable upon the Person at all, and the Costs chargeable upon the Person as well as the Assets, and it were unjust to expound the Decree, by charging the Person to discharge the Assets from Payment of Costs, to which they are naturally chargeable, unless they have been paid by the Defendant's Father.

[247] This Court therefore though fit, that the Costs, from the Time that they were taxed, should carry Interest and charge the Assets by Discent ; and ordered the Account to be taken by the Master accordingly.

WINDHAM *contra* JENNINGS.

34 Car. 2, f. 776 [1682-83].

Mortgage for £2000, before which Time the Mortgagor borrowed of him that was after the Mortgagee £300 which was agreed to be secured by the said Mortgage, both Sums must be paid upon the Redemption.

That Sir George Croke mortgaged Lands in 28 Car. 2 [1676-77], to the Defendant for £2000 and died, and the Plaintiff being his Heir prays a Redemption.

But the Defendant insists, That the said Sir George Croke, before the Mortgage borrowed of the Defendant £300 on Bond, (viz.) in 1672, and the Defendant insists it was agreed to be secured also by the said Mortgage, but the Plaintiff is not willing to pay that ; only will redeem the Mortgage.

This Court decreed the Plaintiff to pay to the Defendant both the £2000 and the £300, and then the Plaintiff to redeem. For he that will have Equity must do Equity, see Max. Eq. fo. 1, &c. 1 Vern. 245. 2 Cha. C. 161, 194, 195, &c. *ibid*.

[248] NOELL & AL' *con.* ROBINSON.

34 Car. 2, f. 168 & 178 [1682-83].

Bill to answer to Devises.

The Case being (viz.) That Sir Martin Noell deceased, Father of the Plaintiff, being seised in Fee of a Moiety of a Plantation in the Barbadoes, called Horn-Hall, with the Appurtenances ; and being legally entitled, by the Laws and Customs of the said Island, to dispose thereof, by his Will in Writing devised the same unto the Plaintiffs Nathaniel, Grace, Elizabeth, and one Theodorus Noell, and Sir Martin by his Will appointed the Defendant Robinson to supply the said Plantation with all Necessaries during the Minorities of the Plaintiffs, and to receive the Profits in Trust for the Plaintiffs, and for his Care therein gives him an Allowance, and made his Son Martin Noell, and Theodorus Noell deceased, and the Defendant Robinson his Executors ; and the Defendant Robinson proved the Will, and took on him the Execution thereof, and Management of the Plantation, and assented to the Legacy and Bequests of the Plaintiffs ; and in Performance of such Trust and Assent, leased the Premises to one John Worsam for twenty Years, at 20,000 lb. Weight of Sugars Rent per Annum, in the Trust for the Plaintiffs the Devises ; and since have conveyed [249] away the same to one Falkner and others to defeat the Plaintiffs ; so the Bill is to call the Defendant Robinson and Falkner to account for the Profits of the Premises, and to convey their Interest to the Plaintiffs.

The Defendants insist, That by the Custom of the said Island of Barbadoes, where the said Premises are, the said Sir Martin had not Power to make such Devise of the Premises to the Plaintiffs, he being then much indebted to several Persons, and the said Defendant Robinson had paid several Debts for him ; and insist, That the said Lease made to Worsam, was done without due Consideration, and not with any Intent thereby to assent to the Lease to the Plaintiffs, and deprive the Creditors of their just Debts, or in any sort to exempt the Estate therefrom, nor had no reason so to do, he being bound with the Testator in several Securities to several Persons in several Sums of Money ; and employed all the Profits he received, as also 500 and odd Pounds for Worsam's Lease, for the payment of Sir Martin's Debts, amounting to £30,000, and so the Testator's Estate ought to pay Debts, and not to be subject to his Will ; and the said Defendant, believing the Premises to be as Lands of Inheritance, made the said Lease to Worsam a Creditor of Sir Martin's, but is since advised it [250] is a Chattel, and liable to the Payment of his Debts.

But the Plaintiffs insisted, That by the said Lease to Worsam, and Reservation of the Rent thereon to himself in Trust for the Plaintiffs, he had placed the Estate in such Manner, that the same could never by any subsequent Act come into the Administration of the Estate of Sir Martin ; and that every Act of the Defendant Robinson was a plain Assent to the Legacy to the Plaintiffs ; and it is plain the Premises were deviseable, and so the Plaintiffs Title plain and undoubted, and the Plaintiffs ought to have a Decree against the Defendant, to account to them for the said Estate, and ought to have the Benefit of the said Lease.

The Defendant further insisted, That by such imprudent Act, as aforesaid, he ought not to be divested of the Estate, but it ought to go to pay Sir Martin's Debts.

This Court declared, That by the said Clause in the Lease to Worsam, the Defendant had assented to the Plaintiffs Legacies, given them by the Will of their Father ; and that the Devise by the Will was a good Devise, and that the Premises did well pass thereby ; and that the said Act of the Defendant Robinson being voluntary, had put the Estate out of the [251] Power of the Creditors of Sir Martin, or out of the Power of any Administrator *de bonis non* of him, and decreed the Plaintiffs to have the Benefit of the Premises, and of the Lease to Worsam, and the Defendants to assign their Interests to the Plaintiffs accordingly.

But the said Defendant desiring a Re-hearing of the Cause, which was on the 20th of Nov. 1682, when the Defendant insisted, That the said Lease could not be an Assent, for that the Defendant Robinson then claimed the Premises, not as Executor, or otherwise than only as Trustee for the Devises, whose Inheritance he then took the same to be, and not as personal Estate, upon which and other grounds the Defendant insists, the said Rent and Reversion of the Premises, expectant on the Determination of the Lease, was and ought to be of the Testator's personal Estate, and to go in the ordinary Course of Administration, and to an Administrator *de bonis non*, and be liable to Debts.

His Lordship, notwithstanding what was now urged by the Defendant, declared, he saw no Cause to alter the former Decree, but confirmed the same.

[252] This Decree reversed by the Lord Keeper North, and in 1683, fo. 168, he heard this Cause upon the whole Merits, and ordered an Account.

And in 1686 The Lord Chancellor Jefferys reheard this Cause upon the Merits, and confirmed my Lord Chancellor Finch's Decree, and discharged my Lord North's Decree.

BENSON *contra* BELLASIS.

34 Car. 2, f. 848 [1682-83].

Marriage Agreement.

This Cause having received a Hearing before the Lord Chancellor Nottingham, 11 July, 33 Car. 2 [1681-82], who made a Decree for excluding the Defendant Dame Dorothy, Administratrix of Robert Benson the Plaintiff's Father, from having any Part of his personal Estate; and the said Cause being heard 10 July, 35 Car. 2 [1683], before the Lord Keeper North, who decreed the said Defendant Dame Dorothy to retain to her own Use one third Part of the said personal Estate of the said Robert Benson; and the said Cause being again re-heard this Day by the Lord Chancellor Jefferys.

The Case being, that the said Robert Benson, on his Marriage with the Defendant Dame Dorothy, for the settling of a Jointure on the said Dorothy, in full of [253] all Jointures, Dowers and Thirds, which she might claim out of his real and personal Estate, conveyed Lands to the Use of himself for Life, and after to the said Dorothy for Life, in full of all Jointures, &c. as is aforesaid, with this Proviso, That if the said Dorothy should, after the Death of the said Robert Benson, have or claim to have, or should recover any other Part of the Lands or Tenements, or any Part of the personal Estate of the said Robert, by the Custom of the Province of York, or by any other Means whatever, other than what the said Robert Benson should give, bequeath or settle upon or to her; That then the Feoffees therein named should be seised of all the Premises settled in Use upon the said Dorothy, to the Use of Sir Henry Thompson and Mr. Grayham, their Executors, Administrators and Assigns for sixty Years, to commence from the Death of the said Robert, if the said Dorothy should so long live: upon special Trust, that the said Thompson and Graham should receive the Profits of the Premises limited in the Jointure, and they should dispose thereof to such Persons and their Uses, as should be dammified by the said Dorothy's Perception of the Profits of any other Lands of the said Robert, or the Taking or Recovery of any Part of the personal Estate, other than what [254] should be given or bequeathed, until the respective Values of the Profits, or Values of such personal Estate should be fully satisfied, and the Residue of the said Profits to remain to the said Dorothy.

That the said Robert dying Intestate, and the said Dorothy administring at York, and in the Prerogative Court of Canterbury, as Guardian to the Plaintiff Robert, possessed the real and personal Estate, pretends a Right to some Part of the personal Estate by the said Administration, notwithstanding the said Marriage Settlement.

The Lord Chancellor Nottingham declared, the said Dorothy was bound by the said Marriage Agreement, and the Administration ought to have been granted to her, and that however, the same ought not any Ways to avail her; for that it would be contrary to the said Settlement and Agreement, and that the said Dorothy ought not to claim any Part of the real Estate, other than what was settled on her by the said Deed, or any of the personal Estate; and decreed accordingly.

But the Defendant Dorothy insisted, That the Lord Keeper North had adjudged one Third of the personal Estate to [255] belong to the Defendant, by Virtue of the said Administration, and was an accruing Right not barred by the Marriage Agreement.

The Lord Chancellor Jefferys, on reading the said Marriage Settlement and the said two former Orders, declared, That the said Order for the excluding of the said

Defendant Dorothy from having any Part of the personal Estate, was a just Order, and ought to stand and be pursued; and that the said Order of the Lord Keeper North's before mentioned ought to be set aside; and decreed accordingly.

STAPLETON *con.* DOM. SHERWOOD.

34 Car. 2, f. 732 [1682-83].

Bill for Distribution of the personal Estate in York Province.

That Sir Philip Stapleton the Plaintiff's Father, on his Marriage with his first Wife, settled the Manor of Warter in the County of York, whereby he made himself but Tenant for Life, the Inheritance vesting in the Plaintiff his eldest Son; and Sir Philip had Issue by his first Wife, the Plaintiff his eldest Son, Robert his second Son, and Mary who married the other Plaintiff, the Lord Merriion. That Sir Philip in 1647 by Will devised to his said Son Robert a Rent-charge of £40 per Annum, to be issuing out of the said Manor; and afterwards the said [256] Robert died, and the Defendant Dorothy his Relict administred to the said Roberts personal Estate; so the Plaintiff's Bill is to have Distribution of his personal Estate.

The Defendant Dorothy insisted, that she, as Widow of her said late Husband Robert, by the Custom of York, is intitled to a Moiety of the said personal Estate; and by the late Act for settling Intestates Estates, the said Defendant is intitled to the other Moiety, and insisted, That Sir Philip having Issue by several Venters which are yet alive, or their Representatives, they are equally intitled with the Plaintiff Stapleton.

This Court declared a Distribution of the said personal Estate, according to Law, to be made amongst the Plaintiff Stapleton, and the Child of the Lord Merriion, as also the Brothers and Sisters of the said Robert, as well those of the half Blood, as those of the whole Blood, and their respective Lineal Representatives, who are to be called into the Account.

And as to the Point, whether the Lord Merriion and his Child have the Right to his Wife's Share of the Estate, a Case is to be made.

That the Master to whom the Account of the Intestate's personal Estate was referred, hath allowed to the Defendant [257] Dorothy the Administratrix, a Moiety of the said Estate of the said Intestate's dying without Issue, and hath distributed the other Moiety amongst the Intestate's Kindred, Brothers and Sisters. Whereas by the Custom of the Province of York, she is not only to have a clear Moiety of the personal Estate of her said Husband so dying without Issue after Debts, &c. but by the late Statute for settling Intestates Estates, she is to have a Moiety of the other Moiety.

The Plaintiff insists, That there was no Colour for the Defendant to have a Moiety of the remaining Moiety, the said Statute leaving the Custom as it was, without Addition, Diminution or Inlargement; but the Widow was to have only a Moiety, and the other Moiety to be distributed amongst the next of Kin.

This Court, for the further Satisfaction, ordered the Lord Archbishop of the Province of York to certify, when a Man dies Intestate within that Province without Issue, after his Debts, &c. paid, how the Residue is to be distributed by the Custom of the Province.

The Bishop certified, That in such Cases as aforesaid, the Widow of the Intestate, by the Custom of the Province, had usually allotted to her, one Moiety of the clear personal Estate, and the other Moiety [258] hath been distributed amongst the next of Kin to the Intestate; and that had been the constant Practice of the Ecclesiastical Court at York.

The Plaintiff insisted, That the Custom of that Province is excepted out of the Act of Parliament, and if it were within the Act, it ought to have the more favourable Construction on their Part, because it was made in Favour of them, and not of the Widow and Administratrix, who, before the said Act, usually went away with the whole Estate, unless more particular Instances prevented.

This Court declared, They could not expound the Act, to give the Defendant more than a Moiety, that being the Proportion allotted to her by the Custom, and also by the Act, if it had not been a Case within the Custom; which Custom is confirmed, because it appoints the same Kind of Distribution with the Act, and it would be a Strein to give her more than a Moiety, Part by the Custom and Part by the Act; and refers to the Master's Report made in this Cause.

[259] COVENTRY *contra* HALL.

34 Car. 2, f. 330 [1682-83].

Bill for mean Profits.

That Sir Thomas Thynn, Father both of Sir Henry Frederick Thynn, and Sir James Thynn, conveyed to Sir Henry Frederick, and the Heirs Males of his Body, expectant after the Decease of him the said Sir Thomas, the Manor of Hempstead and other Lands, and soon after died, and the said Sir Henry Frederick possessed the said Premises; but Sir James Thynn, pretending the said Conveyance was defective, Sir Henry Frederick in Oct. 1650, obtained a Decree, that the said Sir Henry Frederick and the Heirs of his Body, should enjoy the said Premises against the said Sir James Thynn and his Heirs, according to the Intent of the said Settlement. That Sir James Thynn insisting, That Sir Thomas was but Tenant for Life, and not seised in Fee of the Premises, having suffered Recoveries, so that the Freehold was in the said Sir James, or some other for his Use, by Virtue whereof he received the Profits which Sir Henry Frederick ought to have received: That Sir Henry not being able to recover the said mean Profits at Law, by Reason of the Defect in the said Conveyance, which is now supplied and settled by the said Decree and Act of Parliament; so that the said Sir Henry hath the Right to the said Profits [260] and Writings; so the Bill is to be relieved for the same, and to have an Account thereof.

The Defendant insisted, That there ought to be no Account of the mean Profits, the Demand thereof being very old, and is grounded on a Decree in a former Cause, whereby a Defect in a Conveyance, under which the Plaintiffs Claim, was supplied, and there is no Provision in the said Decree for mean Profits, though the Bill originally was such, as this Court might have decreed mean Profits: and when the Decree was made, it was not granted, nor any farther Relief than only Possession, and the Possession hath been so unconstantly in any one Person, that it is very difficult, especially after so long Time against an Executor, that is no Way privy to the Account of the Testator.

The Plaintiff insisted, That though the Demand on the Decree is antient, and a Prosecution hath been for the same ever since, and the Right being determined, the Plaintiff ought to have an Account of the mean Profits as the Consequences of that Right; though the original Bill might pray an Account, and the Decree be silent as to that Point.

This Court declared, That considering this Case as if there were no Act of Parliament, the Plaintiff hath a Right to [261] demand an Account, upon an Equity that ariseth on the Marriage Agreement, and Settlement made in Pursuance thereof, notwithstanding the Length of Time, for that the Plaintiffs, or their Testator, could not come sooner than when the Title was cleared; and the Objection raised from the Shortness of the former Decree, is not material to prejudice the Plaintiff's Demand, for that there could not then be any Decree for Profits, the said Sir James pretending Title as Tenant in Tail, and that Sir Thomas was but Tenant for Life; so now the Right being cleared, the Plaintiff ought to have an Account of the mean Profits from the Time the Right accrued; and decreed accordingly.

The Defendant appealing from the said Decree made by the Lord Chancellor Finch, to the Lord Keeper North, the Case was heard *ab integra*, and the Lord Keeper on hearing the Decree in 1650, and the Decree of the Lord Finch read, declared, that there was nothing in the Case but the Loss of Time; and though the Decree in 1650 was silent as to the mean Profits, yet the same ought to be no Objection to the Right; and though it was omitted by the Decree in 1650, yet it ought in Justice to have been decreed for the mean Profits, as well as for the Right of the Title, it being an Accessary to the Decree, and it ought to be judged [262] *nonne proinde*, there being no Bar against it; and confirmed the Decree made by the Lord Finch.

GIRLING *contra* DOM. LOWTHER & AL.

34 Car. 2, f. 148 [1682-83].

Payment of Debts.

That Sir Thomas Leigh deceased, late Father of the Defendants John, Thomas and Woolley Leigh, became indebted to Edmund Girling deceased, in several Sums

of Money by Bonds, and the said Girling became bound for the said Sir Thomas, for several great Sums of Money, against which Securities Sir Thomas gave the said Girling Counterbonds; and in Hilary Term 28 Car. 2 [1677], Sir Thomas gave a Judgment of £1000 to the said Girling, for the Payment of £530, and in August 1669 Sir Thomas made his last Will in Writing, and thereby devised to the Defendants Sir John Lowther, John Currence and Edward Badby, Executors of his said Will, several Lands and Tenements for the Payment of his Debts, and to be by them sold for that Purpose: That the Swan Inn in St. Martin's Lane being sold, there ariseth a Question touching the Money raised by such Sale, whether it were well applied or not.

The Case being (viz.) That Sir Thomas Leigh, upon his Marriage with Hannah [263] Relfe, Daughter of Anthony Relfe, whilst he was under Age, by Articles, previous to the said Marriage with the said Hannah, agreed to settle on himself and the said Hannah his intended Wife, and such as they should have between them, Lands of £700, and in Consideration thereof, the said Anthony Relfe was to settle, and did settle upon the said Thomas and his Heirs, Lands of £200 per Annum; whereupon Sir Thomas Leigh, July 1661, makes a Settlement upon himself and the said Hannah his intended Wife, and their first, second and other Sons in Tail, his Manor of Addington, and other Lands in Addington, and several Lands in Com' Surrey and Kent: That afterwards in May 1665, Sir Thomas Leigh mortgaged to Mr. Peck for £2000, several Lands in Middlesex and Norfolk, and afterwards in December 1665, those Lands and the Moiety of the Swan Inn in St. Martins, and the Reversion thereof were granted to Trustees upon several Trusts, which by Deed 15 June 1668, appears to be performed and satisfied; and thereupon on the same 15 June 1668, the said Premises were mortgaged to Sir John Lowther for £2500, which £2500 was raised and paid to Sir John Lowther out of the Profits and by Sale of the said Swan Inn, which was formerly by voluntary Conveyance drawn and [264] settled by the said Sir Thomas Leigh upon the two Defendants Thomas and Woolley Leigh for natural Love and Affection: That Sir John Lowther, in April 1679, assigned the said Mortgage by conveying to one Burton and others, the Manor of Thorpe, in Surrey and Shoelands, and other Premises in Trust for the Payment of such of the Debts of Sir Thomas Leigh, as should any Ways incur or disturb the Purchaser of the Swan Inn, which said Lands are sufficient to pay the Plaintiff's Debts, and the Testator's Engagement being £1331, which Debt is to be paid the Plaintiff by Decree of this Court.

The Defendants the Leighs insist, That the Money raised by the Sale of the Swan Inn, altho' paid to redeem the other Estate in Mortgage to Sir John Lowther, ought not to be applied so, that the Land ought to be discharged of the Mortgage Money, or of what was paid to redeem the same; but the said Lands ought still to be a Security for the said Money to the Use of the younger Children, for whose Benefit the said Swan Inn was settled; and although the said Settlement was voluntary, yet the same, being a Provision for younger Children, ought not to be adjudged fraudulent as to a subsequent Judgment (which the Plaintiff's is), or however not as to a subsequent voluntary Devise of [265] their Father, under which only the Creditors by Bond come in; and therefore as to them the said mortgaged Lands ought to be charged with the said Money, raised by the Sale of the said Swan Inn, with Interest, since it was paid to redeem the said Estate, precedent to any Benefit any Creditor by Bond can have out of the said Lands.

This Court declared, That the said voluntary Conveyance ought not to stand in the Way to prevent Satisfaction of a subsequent Judgment for good Considerations, and that the Monies due on the Plaintiff's Judgment, and the Monies raised by Sale of the Swan Inn, was well applied to discharge the Mortgage on the other Estate whereby the Money due on the Judgment with Interest may be the more speedily raised by Sale thereof; and the Money raised by Sale of the said Inn, after the Judgment satisfied with Interest, ought to stand secured for the Benefit of the younger Children, and be raised by Sale of the said Estate, and by Rents and Profits in the mean Time precedent to the other Creditors not on Judgment; and after the said Judgment and Provision for the younger Children are satisfied, the Residue to be applied to the other Creditors; and decreed accordingly.

[Observed upon, *Beavan v. Earl of Oxford*, 1856, 6 De G. M. & G. 520; 25 L. J. Ch. 299; 2 Jur. N. S. 121.]

[266] COMES ARGLAS *con.* HENRY MUSCHAMPE.

35 Car. 2, f. 524 [1683-84].

Relief against over-reaching Bargains, Fraud, &c.

That Thomas first Earl of Arglas, the now Plaintiff's Father, and William Earl of Arglas, the Plaintiff's Brother, were seised in Fee of the Premises in Question, and made divers Settlements thereof, by which, in case of Failure of Issue Male of the said William, the said Estate should come to the Plaintiff and the Heirs Males of his Body : That Thomas the Plaintiff's Father died, leaving Issue Male only Earl William and the Plaintiff, and Earl William is dead, leaving Issue Male only the last Earl Thomas the Plaintiff's Nephew ; and the said last Earl Thomas, upon his Marriage with his now Wife, levied a Fine and suffered a Recovery, but not with intent to defeat the Remainder to the Plaintiff, but only to settle a Jointure ; and several Deeds were executed leading the Uses, by which there was a Remainder in Fee reserved for the Plaintiff, for Want of Issue Male of the last Earl Thomas ; and the said last Earl Thomas, to the Intent the Reversion of the Premises should come to the Plaintiff and the Heirs Male of his Body, did for £300 convey the said Premises to the Use of the last Earl Thomas for Life, and in case of Failure of Issue Male of his Body, to the Plaintiff [267] and the Heirs Males of his Body, with Remainders over : That Earl Thomas the Plaintiff's Nephew, coming over into England, and getting acquaintance with the Defendant Muschampe, and being in Want of Money, the said Muschampe lent him £100, and for Security he press'd the said Earl to make it out of his Estate in Ireland, and the said Defendant having the Drawing the Security, brought the said Earl some writings ready to be executed, of which the said Earl had no Copies or Counterparts, neither did he give Time to peruse the same ; and the said Earl, relying on the Defendant's Integrity, seal'd the same, believing the said Security to be void on Payment of the said £100, as the Defendant affirmed it should ; but the said Deeds being made to settle on the Defendant a Rent-charge of £300 per Annum, to his own Use, which being done by Fraud, there ought to arise a Trust which ought to go and be enjoyed by the Plaintiff according to the aforesaid Settlement made on the Plaintiff ; and the Plaintiff is willing to pay the Defendant whatever Sum of Money he hath really lent or paid to the said last Earl Thomas with Interest.

The Defendant insists, That the said last Earl Thomas, by Deed in 1675, for £300 and other Considerations, granted to the Defendant a [268] Rent-charge of £300 per Annum, without any Deduction to be issuing out of the Estate in Ireland, to be held by the Defendant and his Heirs, and to commence at such of the Feasts as should first happen after the Death of the said last Earl of Arglas, without Issue Male ; with Power to distrain, and a Proviso, That if the said Last Earl should during his Life-time have, or at his Death leave Issue Male which do attain to the Age of twenty one, then the said Grant to be void ; and of the said £300 there was at one entire Payment £180 paid to the said last Earl, and the Defendant hath a Receipt for the said £300, and says the Deed was fairly executed and made without any Fraud or Practice ; and insists, That the said Grant of a Rent-charge was on a contingency so uncertain, that £300 was a sufficient Consideration for the said Grant, which £300 was paid thus (viz.) £100 after the Agreement, and before the Conveyance of the said Rent-charge, and £184 to the said Earl the same Day the Conveyance was executed : and the said Money was paid as Purchase Money, and not as Money lent : and the said Earl approved of the said Conveyance, though he had no Copy ; and after the said Defendant's Purchase of the Rent-charge, and since the Exhibiting of this Bill, the said Earl Thomas hath [269] given the Defendant a general Release under Hand and Seal, wherein it is declared, that the Bill is exhibited against the Defendant contrary to the said Earl's Direction, and disallowed all further Proceedings thereon against the Defendant.

This Court upon reading the said Deeds, and several Precedents in this Court, as well in the Reigns of Queen Elizabeth, King James, King Charles the First, as in his now Majesty's Reign, where Relief hath been given against over-reaching Bargains and Contracts made by young Heirs : and taking into Consideration the Circumstances of this Case, it appeared, That Thomas Earl of Arglas, at the Time of this Bargain, was very young and of an easy Nature, and had forsaken his Wife and Friends and came to London, where he lived in Riot and Debauchery, and for the supply of his Expences therein, was this Bargain made, wherein it doth not appear he took the Advice of any

Friends or Counsel, but relied wholly on the Defendant : That the Consideration of this Grant is very small, being but one Year's Purchase for a Rent-charge in Fee-simple, which is now happened in Possession ; and the Over-value, be it never so great, is not of it self sufficient Ground to set aside a Bargain, or whereupon this Court can presume Fraud : Yet it is a great Evidence of Fraud, where there [270] are other Circumstances concurring, as there is in this Case.

And whereas the Defendant insisted, that the Contingency of the Death of a young Man without Issue Male was so great, that it cannot be esteemed an Over-value, such a Reversion not being worth one Year's Purchase,

His Lordship declared ; He looked upon it as an Artifice of the Defendant, for it was easy to persuade the Earl Thomas, who could not judge of his own Defects, that the Defendant had the worst of the Bargain. Whereas it is not likely the Defendant would have made it, but that he thought Earl Thomas would in a short Time destroy himself by his vitious and debauched Course of Life ; and his Lordship was of Opinion the Defendant had circumvented the said Earl Thomas in his Bargain, and concluded upon the whole Matter, that the Plaintiff ought to be relieved in this Court, and the Release made by Earl Thomas without any Consent, after the Settlement made upon the Plaintiff, ought to be no Bar thereunto ; but in as much as his Lordship found by the Precedents, that in such Cases, this Court doth not turn any Loss upon the Defendant, but only correct the Excess and Extravagancy of such Bargain ; therefore his Lordship thought fit the £300 should be restored to the Defendant, [271] with Consideration for the same, at £6 per Cent., and on Payment thereof, the Defendant to convey the said Rent charge of £300 per Annum, and all his Title, Interest and Demand in the Premises to the Plaintiff, and granted a perpetual injunction, not only to stay all Proceedings at Law, but for quieting the Plaintiff, his Heirs, &c., in the Possession of the Premises.

LANGTON *contra* NORTH & AL'.

35 Car. 2, f. 95 [1683-84].

Marriage Settlement.

That Sir Robert Gouning deceased, being seised of Lands and a great personal Estate, upon a Marriage to be had between him and the Defendant Dame Anne, Daughter of Sir Robert Cann, Articles of Agreement were executed, and in Pursuance of the Articles, a Settlement of Part of the Premises was made upon the Defendant Dame Anne for her Jointure ; and in the said Settlement, there was a Covenant on the said Sir Robert Gouning's Part, to lay out as much Money in the Purchase of Lands, as would amount to £110 per Annum, to be settled on the said Dame Anne for her Life, Remainder to the Heirs of the said Sir Robert Gouning, which was intended to be an Enlargement of his real Estate, and to be for the Benefit of his [272] Heir ; but the said Defendant Dame Anne refuseth, since the Death of Sir Robert Gouning her Husband to whom she is Administratrix, to execute the said Covenant in Specie, by purchasing of Lands of £110 per Annum, to be settled according to the Covenant as aforesaid, and which ought to come to the Plaintiffs as Coheirs of the said Sir Robert Gouning.

The Defendants insisting, That the said Covenant was made in Favour of the said Dame Anne only, and not for the Plaintiffs the Heirs benefit ; and the Defendant also as Administratrix claims Title to the mortgaged Lands at Siston, insisting, that the same are a Chattel Lease for a long Term of Years, which by Assignment came to Mary Gouning, Sister of the said Sir Robert, and that she afterwards procured a Release of the Equity of Redemption for £950, including therein the Money due upon the said Mortgage ; and that she purchased the Reversion in Fee thereof, in the Name of her Brother Sir Robert, which she did on purpose to keep the lease distinct and separate, and that it ought not to go to the Heir, but to the Administratrix.

But the Plaintiffs insist, That the said Lease ought to attend the Inheritance, which Mary Gouning, to whom the Plaintiffs are Heirs, bought in for that Purpose, in the Name of the said Sir Robert her [273] Brother, and that the same ought to come to the Plaintiffs, as other the real Estate of the said Sir Robert.

This Court declared, as to the Lands at Siston, it was an Inheritance, and ought to go to the Heirs at Law ; and decreed accordingly.

And as touching the Covenant for purchasing Lands of £110 per Annum, this Court dismiss'd the Bill.

EYRE contra HASTINGS.

35 Car. 2, f. 590 [1683-84].

Relief upon a Mortgage.

That Henry Eyre deceased, the Plaintiff's Brother, being seised of Lands 22 Car. 2, mortgaged the same for £200 to Giles Eyre the Plaintiff's Son, and the said Henry Eyre covenanted to pay the Mortgage Money, and gave Bond for Performance of the Covenants; and the said Henry dying without Issue, and Intestate, the Premises descended on the Plaintiff, as Brother and Heir; and Administration was granted to Dorothy his Relict, who paid the Mortgage Money, and Interest then due, to the said Giles Eyre the Mortgagee, in Relief of the Plaintiff, who ought to enjoy the Premises discharged of the Mortgage Money; and the said Dorothy made her Will, and the Defendant Ralph Hastings senior her Executor hath got the [274] mortgaged Premises assigned to him, and insists, he ought to hold the same till the £200 and Interest be paid him by the Plaintiff.

That the Defendant Ralph junior, an Infant, claims the Premises by the Will of the said Dorothy, who devised the same to him.

To be relieved against them, and the Plaintiff to have the Inheritance of the Premises discharged from the Payment of the Mortgage Money and Interest, and the Bond delivered up, is the Bill.

The Defendant Hastings senior insists, That the said Dorothy paid the said Mortgage Money and Interest; but not in Relief of, or for the Benefit of the Plaintiff, and thereupon the Premises were assigned to the said Hastings senior, in Trust for the said Dorothy, who had an equitable Right to all her Husband's Estate, and Dorothy devised the said Premises to Hastings junior her Godson.

The Master of the Rolls decreed the Plaintiff to enjoy the Premises against the Defendant.

This cause was re-heard by the Lord Keeper, and this Defendant the Infant insists, That he is much prejudiced by the Decree; for that thereby he is strip'd of the Estate in Question, devised to him by the said Dorothy's Will, without Payment of [275] the Money and Interest, there being no Covenant in the said Mortgage Deed, for Payment of the Money and Interest, or any Bond; but the Plaintiff's Counsel insisted, That Dorothy paid the Mortgage Money and Interest, for the Plaintiff's Benefit.

The Defendant insisted, That Dorothy declared the Mortgage Money and Interest was paid in Relief of the Heir at Law.

This Court declared, That in case there was not any Covenant in the Deed for Payment of the Mortgage Money and Interest, the said Dorothy the Administratrix was not obliged to discharge the same.

MASSINGBERD contra ASH.

35 Car. 2, f. 466 [1683-84].

Executory Devises.

This Court ordered a Case to be stated in this Cause upon the Deed (only) by Way of executory Devise, to bring the Question arising into Determination, as it in a Will, and in such Method, as if the Trust and Limitations in the Deed, had been limited and created by the Will; upon which Case, the Judges of the Common Pleas were to certify their Opinions, Whether the Remainder of a residuary Estate of the two leases or Terms in Question limited to the Plaintiff, were a good Devise or Limitation or not; and the [276] said Judges were also to be attended with another Case made upon both Deed and Will, and they are to certify what the Law is, in Case of executory Devise, as also what is fit to be decreed in Equity.

The case on the Deed only by Way of executory Devise is (viz.), *

Two several Terms, one for 500 and the other for 20 Years by Will, dated the 1st of November 1679, and devised in these Words (viz.).

That Sir Henry Massingberd and his Assigns shall take the Rents, Issues, and Profits, for and during the Term of his Life.

And that after his Decease, Elizabeth his Wife should receive the Rents, Issues, and Profits during her Life.

And after the Decease of the said Sir Henry and Elizabeth, the eldest Son of the said Sir Henry, begotten upon the Body of the said Elizabeth, shall take the Profits of the said Lands till Age, and then to have the whole Term to him, his Executors and Administrators.

And if such eldest Son happen to die before he comes of Age, then the second Son of their two Bodies shall take the Profits of the said Premises, till he come of Age, and then to have the whole Term.

And if such second Son die before he comes of Age, then the third Son to have and [277] receive as aforesaid, and if such Son die before he likewise comes of Age, then the fourth Son to have and receive as aforesaid.

And in case of no issue Male between Sir Henry and Elizabeth living at the Time of the Death of the Survivor of them, who shall live to their Age; and that there shall be one or more Daughter or Daughters of the said Sir Henry and Elizabeth, that then the said Daughter or Daughters, their Executors and Administrators, to have and take their several equal Shares and Proportion of the said Rents, Issues and Profits, for and during the said Terms;

Unless William Massingberd the now Plaintiff should, within six Months after the Death of the Survivor of them the said Sir Henry and Elizabeth, pay such Daughter or Daughters, or secure the several Sums following (viz.), if but one Daughter £1000, and if more, then to every one of the rest £5000 a-piece; and after the same paid or secured, in case there shall be no such Son or Daughter living at the Time of the Death of the Survivor of the said Sir Henry and Elizabeth, or which should live to attain his or her Age, then the Residue of the said Terms to go and be to Sir William Massingberd the now Plaintiff, his Executor and Administrators.

[278] Sir Henry Massingberd dies in Sept. 1680, leaving his Wife Elizabeth ensient of a Son after born and named Henry, who died within six Weeks after.

Sir Henry and Elizabeth had no other issue, which Elizabeth is now the Defendant.

Quære, Whether the said Devise to William Massingberd the now Plaintiff be good.

THE CASE UPON BOTH DEED AND WILL.

That Sir Henry Massingberd being possessed of two several Terms, one for 500 and the other for ninety-nine Years, by the Indenture 2 Nov. 1679, made an Assignment thereof to Trustees, upon Trust,

To permit and suffer him the said Sir Henry, and his Assigns, to receive the Rents and Profits during his Life; and after his Death, to permit the Defendant Elizabeth, then Elizabeth Rayner his intended Wife, to receive the Rents and Profits during her Life; then upon Trust to assign the Residue of the said Terms to such Person or Persons, and for such Estates and Terms, and in such manner as the said Sir Henry should by Will in Writing nominate, limit and appoint, give, devise, or dispose thereof, or any Part thereof; and [279] in case the said Sir Henry should die Intestate, or should not by his Will nominate, limit, appoint, give, devise, or dispose of the same and every Part thereof, that then the Trustees should permit the eldest Son of the Body of the said Sir Henry, on the Body of the said Elizabeth, to receive the Rents, Issues and Profits of the Premises undisposed of by the Will of the said Sir Henry, till he should attain his Age, and should then assign to him, his Executors and Administrators, the Residue of the said Terms; and in case the eldest Son should die before Age, then the Trustees should permit the second Son to receive the Rents and Profits, with the like Trust to assign to him at his Age, and so to the third and fourth Son in like Manner.

And in case of no Issue Male between them, at the Time of the Death of the Survivor of them, the said Sir Henry and Elizabeth, which should live to attain their respective Ages, and that there should be one or more Daughter or Daughters between them, that then the Trustees should permit the said Daughter and Daughters, her and their Executor and Administrators, to take their several equal Shares and Proportions of the said Rents, Issues and Profits, not devised or disposed of by the Will of the said Sir Henry, for and during the [280] said Terms, unless William Massingberd the now Plaintiff, the eldest Son and Heir of the said Sir Henry by a former Venter, should, within six Months after the Death of the Survivor of them, the said Sir Henry and Elizabeth, pay unto such Daughter or Daughters, or secure to the good liking of the Trustees, the several Portions therein mentioned for the said Daughter or Daughters; and after the said Portions paid or secured, or in case there should be neither Son or Daughter living at the Time of the Death of the Survivor of them, the said Sir Henry

and Elizabeth, or that should live to their respective Ages, that then the Trustees should assign the Residue of the said Terms to the said William Massingberd, his Executors and Administrators.

Then there is a Power of Revocation in the said Sir Henry, by Deed or Will to revoke and make void this present Deed, and the Estate and Estates, Trust and Trusts of the Premises, or any Part thereof.

After this Sir Henry made his Will in Writing, and the Defendant Elizabeth his Lady Executrix, and residuary Legatee, and devised in these Words (viz.), 'I do hereby give unto her all my Estate, which I have by Deed settled upon her, according to the true Meaning and [281] Intent of the said Settlement: And also I give her all those other Lands hereby hereafter settled upon her, according to my true Intent of my Settlement thereof for her Life, or on my Issue by her: And I do also give her all my Estate, concerning my Interest in the College Leases, from John Rutter of Canterbury, and also all my Goods and Chattels, not hereby otherwise disposed of, I Will that all the Copyholds any Ways appertaining to Paston, be taken to the Use of my Executrix, and also the Bishop's Lease, when need is, that it be renewed also to her Use, and also the Lease for 500 Years of Paston, all at her Charge, according to the true Intent of my Settlements upon her, which I hope my Son William will endeavour, as before the Almighty, to make good unto her and hers: and if either I have no Issue by her, or that they or their Issue all die, so that the Succession be expired: Then after my Wife's Decease, I hereby give (upon my Son's wilful Neglect or Refusal of his Duty herein, and not otherwise) all my said Lands, not settled on him by his Marriage, to all the Daughters of my Daughters Sanderson and Stoughton, to be divided among them. Yet always provided, that if my said Son neither Neglect, nor refuse any reasonable Duty [282] herein: Then my Will is, that after my Wife's Decease, and that all her Issue by me be either dead or have their Portions paid them as is provided. That then all my said Lands settled on her for Life, whether Copyhold, Leasehold, or Freehold with all the rest unsettled, shall descend and be to him and his Heirs for ever.'

Sir Henry Massingberd left no Issue living by that Wife, but left his said Wife ensient of a Son born alive, and named Henry, but he died about six Weeks after, to whom the Lady is Administratrix.

THE JUDGES OPINION UPON BOTH THESE CASES.

We have heard the Case of Massingberd and Ash, referred to us, argued by Counsel on both sides, both upon the Deed of Trust and upon the Will, and are all of Opinion, that the whole Weight of the Case rests upon the Deed of Trust, and that the Will, though it have some Clauses in it, which if they were substantive of themselves would alter the Case: yet as it is penned, and the Clauses all bound up with Relation to the Deed of Trust, it does not: And we are likewise of Opinion, That all the Remainders and Contingencies in the Deed of Trust, being limited and [283] confined to fall within the Compass of twenty-one Years, are good: and that theretore the Remainder of the Term ought to be decreed to the Plaintiff Sir William Massingberd.

Febr. 17.
1684.

Thomas Jones,
Creswell Levinz,
J. Charlton,
T. Street.

The Lord Keeper declared himself of the same Opinion with the Judges, That the Remainder of the said Terms, after the Death of the said Dame Elizabeth, were good Remainders in Law, and that the Plaintiff Sir William ought to enjoy the Premises for the Remainder of the said Term accordingly; and decreed the same.

NODES *contra* BATLE.

35 Car. 2, f. 106 [1683-84].

The Bill not to be taken *pro confesso*, if the Defendant hath not appeared, but a sequestration shall issue out against him.

The Bill is, that the Defendant may redeem or be foreclosed: and the Defendant being served with a Subpœna refuseth to appear, and sits out all Process of Contempt to a Serjeant at Arms returned and cannot be apprehended.

The Plaintiff prays the Bill may be taken *pro confesso*.

[284] This Court declared, In regard the Defendant hath not appeared, this Court could not decree the Bill *pro confesso*, but ordered a Sequestration against his real and personal Estate, until he cleared his Contempt.

MOOR *contra* HART.

35 Car. 2, f. 60 [1683-84].

Letters under one's Hand shall amount to a good Agreement within the Statute of Frauds and Perjuries.

That a Treaty of Marriage was had between the Plaintiff and Anne his Wife, the Defendant's Daughter, who promised to give with her £4000, but when the Defendant perceived them to be mutually ingaged, began to recede from his Promise, which the Plaintiff finding, a Letter was wrote to the Defendant by a Friend of the Plaintiff, desiring him to be plain, and ascertain what Portion he would give the Plaintiff with his Daughter, and then the Defendant agreed to give £1500 down, and £500 more at his Death, if she should have Issue, and both Sums to be charged on his Estate at Creaton and Wapingham; which Agreement was in Writing, and signed by the Defendant, and he did, in Answer to the said former Letter, express and declare as much under his Hand; and thereupon the Marriage took Effect.

[285] But the Defendant pretended, he never made any such Agreement; and that the Plaintiff married his Daughter without his Consent; but confesseth he received a Letter from one Reeve, a Friend of the Plaintiff, wherein he desired the Defendant to be clear, and say what he would lay down upon the Nail in Marriage with his Daughter to the Plaintiff, and what he would secure to be paid at his Death; and that he sent a Letter to Reeve in Answer, wherein he acknowledged the Plaintiff's Deserts exceeded his Ability, and with all Plainness acquainted him, he would give her £1500 in present out of his Estate at Creaton, and £500 more at his Death, if she should have Issue then living; but that afterwards Mr. Reeve sent a Letter in Answer to that, whereby the Treaty and Proposals were absolutely waived, and the Defendant never further treated; but the Marriage was had without his Consent, and without any Agreement in Writing or Settlement; and therefore he insists upon the Act for Prevention of Frauds and Perjuries.

To which the Plaintiff insists, The last Letter sent by Reeve was no manner of the Treaty or Proposal in the former Letters in Jan. 1680.

[286] This Court, on reading the several Letters sent by Reeve to the Defendant, in the Behalf of the Plaintiff, and the Defendant's Answer thereunto, is fully satisfied, the Plaintiff upon his Marriage became well intitled to £1500 agreed, by the Defendant under his own Hand, to be paid to the Plaintiff as his Wife's Portion, out of his Estate at Creaton; and decreed accordingly.

BRADBURY *con.* DUCHESS OF BUCKS.

36 Car. 2, f. 401 [1684-85].

Interest upon Interest decreed.

This Court did declare, That the Plaintiffs ought to have Interest for their Interest Money from Time to Time, when it is a stated Sum.

DOM' PAWLET *con.* DOM' PAWLET.

36 Car. 2, f. 516 [1684-85].

Trust for Payment of Debts. Maintenance of younger Children, and raising Portions.

This is upon a Case stated, viz.

That John late Lord Pawlet, on Marriage with the Plaintiff the Lady Susanna his second Wife, in Consideration of her Portion settled a Jointure of £1000 per Annum on her, and afterwards having three Children (viz.), the Defendant the now Lord Pawlet, and Susanna, and Vere Pawlet, by Deed conveyed Lands to Trustees, [287] and their Heirs (viz.), to the Use of the said Lord Pawlet for Life, charged with Portions for his Daughters by the Lady Essex Pawlet his former Wife; and after the Death of the said Lord Pawlet, to the Use of Francis Pawlet and others, for 500 Years, on Trust

that they should, after the Commencement of the 500 Years, out of the Profits, or by Leases, or other Lawful Ways out of the Premises, allow the now Defendant Maintenance, and also sufficient to pay all the late Lord Pawlet's Debts, and Maintenance for the younger Children; and after that to raise Money to pay the younger Children's Portions, in such Manner and Time as the said Lord Pawlet should by any Writing or last Will appoint; and in Default of such Limitation or Appointment, the Trustees to raise £4000 a-piece for every younger Son, and £4000 a-piece for every Daughter of the said Lord Pawlet by the Lady Susanna, to be paid at their Ages or Day of Marriages, if such Portions could conveniently be raised, and if not, then so soon after as the same could be; with this further, That every younger Son and Daughter should have Maintenance till Portions paid; and after all the said Sums raised, the Remainder of the 500 Years to be surrendered to whom the immediate Reversion belonged: which is now the Defendant.

[288] That the late Lord Pawlet by Will in 1677 (published at the same Time when the said Deed was executed) gave to his said Daughters Susanna and Vere Pawlet £4000 for their respective Portions, to be paid them as the said Deed directed, and made the said Francis Pawlet and the other Trustees Executors.

That Vere Pawlet one of the said Daughters died, and the Plaintiff her Mother took Administration to her Estate, and thereby intitles her self to the said Portions of £4000 appointed to be paid to the said Vere at her Age or Day of Marriage.

And the Question now being, Whether the Plaintiff, by Virtue of such Administration, is intitled to the Portion of her said Daughter Vere, who died before her Age or Day of Marriage, and the Trustees should be compelled to raise the same out of the Trust of the Term of 500 Years, which was granted out of the Defendant, the now Lord Pawlet, the Infant's Inheritance.

This Court, upon Perusal of Precedents, declared, they did not find that any of the Precedents came up to this Case, and conceived there was a great Difference between a Legacy and a Trust, for that a Trust is expounded according to the [289] Intent of the Party, but a Legacy is governed by the Rules of Common Law, and an Executor who is to have the Residue in one Case, is not of so great Regard as the Heir, who is to have the Residue in the other: That this Case, is of general Concern to all Families, for it was grown a Thing of Course, to charge the younger Children's Portions upon the Heir's Estate, which would not have been charged, but for these Occasions of providing for Children. And in this Case, the Time of Payment never happening, but becoming impossible by the Death of the Child before the Portion was payable, the Plaintiff has no Right to demand it: And it were hard for this Court to make a Strain against the Heir, where the Consideration fails for which the Portion was given (viz.), the Advancement of the Children: and altho' there was a Will in the Case, yet it refers to the Deed, and was made at the same Time, so that it does not at all alter the Consideration of the Case: and it would be hard to decree the Payment presently, for that were to wrong the Heir, who is to have the Proceed of the Money beyond the Maintenance until the Time of Payment: This Court saw no Ground to take it from the Heir at Law, to give it to an Administrator who might have been a Stranger; and so dismissed the Plaintiff's Bill.

[290] The Precedents used in this Cause for the Administrators were, *Rowley contra Lancaster*, *Brown contra Bruen*, *Clobery contra Lampen*.

The Precedent for the Heir, *Gold contra Emery*. This Cause was heard in Parliament, and the Dismission confirm'd.

[S. C. 1 Vern. 321. See *Bellairs v. Bellairs*, 1874, L. R. 18 Eq. 515.]

WOODHALL *con.* BENSON & AL'.

36 Car. 2, f. 314 [1684-85].

Settlement—Will.

That John Wirley deceased, being possessed of divers Manors and Lands for 320 Years, the said Term came to the Defendants Adams and Shagburgh, in Trust for Payment of Monies, and after in Trust for Edward Colley, Grandson of John Wirley for his Life, and after his Decease to the Plaintiff Anne, late Wife of the said Edward Colley, and the said Plaintiff Anne to have £150 per Annum for her Life, which settlement was made in Consideration of Marriage; and after the Death of Edward Colley,

the Trustees were directed to permit the Heirs Males of Edward, on the Plaintiff Anne to be begotten, to receive the Residue of the Profits, and in Case of no Issue Male of her, there is Provision for Daughters, and Limitations over to the said Edward Colley's Heirs Males; and it was also declared, that in case the Plaintiff Anne should [291] survive the said Edward, then she to have the Moiety of the Manor house for her Life; that the Trust limited to the Heirs Males of Edward, and the Remainders thereupon depending are void, and the Benefit of the whole Trust was in Edward, for that the Trust would not be intailed.

That by another Deed it was declared by the said Edward Colley and his said Trustees, That in case the Plaintiff Anne should have no Issue, she should have the whole Manor house above the £130 per Annum; and by another Deed the said Edward Colley, by Consent of his said Trustees, declared, in case the said Edward should die, leaving the Plaintiff Anne no Issue, and should not otherwise dispose of the Residue of the Profits of the Premises, over and above the Rents and Charges payable as aforesaid, then his said Trustees after his Death, should, by Sale or Leases of the Premises, pay all Debts; and after all Debts paid, to permit the Plaintiff to receive the Residue of the Profits for her Life, and after her Death, to permit the right Heirs of Edward to receive the same; That the Trust for the right Heirs of Edward, was void and reverted; and the said Edward did afterwards declare, that in case he had no Issue, he intended to leave his whole Estate to the Plaintiff Anne.

[292] That the said Edward, 22 Jan. 26 Car. 2 [1675], made his Will in Writing, reciting the Agreement in the last Deed touching Payment of his Debts, and after some small Lagacies, devised to his said Trustees all the rest of his personal Estate in Trust, that they should pay his Debts as aforesaid, and declaring his Meaning to be, that his Executors, after his Debts paid, should deliver the Overplus to the Plaintiff Anne, deducting £5 apiece for their Pains and all Charges; That Edward soon after dying, the Overplus belonged to the Plaintiff; and the said Trustees possessed the Premises and the personal Estate, and the Plaintiff Anne having since intermarried the Plaintiff Woodhall, whereby the whole belongs and remains unto him in Right of his Wife, the said Trustees ought to assign to the said Plaintiff: But the said Trustees pretend the Trust and Term aforesaid doth, after the Plaintiff Anne's Death, belong unto the Defendant Gabriel Ciber and Jane his Wife, she being the only Sister and Heir at Law of the said Edward Colley; That the Defendant Benson, knowing of the Will and Settlement aforesaid, purchased the Premises of the Defendant Ciber and his Wife, and the Trustees assigned to him.

[293] The Defendants the Trustees insisted, That their Names were used in the Marriage Settlement of Edward Colley, upon his Marriage with the Plaintiff Anne, in which Settlement was recited a Conveyance made by John Wirley, whereby he did demise the Trusts therein mentioned, and the Premises in Trust as to Clark's Farm, for such Persons as he or his Executors should by Will or otherwise direct, and several other Persons upon several other Trusts; and as to several Parcels of the said Premises, which the said Defendant conceived was the Estate lately enjoyed by Edward Colley, in Trust for such Persons as the said John Wirley should direct; and for Want of such Appointment, to Jane his Daughter for her Life, and after to John Colley her Son and Heir and his Issue Male; and for Want of such Issue, in Trust for the Daughters of the said Jane; and after the Death of Jane and John, Edward was intitled, and he, together with Sir John Wirley the surviving Trustees, upon Edward's marrying with the Plaintiff, did demise to the said Defendants the Trustees, the Manor-house, &c., for the Term of twenty Years, in Trust to pay certain Annuities therein mentioned, and to permit Edward Colley for his Life to receive the Profits of the Residue; and in case the Marriage took Effect, and the [294] Plaintiff Anne survived him, then to pay her £130 per Annum for her Life; and after Edward's Death, to permit the Heirs Males of their two Bodies to receive the Residue of the Profits; and for Default of such Issue Male there is Provision for Daughters, and supposes the Residue of the Profits may be limited to any Issue Male of Edward; and for Want of such Issue, to permit the Defendant Jane, and Anne since deceased, Sister of the said Edward, to receive the Profits of the Estate as the Deed expresses; and that he remembered no other Agreement than what is mentioned in the said Deed; and sets forth the Deed of 21 Jan. 26 Car. 2 [1675], whereby the said Defendants the Trustees were intitled by Sale of Leases to pay Debts, and after Payment thereof (if the Plaintiff Anne should be then living) should permit her to receive the Residue of the Profits for her Life,

and after her Decease the right Heirs of Edward to receive the same : that after the Time of executing the last mentioned Deed, the said Edward made his Will and after some Legacies took Notice of the said Deed bearing Date the Day before ; and it was declared thereby, that the Defendants the Trustees should out of the Profits pay all his Debts ; and being fearful those Profits should not do, did devise to them all the rest of his [295] personal Estate, and made them Executors, and after Debts paid, the Residue to the Plaintiff Anne. That Nov. 1676, Edward Colley died, after which the said Defendant proved the Will, and entred on the Estate ; but the Defendants Ciber and Jane his Wife insisted, That the said Defendant Jane being the only Sister and Heir to Edward Colley, are after his Debts intitled to the Premises for a long Term, to commence after the Death of the Plaintiff Anne, and have sold their Interest to the Defendant Benson.

Upon reading the said Deed and Will, the Lord Keeper North was of Opinion, that the said Term so as aforesaid created, was a Term in Gross, and so not capable of being intailed, and therefore it could not descend to the Heir of Edward Colley, but that the same should be liable to the Payment of his Debts, and that the Plaintiff Anne should hold the £130 per Annum for her Life : and after the said Debts paid, the Plaintiff Anne should receive the Profits of the whole Estate for her Life, charged with the said Annuity ; and the said Plaintiffs were to redeem the Mortgage to the Defendant Woodward : But as to the Residue of the said Term, after the Death of the Plaintiff Anne, and Debts paid, how the same should be disposed of, a Case was ordered to be made.

[296] A Case being stated, this Cause came to be heard thereon before the Lord Chancellor Jefferies, and all the former Pleadings being opened, as also the Defendant Ciber's Cross Bill, which was to this Effect (viz.), to have the said Term of 820 Years to attend the Inheritance ; and the Case stated appearing to be no otherwise than before is set forth.

His Lordship, on reading the said Deed and Will, the Question being, who shall have the Remainder of the Term in the said Lease, whether the Plaintiff Anne as residuary Legatee, or whether she shall have only an Estate for Life, his Lordship declared, that the Deed and Will do make but one Will, and by them there was no more intended to the Plaintiff Anne, than an Estate for her Life, and that she ought to enjoy the whole Mansion house *cum pertin'* during her Life, and also the Overplus of the Profits of the Residue of the said Estate, after Debts and Legacies paid ; and the Defendant Benson, who purchased the Inheritance of Ciber, to enjoy the same, discharging all Things as aforesaid.

[297] *HALL contra DENCH.*

36 Car. 2, f. 799 [1684-85].

When the Mortgage Money is paid, the Mortgagee and his Heirs are Trustees for the Mortgagor and his Heirs. A Will, and after that a Mortgage, the Will is republished, it's a good Will and not revoked.

That the Plaintiff Grace Hall, being Daughter of William Knight deceased, who was Son of Susanna, one of the Sisters and Coheirs of Thomas Bridger deceased, which said Thomas Bridger being seised in Fee of Lands in Binstead and Middleton, and having no Children, made his Will in 1663, by which he gave all his Lands in Binstead to the said Thomas Knight (Son of the said William Knight), and the Heirs of his Body, and for Want of such Issue ; then to the Plaintiff Grace, and the Heirs of her Body, with Remainders over ; and by the same Will devised one Moiety of the Lands in Middleton to the said Thomas Knight and the Heirs of his Body, with the like Remainders over ; and sometime after the said Will, the said Thomas Bridger mortgaged the said Lands in Binstead to John Comber and his Heirs for £500, and the said Bridger repayed the £500, and had the Mortgage delivered up and cancelled, but no Reconveyance of the Lands ; and that the said Comber after that, was but a Trustee for Bridger the Mortgagee, who in 1682 declared, that the Will he made in 1663 should stand and be his last Will, and then died : But the [298] Defendant Dench having got the cancelled Deed in his Custody, and the Plaintiff bringing an Ejectment under the Title of the Will, got a Verdict for the Lands in Middleton : but the Defendant at the Trial, setting up a Title in the Defendant Comber, upon the cancelled Mortgage for the Lands in Binstead, a Verdict passed for the Defendant ; so to have

the said Mortgage Deed delivered up, and the Plaintiff to enjoy the Premises according to the said Will, is the Bill.

The Defendants, as Coheirs at Law to Bridger, insist, That the Testator Bridger never intended that the Estate should go as that Will directed, in regard he soon after the said Will mortgaged the same to Comber ; and besides, the Legatees and Executors in the said Will were most of them dead before the said Bridger, and the Mortgage Money was not paid till after the Estate forfeited ; and that the Mortgage to Comber was an absolute Revocation of the said Will ; and upon an Ejectment brought by the Plaintiff, under the said Will, the Defendants obtained a Verdict for the Lands in Binstead, wherein the Validity of the said Will was in Issue.

The Plaintiffs insisted, That the Verdict obtained by the Defendants as aforesaid, was by Reason the Title in Law was in Comber the Mortgagee, and not upon the [299] Validity of the Will ; and that a Verdict had been had in Affirmation of the said Will for other Lands therein mentioned ; and the Testator was in Possession of the Premises at the Time of his Death.

This Court (the Defendants insisting to have it tried at Law, whether a Revocation of the said Will or not) declared, there was no Colour to direct any Trial at Law in this Case ; for that on reading the Proofs, it plainly appeared, that the Testator expressly declared, the said Will should be his last Will ; and that upon such an express Proof, it would be vain to direct a Trial at Law, and declared, that when the Mortgage Money was paid, the Mortgagee and his Heirs, immediately from that Time, became Trustees for the Mortgagor and his Heirs ; and the Court having considered of several Precedents, as well antient as modern, which were full in the Point ; that notwithstanding such Revocation, yet there was a Republication of the Will, and that the same was a Republication of such a Nature, that made the said Will a good Will ; and decreed the Defendant Grace to enjoy the Premises according to the said Will.

This Cause came to be re-heard before the Lord Chancellor Jefferies, who was well satisfied with the Republication, and declared, that notwithstanding the said [300] Mortgage, the Will was a good Will and not revoked, and confirmed the former Decree

PULLEN *contra* SERJEANT.

36 Car. 2, f. 570 [1684-85].

The Bill is to have a Discovery of the Estate of Anne Nurse deceased, and a Distribution to be made, and the Plaintiffs to have their Proportions thereof, they being next of Kin to the said Anne Nurse, viz. the Plaintiff Anne, Wife of the Plaintiff Pullen, Sister by the Mother's Side of the said Testatrix Anne Nurse, and the other Plaintiffs are of the same Degrees of Consanguinity, and so are intitled to their equal Shares of their personal Estate ; and the said Anne Nurse made Anne the Wife of William Hodges Executrix, who died before the said Anne Nurse, and the said Anne Nurse died without altering of her Will ; That after her Death the Defendant Serjeant, a Relation to the said Anne Nurse, took Administration of the said Anne Nurse's personal Estate.

The Defendant insists, That he being only Brother, and one of the nearest Relations to Anne Nurse the Testatrix, and her said Executrix dying before she administred, with the Will annexed, and paid Debts and Legacies and is willing to [301] distribute as the Court shall direct ; and craves the Direction of the Court, whether the Plaintiffs being of the half Blood shall have equal Proportion with the Defendant and others of the whole Blood.

This Court declared, That the Plaintiffs, who are of the half Blood to the said Anne Nurse, were equally intitled to a Distribution of the said Estate, and to an equal Share with the Defendant Serjeant and others who are of the whole Blood ; and decreed the same accordingly.

KEALE *contra* SUTTON.

36 Car. 2, f. 773 [1684-85].

A Prohibition granted for arresting in the Marshal's Court, for Matters arising in Berkshire.

The Defendant being arrested in the Marshal's Court for Matters arising in Berkshire, out of the Jurisdiction of that Court ; This Court granted a Prohibition, which

being disobeyed, an Attachment was ordered against the Persons disobeying the same, and the Defendant to proceed upon the same.

CARVILL *contra* CARVILL.

36 Car. 2, f. 142 [1684-85].

Will.

That the Testator Robert Carvill made his Will the 5th of June 1675, and thereby gave the Plaintiffs several Legacies, and also Legacies to the Defendants, which [302] he appointed to be paid by sale of Lands, after the Death of his Sister Rosamund, whom with the Defendants he made Executors, and gave his said Executors *residuum bonorum*, and in 1678 died; and the said Rosamund is dead.

That the Defendant Robert Carvill, being the eldest Son of Henry the Testator's Brother, is his Heir at Law, who insists, That the Testator made no such Will, and that he claims the said Lands by Descent; or if any such Will was made, the Testator was *non compos* at the Making thereof, and that no Person was named in the said Will to sell the said Lands, and insists on the Act against Frauds and Perjuries, and avers, That the Testator died not till 1680, and that he did not make and sign that Will according to the said Act, there being no Witnesses that have attested it according to that Act; and doth therefore insist, that the same is void in Law, as to the Devise of Lands, and that the same are come to him as Heir, and he hath since recovered the same at Law, and insists also that the said Will is void in Law, because no Person is appointed to make Sale, and being but a voluntary Disposition for Payment of Legacies, and not Debts, the Plaintiff ought to have no Relief to make the same good in Equity, to the [303] Disinherison of the Defendant, the Heir at Law.

But the Plaintiffs insisted, Though the Testator died after the said Act, viz. December 1678, yet the Will was made long before the 24th of June 1677, and so is not within the Intention of the said Act; and that though no Person be in express Words named to sell the Lands, yet the Sale ought to be made by his Executors, and the Heir ought to be compelled to join in the Sale.

The Defendant the Heir insisted, That though the Will might be out of the Provision of the Act, being made before the making of the Act, yet there is no good Proof that any such Will was made or published by the Testator.

This Court directed it to Law on this Issue, *Devisevit vel non Devisevit*, and a Verdict passed for the Plaintiff.

This Cause coming to be heard on the Equity reserved, and this Court being satisfied with the Verdict, which was (viz.), That the said Robert Carvill, the Testator, did make and publish such Will, and thereby devised the said Lands to be sold as aforesaid.

[304] This Court, upon reading the Will, decreed the said Lands to be sold by the said Executors, and the said Legacies to be paid thereout according to the said Will.

NORTON *contra* MASCALL.

36 Car. 2, f. 544 [1684-85].

A voluntary Award decreed to be performed.

The Suit is to have a voluntary Award performed, the Defendant insisted, It being a voluntary submission of the Parties, and the Reference not directed by this Court, the Award was void and ought not to be performed, and demurred by the Plaintiff's Will.

The Master of the Rolls ordered Precedents, and upon reading of the Award declared, he saw no Cause to relieve the Plaintiff; but dismissed the Bill.

This Cause was re-heard by the Lord Chancellor Jefferies, who declared, he saw no Cause why the said Award should be impeached, but it was fit that the same should be performed, being in part executed and assented unto: and decreed the same to stand confirmed, and the Defendant to perform the same.

[353] ATTORNEY GENERAL *con.* VERNON.

1 Jac. 2, f. 388 [1685-86].

Information against Patentees of Needwood Forest.

The Scope of the Information in this Cause being to set aside Letters Patents obtained by the Defendant Vernon, in the Names of the Defendants Browne and Boheme.

in Nature of a Grant or Contract under the Seal of the Dutchy of Lancaster, of the Honour of Tudbury [354] and Forest of Needwood, at a great Under-value, wherein his late Majesty was surprized; His Majesty's Attorney General by Information setting forth, That his Late Majesty being seized in Fee in Right of his Crown, as Parcel of his Dutchy of Lancaster, of the said Honour of Tudbury, of the value of £2000 per Annum, and also of the Benefit of Timber-Trees, Woods, &c., of the Value of £30,000, whereon the Defendants commit Waste; pretending Title to the Premises by Grant of the Crown from his late Majesty; whereas such Grant was unusually obtained, and by Surprise; for that about Sept. 1683, for some small Sum, and getting some Interest in Ground at Sheerness, to the Value of about £500, and endeavouring to Value the Lands at Sheerness at £3000 in October following they did prefer a Petition for the said Grant, and obtained a Reference thereof to Sir Thomas Chicheley, Chancellor of the Dutchy, and hastily obtained a Report in November; and within two Days after the Report a Warrant was signed for passing the Grant, though Endeavours were used to stop it by Command from his late Majesty, and the Lords of the Treasury, the 19th of the same November, and particular Application made to the Chancellor of the Dutchy, he then denying he knew [355] thereof, and it was not known that any Grant was thereof, till the Particular thereof was found in a Scrivener's Shop about a Month after the Passing thereof, contrary to the Course of the Dutchy, there being no such Grant yet registred or inrolled, to the Prejudice of his Majesty, and the Nobility and others having Dependency there; the said Defendant having given untrue Particulars of the most Profitable Matters thereof, to the Value of some thousand Pounds; wherefore the said Grant ought to be delivered up to be cancelled.

The Defendant Vernon insisted, That the Defendants having long Leases of the said Premises unexpired of a great yearly Rent, and also Offices within the Premises, upon which hath been expended great Sums of Money in Buildings and Repairs, whereby his Majesty's antient Rent hath been much increased; and the Defendant Vernon being informed of some Endeavours used to obtain the Reversion in Fee of the said Premises, he petitioned his Majesty in September 1683, in the Name of the other Defendant Browne, to prevent a Merger of the said Leases, and on the 29th of the said September obtained a Reference to the Chancellor of the Dutchy of Lancaster, and 19th of November 1683, the said Chancellor made a Report, [356] and thereupon 20 Nov. 1683, his Majesty signed a Warrant, dated the 19th of the same Month, authorising the Chancellor to make a grant of the Premises: That thereupon the Defendant Vernon, by Deed 20 Nov. 1683, between his late Majesty of the one Part and himself on the other, did sell unto his Majesty all those forty Acres in the Isle of Sheppey, whereon his Majesty's Fort of Sheerness is built: That in Consideration thereof, and £7000 paid by the Defendant for his Majesty's Use, his said Majesty, 21 Nov. granted unto the Defendants Browne and Boheme, in Trust for the Defendant Vernon, all the said Premises.

And the said Defendant Vernon insists, That the said Patent passed regularly, and is effectual in Law, and ought not to be impeached, the Impeachment whereof being in Derogation of other his Majesty's Grant, and the Considerations are equivalent to the Grant, his Majesty's favour being an Ingredient thereunto, and the Premises mightily over-valued by the Surveyor; and the said Patent was left with a Scrivener, whereon to raise £10,000, but the same was not thought a sufficient Security for such a Sum: That the Defendant Browne for £10,300 hath purchased the said Premises of Vernon, and insists on the said Grant as good in Law; [357] and is advised that this Court will be tender in examining the Methods of the passing the said Grant, when it hath received the Allowance of the proper Officer, by having the Seal affixed to it.

His Majesty's Counsel insisted, That this Suit is properly brought in this Court by English Bill, to be relieved against the said Grant or Patent, and that no *Scire facias* can be brought in the Dutchy, or in this Court, for the Reversal thereof, and if a Bill or Information (as this Case is) should not be admitted, his Majesty would be in a worse Condition than any of his Subjects, considering the great Over-value, and the quick, hasty, and unusual Manner of passing the Patent, contrary to all Patents of that Nature, it passing neither by Privy Seal, Privy Signet, or any immediate Warrant, but the Chancellor of the Dutchy acted therein in all Capacities, and passed the Grant after Notice and fresh Pursuit by his late Majesty for recalling the same, and express Prohibition that no Money should be received.

This Court, assisted with several Judges, were all clear of Opinion, That this Suit was proper by English Bill ; and that the Patent could not be annulled or made void by *Scire facias*, or otherwise at the [358] Common Law ; and the Bill being to have Remedy for his Majesty against Fraud, Surprize and Deceit, which their Lordships declared was made out, and that the King was most grossly deceived and abused as to the Value ; and that therefore his Majesty ought to be relieved in this Court, or otherwise he would be remediless, and so in a worse Condition than any of his Subjects in a Case of this Nature ; and this Court, with the said Judges, taking into Consideration the excessive Over-value, which was offered to be made good by the Survivor, the Surprize and Deceit, and the speedy and unusual passing the said Grant, and that no Money was paid till the Grant was ordered to be stopped, and Directions for this Prosecution, which was before Livery and Seisin.

This Court declared, and was fully satisfied, That in this Case his Majesty ought to be relieved, and the said Grant set aside and made void ; and decreed the same accordingly, and the Inrollment thereof in the Dutchy Court vacated ; and the Defendants to procure those, in whom the Estate in Law is, to reconvey unto his Majesty ; and the Defendants at Liberty to apply to his Majesty for to have the Money paid back, which was paid to Sir Thomas Chicheley and Cuxton, as aforesaid.

[359] BECKFORD *contra* BECKFORD.

1 Jac. 2, f. 196 [1685-86].

The unadvanced Children, by the Custom of London, to bring in what they had received into Hotchpot with the Orphanage Thirds, after the Estate is divided into Thirds, and not with the whole Estate.

That Richard Beckford, Citizen and Freeman of London, had several Children, and by his Will in Writing, after Debts and Funeral Charges paid, appointed one full third Part of his personal Estate to the Plaintiff Frances Beckford his Relict, according to the Custom of the City of London, and declared that Frances and Elizabeth, two of his Daughters, had been fully advanced in his Life-time, and that Mary and Jane, two other Daughters, had not, and directed they should bring their Portions they had received into the third Part of his personal Estate belonging unto his unpreferred Children, and they should have equal Shares with his unpreferred Children.

Now the Question between the Plaintiff Frances and the unpreferred Children, how the said Estate should be divided by the Custom of London, the Plaintiff Frances insisting, that the Children not fully advanced ought to bring what they had received into the whole Estate, and then she ought to have one full third Part of the whole personal Estate, insisting, That every Widow of a Freeman ought, by the Custom of London, to be endowed with [360] one full third Part of the whole personal Estate.

This Court declared the Custom to be, That the Testator's two Children, Mary and Jane, who were not fully advanced, were to bring what they had received into Hotchpot with the Orphanage Thirds, after the Estate is divided into Thirds, and not into Hotchpot with the whole Estate ; and decreed accordingly.

And what hath been received by any one, more than their share and Legacies, is to be repaid as the Master shall appoint.

HALLILEY *contra* KIRTLAND.

1 Jac. 2, f. 566 [1685-86].

Mortgage.

That John Park mortgaged Lands to the Defendant Kirtland for £50, and was also indebted to the Defendant Sanderson £50 on Bond ; and the said Kirtland wanting his Money assigned the said Mortgage to the said Sanderson ; so that Sanderson, on Payment to him of the Money paid to Kirtland, on the said Mortgage, and his £50 on Bond and Interest, is willing to reconvey to the Plaintiff, which he refuses to do.

[361] This Court, in as much as the Estate so vested in the Defendant, as aforesaid, is a Chattel Lease, and so liable to Debts, and the Defendant having an Assignment of the Mortgage, and his Debt on Bond being a just Debt, declared, that the Plaintiff ought not to be let in to a Redemption of the said Mortgage but in a Payment of the said £50 and Interest due on the said Bond, as well as the Mortgage Money ; and decreed accordingly.

COLTMAN *contra* WARR.

1 Jac. 2, f. 566 [1685-86].

No Re-hearing after a Decree signed and inrolled.

This Court would not re-hear a Cause after Decree signed and inrolled, notwithstanding the said Cause had been opened since the Inrollment in order to re-hearing; and discharged the Order for Re-hearing.

JONES & AL' *contra* HENLEY.

1 Jac. 2, f. 995 [1685-86].

Who are Servants capable to receive Legacies by the general Words of a Will, To all my Servants, &c.

Sir Robert Henley by Will gives £100 a-piece to all his Servants, which Will is dated the 10th of November 1680, and Sir Robert lived afterwards till the 7th of August 1681 but made no Republication of the said Will; and the Plaintiffs, as Servants to Sir Robert, demand £100 [362] a-piece Legacy: That these Servants (*viz.*), Jones, Clerke, Meeke, Searle, and Hanbury, were all menial Servants before the 10th of November 1680, and so continued till the 7th of August 1681. That these Servants (*viz.*), Litchfield, Davies, Deacon, Booth, Noon, &c., were all Servants at the time of his Death, but were not in his Service at the Time of Making the Will; that Cook and Hawkes were both Servants at the 10th of November 1680, but before the 7th of August 1681 were discharged from his Service: That William Harrison was a menial Servant the 10th of November 1680, but died before the 7th of August 1681. That Castilian Goddard, &c. were Servants at large, but not menial (*viz.*), as Steward and Bailiff before the 10th of November 1680, and so continued till the said 1681, but did not inhabit in the House: That Stranger and Long were Chairmen, and agreed with after the said 1680 at 20s. per Week; so

The Plaintiffs insist, That such, that were his Servants at the Time of his Death, ought to have the Benefit of the said Devise.

But the Defendant insisted, That none of the Plaintiffs can be any Ways intitled to that Benefit, but only such as were menial Servants before the Publishing of the said Will, and did so continue all along [363] to be menial Servants, and live in the House with him to the Time of his Death.

This Court declared, that none of the said Plaintiffs, but such as were Servants to the said Sir Robert before the making the said Will, and did so continue to be Servants to him until the Time of his Death, could have any pretence to the said Legacy, and such only as were his menial Servants, and lived all along in the House with him, from before the 10th of November 1680 until the 7th of August 1681, and no others; and ordered that Jones, Clerke, &c., only, and no other of the Plaintiffs, be paid their Legacy of £100 a-piece by the said Defendant; and ordered the Bill, as to all the other Plaintiffs, to be dismissed.

[See *In re Marcus*, 1887, 56 L. J. Ch. 831.]FENWICK & AL' *con.* WOODROFFE & AL'.

1 Jac. 2, f. 400 [1685-86].

Agreement on Marriage to purchase Lands.

That Doctor Smalwood deceased, by Deed in 1672, conveys the Land and Premises to Trustees and their Heirs, to the Use of himself for Life, Remainder to Theophania his Wife for Life, Remainder to Mary their sole Daughter, and the Heirs of her Body, Remainder to his own right Heirs, with a Proviso, That if his said Daughter Mary should then after [364] marry in his Life-time without his Privy and Consent first had, then all and every the Uses and Limitations therein mentioned and made should cease and be utterly void; That the said Mary did intermarry with Sir John Lloyd in the Doctor's Life-time, with his Consent, who, upon a Settlement made on the said Mary, was to have £2000 Portion, £1500 whereof was to be laid out in Lands for Increase of Mary's Jointure; and that she had Issue by him the Plaintiff Anne; That Sir John Lloyd died, and the said Dame Mary intermarried with one Hutchinson, without the Consent,

good Liking, or Privity of the said Doctor Smalwood her Father; That in 1683, the said Doctor Smalwood died, having by his Will in 1683, made the Defendant James Smalwood and others Executors; and thereby devised and settled his Estate real and personal (viz.), according to his Settlement formerly made, he gave his said Daughter Dame Mary all his Lands during her Life, if his Executors should so think fit; and and in case they should not, to his Grandchild Anne Love, and in case of Failure, to his Grandchild, Theophania Hutchinson during her Life; and in case of Failure, to his Nephew the Defendant James Smalwood for ever; And his personal Estate, as Money, Books, Plate, &c., to be divided amongst his said Daughters, Grandchildren and [365] Nephew James Smalwood, at the Discretion of his Executors; so to have the said £1500 which rested in Dr. Smalwood's Hands, being Part of £2000 Portion, covenanted by Dr. Smalwood to be laid out in Lands by the said Doctor for Increase of Mary's Jointure aforesaid, to be laid out according to the Doctor's Covenants, and to have the Benefit of the said Settlement in 1672, is the Plaintiff's Bill.

The Defendant James Smalwood pleads, and claims a Right to the Estate of Doctor Smalwood by his Will, and by the said Deed of 1672, the said Dame Mary having, by her Marriage with the said Hutchinson, in the Doctor's Life-time, without his Privity or Consent, broke the Condition by which she was to have enjoy'd the Lands in that Settlement; and prays the Judgment of this Court, the Estate being limited to him as aforesaid: And he further pleads and insists, That Dame Mary ought not to have any Discovery of the Writings of the Doctor's Estate, because he the said James Smalwood and the other Defendant Woodroffe have not yet consented that she should have any Part of the Doctor's Estate, which Power was given them by the Doctor's Will, as aforesaid: and whether he and the other Defendant ought to consent as aforesaid, submits to this Court.

[366] But the Plaintiffs insist, That they admit such Proviso in the Deed of 1672, that in case the said Dame Mary should marry in the Life-time of the Doctor without his Privity, Consent and Liking, then all and every the Limitations therein should cease and be void: But insist, That the Marriage between Sir John Lloyd and Dame Mary was concluded by the Doctor himself, as appears by the said Articles; and that they married with the Doctor's good Liking, Privity and Consent, according to the said Condition; and insist, That Dame Mary's second Marriage with Hutchinson was not without the Consent, Privity and good Liking of the said Doctor, and insist also, that the said Proviso by Dame Mary's first Marriage was fully performed, and the Estates in and by the said Settlement granted, absolutely vested according to the Limitation declared and contained, so as the said second Marriage of Dame Mary with the said Hutchinson, if it had been without such Consent could not have divested the same; and therein crave the Judgment of this Court.

This Court declared, That the first Marriage of Dame Mary being by her Father's Consent, her second Marriage, though it had been without his Consent, could be no Breach of the Proviso or Condition in [367] the first Settlement; and decreed the Defendants, the Executors of Dr. Smalwood, to account for all the personal Estate of the said Doctor, and the Rents and Profits of the real Estate; and if personal Estate sufficient after Debts to pay the £1500, then they are to pay the same to the Trustees, which they are to lay out in a Purchase of Lands, according to the Deed of the 18 August 1683.

COM' WINCHELSEA & AL' *contra* DOM' NORCLOFFE & AL'.

1 Jac. 2, f. 1026 [1685-86].

Act of Parliament for the Settlement of Intestates Estates.

That Katherine late Countess of Winchelsea, the Plaintiff the Earl's late Wife, had three Husbands successively (viz.), Lister her first Husband, by whom she had Issue the Defendant Christopher Lister, Sir John Wentworth her second Husband, by whom she had Issue Thomas Wentworth since deceased, and the Defendant John Wentworth; and the Plaintiff the Earl her third Husband, by whom she had Issue the said Lady Katherine, and the Plaintiff the Lady Elizabeth: That the said Wentworth had a real Estate by Descent from his Father, out of which, after his Father's Death, there was payable to, or to the Use of the said Thomas, several Sums of Money, for Rents, Fines and Profits. That in 1684, the said Thomas [368] died Intestate.

leaving no Wife or Child, but leaving the Defendant Christopher Lister, John Wentworth, the Lady Katherine, and the Plaintiff the Lady Elizabeth, his Brothers and Sisters, who being the next of Kin in equal Degree (his Mother the said Countess dying in his Life-time) they, by Virtue of the late Act of Parliament for selling Intestates Estates, became intitled to the Surplus of the said Thomas's personal Estate, to be equally distributed and divided amongst them (viz.), to each of them a fourth Part thereof; that before any Distribution made, the Lady Katherine died Intestate, and Administration of her Estate was granted to the Plaintiff the Earl her Father, who, by Virtue thereof and of the said Act of Parliament, ought to have the said Lady Katherine's fourth Part of the said personal Estate of the said Thomas Wentworth her Brother: and the Plaintiff the Lady Elizabeth ought to have another fourth Part; but the Defendants pretend that Part of the said Thomas's personal Estate was in his Lifetime invested in the Purchase of Lands, which were conveyed to him and his Heirs, and ought to descend to the said John Wentworth, as his Brother and Heir: and the said Money ought to be accounted as Part of his personal Estate; whereas if any such Purchase were made, [369] the same were without his Consent, and during his Minority, when he had no Power to direct the laying out thereof, and the Lands in Equity ought to be accounted Part of his personal Estate, of which the Plaintiff seeks to have their Shares.

The Defendants insist, That the Defendant John Wentworth only was of the whole Blood, the rest being but of the half Blood to him only, and leaving the Defendant Dame Dorothy his Grandmother, by the Mother's Side (viz.), Mother of the said Countess, who conceives her self to be intitled as Grandmother to an equal Share with any of his Brothers and Sisters; and insists, That the said Lady Katherine dying within less than a Year after the Intestate Thomas Wentworth, she was not by the said Statute intitled to any Share of the said personal Estate, her supposed Right being merely a Thing in Possibility and Expectation, which vanished by her Death within the Year: And the Defendants insist, That the Countess, before her Marriage with the Plaintiff the Earl (viz.) in 1673, granted Lands to Trustees for twenty-one Years, if she so long lived, in Trust out of those Lands, and other Lands late of Sir John Wentworth, to pay her £200 per Annum, till the said Thomas was twelve Years of Age, for his Maintenance, and after till [370] twenty-one, so much as the said Trustees thought fit, and the Residue for the Benefit of the said Thomas his Heirs and Assigns: That the said Defendants, with the Countess's Approbation, out of the Monies arising by the said Trust, made several Purchases in their own Names, and declared the Trust thereof for the said Thomas Wentworth and his Heirs; and the Defendant Dame Dorothy made other Purchases in her own Name, with the said Thomas's Money which she received in Trust for him, and insists, that those Monies so invested in those Purchases in the Life-time of the said Thomas in Trust are not nor at his Death were any Part of his personal Estate, but the Lands descend to the Defendant John Wentworth, as his Heir.

That Sir John Wentworth died in 1671, and left a great personal Estate, which came to the Earl and Countess on their Marriage, and that Sir John Wentworth died Intestate within the Province of York; the Defendant John Wentworth being his younger Son unpreferred, became intitled to a third Part of his Estate, equally with his Widow, by the Custom of that Province; and by Force of the said Act for settling Intestates Estates, Thomas and John became intitled with her to the other third Part.

[371] The Defendants farther insist, That the said Earl is not nor can be intitled to any Share in the said Thomas Wentworth's personal Estate; for that the Act of Parliament is only authoritative and directive to the Ordinary and Administrator, and there are no vesting Words therein, whereby to intitle the Lady Katherine to a Share of the Estate, and that she dying before any Distribution, and within the twelve Months allowed to that Purpose, her Share fell among her surviving Brothers and Sisters: and however if she was intitled to any Part, it could only be to a half Share, she being but of the half Blood to the deceased, and that so in the Course of the Civil Law.

But the Plaintiff insisted, That though the Act of Parliament be only authoritative and directive to the Judge, and yet such Authority and Direction in an Act of Parliament doth, by Judgment and Implication of Law, vest an Interest in the Wife, Children and Kindred, for whose Benefit the Act was made, as much as if it had been a Bequest

of *residuum bonorum*, for that the Act appoints all Ordinaries whatsoever, on granting any Administration, to take the bond prescribed thereby, one Clause of the Condition whereof is to pay the Surplus that shall be found due on such Administration, account to such [372] Person or Persons, as the Judge by his Decree or Sentence to that Act shall limit and appoint; and then appoints the Ordinaries and Judges respectively, to order and make just and equal Distribution of such Surplus amongst the Wife, Children or next of Kin, according to the Rules and Limitations therein, and the same to decree and settle; (which is the very Title of that Act), and that though there be twelve Months Time given for Distribution, yet that is only with respect to Creditors, and no Way hinders the Vesting the Surplus in such Persons as are appointed to have it immediately upon the Trustees Death, any more than a Legacy to be paid *in futuro*; and it is generally a much longer Time before an Intestate's Estate can be got in and the Surplus known; and if the Executors or Administrators of Persons dying in the mean Time shall lose their Shares, it will elude the Intent of the Act of Parliament, which was made for the Benefit of the Wife and Children, and Kindred generally: And it will lie much in the Power of an Administrator, by retarding his Account, to prevent another of his Share; nay it will be mischievous to the Administrator, and those who shall claim Distribution, for that if no Interest be vested in any before an actual Distribution, by Decree or Sentence, [373] then no Distribution can be by Agreement or Consent of the parties: nor, let the Occasions or Necessities of any claiming Distribution be never so great, can any Administrator satisfy the Payment of any Part of the Estate, till such Sentence or Decree made, which the Law-makers could never intend: And if no Interest be vested by that Act, then hath this Court no Jurisdiction to inter-mettle therewith; for that the Act only directs the Ecclesiastical Judge to make a Decree or Sentence for Distribution, but the same vesting an interest, and there being no negative Words that a Distribution shall be sued for there and elsewhere, several Distributions have been made in this Court, as well in the Lord Chancellor Finch's Time, and the Lord Keeper North's Time as since; and that the same is looked upon as a Point settled: and that it is the constant Course of the Ecclesiastical Courts, to decree the Shares of any Persons dying before Distribution, to the Executors or Administrators of such Persons so dying, and not to the surviving Persons claiming Distribution: and this Act was intended as the Will of every Intestate, and the Wife, Children and Kindred respectively, to be as well intitled, as if the Intestate had made a Will and so bequeathed the same amongst them; and for the half Blood [374] and whole Blood, the same hath made no difference between them, but appointed the Distribution to be equal: and that for the Monies alleged to be invested in Lands, such Purchases do not alter the Nature of the Case, for that Thomas being a Minor could not give Authority or Consent for it; and he might have dissented to it when at Age, and dying in Minority, the same still remains Part of his Personal Estate, and the Land is but in the Nature of a Mortgage or additional Security for it.

This Court declared they saw no Cause or Colour to decree any Share for the Defendant Dame Dorothy, and conceived her no way intitled to any; but as to the Plaintiff the Lord Winchelsea, This Court declared, they were fully satisfied that the said Act of Parliament doth immediately, upon the Death of an Intestate, and before any actual Distribution made, vest an Interest in the respective Persons appointed to have Distribution of the Surplus of his Estate, as much as if it had been bequeathed by Will, and that if any one of them die before Distribution, tho' within the Year, yet the Part or Share of such Person so dying ought to go over to the Executors or Administrators of such Party so dying, and not to the Survivor or next of Kindred to the first Intestate; and [375] that the Lady Katherine was at her Death well entitled to a Share of her Brother Thomas Wentworth's Estate, as an Interest thereby vested in her, notwithstanding she died within a Year after the Intestate, and before any Distribution made; and that the Lord Winchelsea, as her Administrator, is now well intitled thereto; and decreed a Distribution, and the Plaintiff the Lord Winchelsea shall have the Lady Katherine's Share and Proportion of the said Thomas Wentworth's Estate accordingly; and the Plaintiff the Lady Elizabeth shall have a like Share thereof with the Defendant Lister and John Wentworth.

2 Jac. 2. fo. 315 [1686-87]. The Question being whether the respective Shares of the Plaintiff and Defendant Lister (the said Lady Katherine and Elizabeth, and the Defendant Lister being only of the half Blood to the Intestate); and whether the Money be vested in Lands, or the Lands themselves should be accounted Part of the Personal Estate of

the said Thomas Wentworth or not ? His Lordship ordered a Case to be made as to those two Points.

The Case being (*viz.*), That the said Thomas Wentworth died an Infant and unmarried, leaving such Brother of the whole Blood, and such Brother and Sisters of the half Blood as aforesaid, who were [376] his next of Kindred in equal Degree ; and that upon his Death, a real Estate of near £2500 per Annum descended to the Defendant John Wentworth, his Brother and Heir, and that above £3000 of the Profits of that Estate, received in the Intestate's Life time by Dame Dorothy Norcliffe and the said Trustees, which belonged to him and his proper Monies, were by them during his Nonage and without any direction or Power in their Trust, but of their own Heads, laid out in Purchases in Fee, and Conveyances in their Names, but in Trust for the said Intestate and his Heirs, with this express Clause in the said Conveyances (*viz.*), in case he at his full Age would accept the same at the Rate purchased, the Purchase being made with his Money, and for his Advantage.

This Court, as to the said two Points, being assisted with Judges, declared, that the Plaintiff and the Defendant Lister ought each of them to have an equal Share with the Defendant John Wentworth, of the Surplus of the personal Estate of the said Intestate, and the Distribution thereof ought to made among them share and share alike ; and decreed accordingly.

[377] And as to the other Point declared, That the Monies laid out in the said Purchases ought to be taken and accounted for as Part of the said personal Estate, and distributed with the rest ; and decreed a Sale of the said purchased Premises, and Distribution thereof to be made as aforesaid. See Max. Eq. 22, c. 4.

DOM' MIDDLETON *con.* MIDDLETON.

1 Jac. 2, f. 793 [1685-86].

Devisee in Trust to pay Debts, &c.

That Sir Thomas Middleton, upon his Marriage with the Plaintiff Dame Charlotta Middleton, settled a great part of his Estate in Com' Flint and other Counties for her Jointure, being seised in Fee of Lands in several Counties (*viz.*), Flint, Denbigh and Merioneth, and settled all his Estate on his first and other Sons on her body in Tail Male, and charged the same with several Terms of Years, for raising Portions for Daughters (*viz.*), If one Daughter and no Issue Male, £8000, and out of his personal Estate, intending to make an Addition to the Portion of the Plaintiff Charlotta his only Child, and to increase the Plaintiff Dame Charlotta's Fortune and Jointure, made his Will in 1678, and thereby reciting, that whereas upon his Marriage Settlement it was provided, That if he should have a Daughter [378] she was to have £6000 Portion, as his Will was ; and he gave to his only Daughter Charlotta, in case she should have no Son living at his Death, £10,000 more, as an addition to her Portion, to make her up the same £16,000, and for raising of the said Portions, and Payment of his Debts and Legacies, he devised all his said Lands (except his Lands limited for his Wife's Jointure for her life) unto Trustees and their Heirs in Trust, to raise out of the Rents and Profits of the said Premises, the several Sums mentioned for his Daughter's Portion, and the Sums of Money thereafter mentioned ; and willed, that till one-half of the said Daughter's Portion should be raised, his Daughter Charlotta to have £100 per Annum for the first four Years, and afterwards £200 per Annum till her Moiety of her Portion should be raised ; and after Payment of the said Portions, Maintenance, Debts and Legacies, he devised the said Trustees to stand seised of all the said Premises (except before excepted) to the Use of the Heirs Males of his Body, with a Remainder to the Defendant Sir Richard Middleton his Brother for Life, without Impeachment of Waste, Remainder to his first Son and Heirs Males of his Body, with other Remainder to the Defendants Thomas, Richard and Charles Middleton, Remainder to the [379] right Heirs of the said Thomas ; and he bequeathed to his said Daughter Charlotta the Plaintiff his Diamond Pendants which his Wife wore ; and bequeathed to his Wife Dame Charlotta, after his Death, one Annuity of £200 per Annum for her Life, to be raised out of the Profits of the said Premises ; and bequeathed the great Silver Candlesticks to go according to his Grandmother's Will, to the Heirs of His Family, with his Estate as an Heirloom ; and bequeathed the Use of all his Goods, Stock and Household-stuff to his Wife the Plaintiff Dame Charlotta, for so long as she should live at Chirke

Castle, and from thence he left the same to his Eldest Son and Heirs, or such as should be Heir Male of his Family, according to the Limitations aforesaid : and his further Will was, that his said Wife should have such Proportion of the Goods, Household-stuff and Stock, for stocking and furnishing of Cardigan House and Demeane, being Part of her Jointure, as should be judged fit by her Trustees, that she might be supplied with Goods and Stock requisite for her House ; and left to whomsoever should be his Heir, all his Stable of Horses, and made the Plaintiff Dame Charlotta Executrix, and died in 1683, leaving the Plaintiff Charlotta his Daughter and Heir.

[380] The Defendant Sir Richard Middleton insisted, That Sir Thomas Middleton his Brother had, in Consideration of £184 to him paid in 1680, conveyed to the said Defendant and his Heirs, two Messuages, being £11. 10s. per Annum in Com' Denbigh, and taking Notice that the same was comprised in his Wife's Jointure, declared he would leave or give his Wife by Will or otherwise, a sufficient Compensation for the same, so that he should not be troubled. And the Defendant insists, That the £200 per Annum given her by the Will, was intended to be as a Compensation ; and insists, That Sir Thomas intended his Daughter more than £16,000, and that such Part of his personal Estate, as was not specifically devised to his Executrix, which was all he intended her, ought to be applied towards Satisfaction of the Testator's Debts and Legacies, and the Plaintiff's Portion ; and the rather, for that by the true Construction of the Will, the real Estate is subjected only supplementarily, and that Part of the personal Estate intended to the Executrix is specifically devised to her, the Devise of the Goods and Stock were only intended, in case the Plaintiff Dame Charlotta should live on her Jointure ; but she not residing on her Jointure, he insists, she is not intitled to the said [381] Stock and Goods : and as to all other the Goods and Stock, and Furniture, the Defendant was well intitled by the Will, as Heir Male of the Family, according to the Limitation of the Will.

The Plaintiff insists, That the personal Estate, not being devised for Payment of Debts, and Provision being made for Payment thereof out of the real Estate, doth submit to the Court, Whether the personal Estate ought to be applied for Debts and Legacies, the real Estate being sufficient to do the same ; and whether, if she be compelled to pay the Debts and Legacies therewith, she shall not be reimbursed out of the real Estate.

The Questions arising upon the said Will, and now debated, are (viz.),

First, Whether the personal Estate not specifically devised, ought to come in Aid of the real Estate, and be subject to the Debts and Legacies chargeable thereon ?

Secondly, Whether the Plaintiff Charlotta ought to have any greater Portion by the Settlement and Will, than £16,000, and whether she ought to have the several yearly Maintenances given by the said Deed and Will, and to what Time and Times ; and whether the Stable of Horses did not belong unto her, as being given to whomsoever shall be the Testator's Heir, she being the Testator's Heir.

[382] Thirdly, Whether the Plaintiff the Lady Charlotta Middleton ought not, besides her Jointure, to have her Annuity of £200 per Annum, and to have Furniture and Stock for her Jointure, House and Lands, and to have the Jewels and Chamber Plate, and Furniture of her Chamber as her Paraphernalia.

This Court declared, it was intended the Daughter should have only £16,000 Portion ; and that such of the Goods and Stock, and Household-stuff at Chirke Castle, which were devised to the Defendant Sir Richard Middleton, did belong, and ought to be enjoyed by the said Sir Richard ; and that the personal Estate, not specifically devised away, and which is not to be set out to the Plaintiff the Lady Middleton, pursuant to the said Will, ought to be applied, and paid towards Payment of the Debts and Legacies, and the Portion of the Daughter ; and that the Plaintiff the Lady Middleton (besides her Jointure which she ought to enjoy free from Incumbrances) ought to have and enjoy the said Annuity of £200 per Ann. and Arrears given and devised to her by the said Testator ; and that she ought to have her Paraphernalia, and Proportion of the Goods, Household-stuff and Stock for furnishing and stocking her Jointure-house, and Demesnes to be set out by the [383] Trustees according to the Will ; and the Daughter to have both the Maintenances by Will and Deed of Settlement, and the Stable of Horses, and all Things specifically devised to her by the Will and decreed accordingly.

WHITMORE *contra* WELD.

1 Jac. 2, f. 106 [1685-86].

Devisee Infant lived to eighteen Years, and makes his Will and Executors, and dies, the Executor shall have the Legacy; for that an Interest was vested in the Infant.

That William Whitmore deceased, in 1675 by his Will devised to the Earl of Craven for the Use of William Whitmore his Son, the Plaintiff Frances Whitmore's late Husband, all the Surplusage of his personal Estate, and made his Son William Whitmore Executor, and the said Earl of Craven his Executor, during the Minority of his said Son; and the said William the Father died, and left a personal Estate of £40,000, that William the Son, at his Father's Death, being but of the Age of thirteen Years, the said Earl proved his Father's Will, and possessed all the personal Estate; and the said William the Son, having attained the Age of eighteen Years, not having proved the said Will, and being intitled to the Surplus of the said personal Estate, in 1684 made his Will, and thereby devised to the Plaintiff Frances all his personal Estate, and whatsoever lay in his Power to give, and made her [384] his Executrix, and died in 1684, and the Plaintiff Frances being of the Age of eighteen Years proved his Will, and is thereby intitled to the personal Estate of William the Father.

But the Defendants, one of them being Sister of William the Father, and the others the Children and Grandchildren of the Sisters of the said William Whitmore the Father, pretend the Surplus of the personal Estate of William the Father belongs to them.

The said William Whitmore the Father's Will is in these Words, (viz.) The Surplus of my personal Estate, my Debts, Legacies and Funeral paid and satisfied, I give to the Right Honourable William Earl of Craven, for the use of my only Son William Whitmore, and his Heirs lawfully descended from his Body; and for the Use of the Issue Male, and Issue Female, descended from the Bodies of my Sisters, Elizabeth Weld deceased, Margaret Kemesh and Anne Robinson, in Case that my only Son William Whitmore should decease in his Minority, without having Issue lawfully descended from his Body: I nominate and appoint my only Son William Whitmore, Executor of my last Will and Testament. I nominate and appoint the Earl of Craven, during the Minority of my only Son [385] William Whitmore, Executor of my last Will and Testament.

The Defendant Dame Anne Robinson insists, she is the surviving Sister of William Whitmore the Elder, and so is intitled to the Administration of William the Elder, unadministred by William the Younger; and the Defendant Sir John Robinson, and others the younger Children of the said Dame Anne Robinson insist, That they are intitled (by William the Father's will) to an equal Share of the Surplus of the personal Estate of William the Elder; the rather, for that William the Elder made a Settlement of his real Estate on Trustees, and thereby made a Provision for the Maintenance of William the Younger, during his Minority, and therefore they opposed the Plaintiff Frances, getting Administration of William the Elder.

The said Plaintiff Frances Whitmore insisted, That by the Will of William the Elder, there was no joint Devise made to the said William the Son and the Issue Male and Female of the Sisters of William the Father, but a several Devise to William the Son, with Remainder to the Sisters Issue; and that the said William the Son, having an Interest vested in him by the Will of his Father, and being eighteen Years old when he died, and he having then a Power to have proved his Father's [386] Will, the Earl's Executorship during his Minority being determined, might have spent or given away the said Estate in his Life-time, he might surely give away the same by his Will, which he having done to the Plaintiff Frances, she is thereby well intitled to the same; and that the Remainder over to Issue Male and Female of the Sisters, the Estate being purely personal, is absolutely void.

This Court hearing several Precedents quoted declared, That by the Will of the Father there was an Interest vested in William the Son, and the Remainder over to the Issue Male and Female of the Sisters of William the Elder was void; and that William the Son living to eighteen Years, and making his Will as aforesaid, and the Plaintiff Frances his Executrix, she is thereby well intitled to the Surplus of the personal Estate; and decreed the same accordingly.

WHITLOCK *contra* MARRIOT.

1 Jac. 2, f. 700 [1685-86].

Defendant ordered to pay the Plaintiff £100 for putting in a scandalous Answer.

This Case being upon a scandalous Answer, his Lordship declared the said Answer to be very scandalous and impertinent, and that the Exceptions taken by the Defendant to the Master's Report were not only more scandalous but also malicious; and that it appearing that [387] Ryley, the Defendant's Solicitor, had put Mr. Lynn a Counsellor's Hand to the Exceptions without his Knowledge; this Court ordered the said Ryley to be taken into Custody of the Messenger, and declared the Answer and Exceptions were not pertinent to the Cause, but merely to defame the Plaintiff: his Lordship ordered the Defendant Marriot to pay to the Plaintiff £100 for his Reparation and Costs, for the Abuse and Scandal aforesaid; and the said Ryley to pay £20 and to stand committed to the Prison of the Fleet till Payment thereof be made.

ASH *contra* ROGLE AND THE DEAN AND CHAPTER OF ST. PAULS.

1 Jac. 2, f. 154 [1685-86].

Bill to enforce the Lord of a Manor to receive a Petition in Nature of a Writ of false Judgment, to reverse a common Recovery, demurred to, and the Demurrer allowed.

This Case is upon a Demurrer, the Plaintiff's Bill is to enforce the Defendant, the Lord of the Manor of Barnes in Surrey, to receive the Plaintiff's Petition or Bill in the Nature of a Writ of false Judgment, to reverse a common Recovery, suffered of some Copyhold Lands in the Manor by Susan Rogle Widow, which the Defendant Rogle holds under the said Recovery; the Bill setting forth, that Katherine Ferrers, by the Will of her Husband, or by some other good Conveyance, was seised in fee of Free and Copyhold Lands in Barnes, formerly her said [388] Husband's, in Trust to convey £200 a Year thereof upon William Ferrers her eldest Son, and the said Susan his then Wife, and Heirs Males of the Body of William, Remainder in Tail to Thomas Ferrers the Plaintiff's Father, second Son of Katherine, and the Heirs of his Body: Edward being obliged by Articles, upon Susan's Marriage with his Son William, to settle Lands of that Value on Susan, for her Jointure: That Katherine on that Trust in 1642, surrendered the Premises, to the Value of £100 per Annum, to the Use of the said William and Susan, and the Heirs of their two Bodies begotten, Remainder to the right Heirs of William; which was a Breach of the Trust in Katherine, in limiting an Estate-tail to Susan, when it should have been an Estate for Life: That William died before the Admittance, leaving Issue only his Son William, and in 1652 Susan surrendered to one Mitchell, against whom the common Recovery in Question was then obtained, wherein one Walter was Demandant, the said Mitchell Tenant, and Susan Vouchee, to the Use of her self the said Susan for Life, the Remainder to William Ferrers, and the Heirs of his Body, the Remainder to the right Heirs of the Survivor of them the said Susan and William her Son: That William the Son died soon after, and [389] Susan died in 1684, and the Plaintiff's Father Thomas being dead without Issue Male, in case the common Recovery had not been suffered, the Premises would have come to the Plaintiff, being the youngest Daughter to her Father, as Cousin and Heir both of William Ferrers the Father, and William the Son, the Premises being Borough-English, and so the Plaintiff was well intitled to prosecute the Lord of the Manor, in the Nature of a Writ of false Judgment, to reverse the said Recovery, wherein there are manifest Errors and Defaults; but the said Lord refuses to receive the said Petition, and combines with the Defendant Rogle, who is Son and Heir of the said Susan, by a second Husband, who pretends, that his Mother Susan surviving her Son William Ferrers, the Premises are descended to him by Virtue of the Use of the said Recovery, limited to the right Heirs of the Survivor of Susan and her Son William; so the Plaintiff's Bill is to examine the Defects of the said Recovery.

The Defendants demur, for that the Relief sought by the Bill is of a strange and unprecedented Nature, being to avoid and reverse a common Recovery had in the said Manor thirty Years ago; and that upon a bare Suggestion generally, that the Recovery is erroneous, without instancing wherein, which may be said in any Case.

[390] The Master of the Rolls declared, that as to that Part of the Bill which seeks to impeach or reverse the said Recovery for any Errors or Defects therein, or compel the said Lord to receive any Petition for Reversal thereof, or any Ways to impeach the same; This Court being the proper Court to supply the Defects in common Assurances, and rather to support than to assist the avoiding or defeating of them, and there being no Precedents of such a Bill as this is, he thought not fit to admit of this, nor to introduce so dangerous a Precedent, whereby a Multitude of Settlements and Estates, depending on common Recoveries, suffered in Copyhold Courts for valuable Considerations, would be avoided and defeated through the Negligence or Unskilfulness of Clerks, and therefore conceived the said common Recovery ought not to be shaken; yet nevertheless, the Case being new and great, referred it to the Opinion and Determination of the Lord Chancellor.

His Lordship held the Demurrer good, and ordered it to stand.

[391] SKINNER *contra* KILBY.

2 Jac. 2, f. 72 [1686-87].

The Son Devisee of Lands upon good Behaviour, for his Misbehaviour decreed against him.

The Bill is to have the Benefit of a Bequest by the Will of Robert Kilby. The Will being (viz.), If my Son Richard Kilby should behave himself towards, and undertake the Payment of my Debts and Legacies, then he to have all my Lands in Tredington; if he behave himself otherwise, or to Neglect to pay my Debts and Legacies as aforesaid, then he to have but 5s., and left it to the Direction of his Executrix Jane Kilby, the Defendant's Mother, and also Mother of the said Richard Kilby, the Plaintiff's Father.

That the said Richard waving the said Devise made to him, and neglecting the Payment of his said Father's Debts and Legacies, the said Jane undertook and paid the same, being intitled by the said Will, and by her Will bequeathed to the said Defendant the Premises.

This Court, upon reading the said Will of Robert Kilby the Testator, which being as is aforesaid, declared, that according to the said Will the said Jane was well intitled to the Premises, and that the Defendant ought to enjoy the same, and could not relieve the Plaintiff but dismissed the Bill.

[392] NAYLER *contra* STRODE.

2 Jac. 2, f. 473 [1686-87].

Surrender of a Copyhold by an Infant of five Years of Age.

The Surrender of a Copyhold Estate by an Infant of four or five Years of Age allowed of by this Court; yet the Lord of the Manor insisted he never heard of any Admittance in that Manor at such an Age.

CLOBERRY *contra* LYMONDS.

2 Jac. 2, f. 1069 [1686-87].

Upon the buying the Equity of Redemption of Lands in Extent.

Lands extended in 1 Car. 1 [1625-26], and held in Extent, and a Bill exhibited to redeem, and being not redeemed the Bill dismissed in 16 Car. 1 [1640-41], and afterwards he who had the extent by Virtue of the said Dismission, sold the said Premises to the Defendant: But the Plaintiff, having since bought the Equity of Redemption, seeks a Redemption.

This Court, notwithstanding the Dismission and Length of Time, ordered an Account from the Time of the Purchase, but no Account from any Time before, but the Profits to go against the Interest to that Time. 3 Vol. [Chan. Rep.] 78, & *ibid.* 27 & 56.

[393] NEWTE *contra* FOOTE.

2 Jac. 2, f. 695 [1686-87].

Depositions suppressed, because the Solicitor's Clerk in the Cause, did write as a Clerk in the Execution of the Commission.

The Defendant insists, That the Depositions in this Cause are irregularly taken and ought to be suppressed ; for that Mr. Samuel Underwood, who was Clerk to Mr. Edward Gibbon Solicitor for the Plaintiff in this Cause, did write as Clerk in Execution of the said Commission under the said Commissioners, and the said Underwood confessed the same, and solicited the Matter ; for which Reasons the Defendant's Commissioners refused to join in the Execution of the said Commission, it being of great Mischief for Solicitors or their Clerks to be privy to the taking of Depositions in such Causes as they solicit.

This Court was well satisfied, that the said Depositions were (for the Reasons aforesaid) irregularly taken, and doth order that the same be hereby suppressed ; and that the Six Clerk's Certificate for the regular Taking of the Depositions be discharged.

[394] GRIFFITH & AL' *con.* JONES & AL'.

2 Jac. 2, f. 353 [1686-87].

Will.

That Peter Griffith being seised in Fee of Lands and possessed of a personal Estate of £20,000, in 1681, by his Will devised to his Brother the Plaintiff £200, to the Plaintiff Shonnet Price, and Dorothy Parry, the Daughter of his Sister Shonnet, £150 apiece, &c., and to the Sons and Daughters of his Brother and Sisters (not mentioned by Name in his Will) £10,000 equally between them, which said Legacy doth belong to the Plaintiffs John Lloyd and Alice Williams, being the only Nephew and Niece not named in the Will, and the Overplus of his Estate he obliged the Executors should pay and distribute amongst his Brothers and Sisters Children and Grandchildren, and the rest of his poor Kindred, according to his Executors Discretions ; and the Plaintiff claims the Overplus of the said Estate, as being all the Brothers and Sisters Children and Grandchildren of the Testator, and poor Kindred that can take by the Will.

The Defendants, the Executors insisted, That they conceive the Distributing and Apportioning the said Surplus is left to them by the express Words of the Will ; and that they ought to distinguish the [395] Grandchildren of the Testator's Brothers and Sisters, whose Fathers and Mothers were dead before the Testator, and had no particular Legacies by the Will, and consider the Condition and Number of Children of the said Kindred, and give most to those that most want ; and conceived that such of the Plaintiffs, as have particular Legacies, ought to have but a small one if any Part of the said Surplus ; and the Defendants crave the Directions of this Court, how far the Words (Poor Kindred) shall extend, to what Degree of Relation.

This Court decreed, That the Surplus of the said Estate be distributed to and amongst the Testator's Brothers and Sisters Children and Grandchildren ; and as to the rest of the poor Kindred, according to the Act of Parliament for distributing Intestates Estates, and no further ; and to be distributed in such Shares and Proportions, as the Executors in their Discretions should think fit : And whereas there are Debts owing to the Testator's Estate, and the Debtors poor, but propose to pay as far as they are able ;

This Court decreed, That the Executors be at Liberty to compound any Debt owing to the said Estate, if they should think fit.

[396] Creditors on Judgments and Bonds decreed to redeem Mortgages towards Satisfaction of their Debts, fo. 843.

BERNEY *contra* PITT.

2 Jac. 2, f. 373 [1686].

The Heir relieved against a contingent Contract made in his Father's Lifetime, because it seemed unconscionable.

The Bill is, That the Plaintiff's Father being only Tenant for Life of a real Estate, which after his Death would come to the Plaintiff, and the Plaintiff's Father allowing

the Plaintiff but a small subsistence, the Plaintiff borrowed of the Defendant £1000 in 1675, and entred into Judgment of £5000, defeazanced for the Payment of £2500, after the Plaintiff's Father's Death, which happened in 1679.

The Defendant insists, That he lent the Plaintiff £1000, for which the Plaintiff gave Bond, and Warrant of Attorney to confess Judgment to the Defendant of £5000, which was defeazanced, that in case the Plaintiff should out-live his Father, and in one month after his Father's Death pay the Defendant £2500, and if the Plaintiff should marry in his Father's Life time, then he should from such Marriage, during his Father's Life, pay the Defendant Interest for the £2500. And the Defendant insists, That if the said [397] Plaintiff died before his Father, the Defendant had lost all his Money : This Cause being first heard by my Lord Finch, 9 Feb. 33 Car. 2 [1681], who then, upon reading the said Defeazance, declared, That as this Cause was, he could not relieve the Plaintiff otherwise than against the Penalty, and decreed the Plaintiff to pay to the Defendant £2500 with Interest.

This Cause was re-heard by my Lord Chancellor Jefferies ; the Plaintiff insisted, That he had, by Order of this Court, paid £2300 upon the said Judgment, and that the late Lord Chancellor and Lord Keeper had frequently relieved against such fraudulent and corrupt Bargains, made by Heirs in their Father's Life-time ; and that there was not any real Difference where the Contract is for Money and where it is for Goods.

This Court, on reading the Defeazance, declared it fully appeared, that these Bargains were corrupt and fraudulent, and tended to the Destruction of Heirs, sent hither for Education, and to the utter Ruin of Families ; and as there were new Frauds and subtle Contrivances for the carrying them on ; so the Relief of this Court ought to be extended to meet with, and correct such corrupt Bargains and unconscionable Practices, and decreed the former Order to be discharged, and the Plaintiff to be [398] restored to what he hath paid over and besides the Principal Money and Interest.

[S. C. 2 Vern. 14 ; 2 Ch. Ca. 391. See *Davis v. Duke of Marlborough*, 1819, 2 Swans. 108, 139 (n.) ; *O'Rorke v. Bollingbroke*, 1877, 2 App. Cas. 822.]

DURSTON *contra* SANDYS.

2 Jac. 2, f. 108 [1686-87].

The Parson relieved against a Bond given for Resignation.

That the Defendant being Patron of the Rectory of Messenden in Com' Gloucester, and the former Incumbent having resigned the same, the Defendant told the Plaintiff, he would present him to the said Rectory worth about £100 per Annum, and the Plaintiff coming to the Defendant for the said Presentation, the Defendant drew a Bond of £300 Penalty, with Condition, That the Plaintiff should resign the said Rectory at any time within six Months Notice, which the Plaintiff sealed ; and thereupon the Plaintiff was instituted and inducted, and was ever since a constant Resident on the Place, and hath been at Charge of Repairs ; and the Plaintiff demanded Tithes of the Defendant, who refuses to pay the same, but gave the Plaintiff Notice to resign, who resigned the said Rectory into the Hands of the Bishop of Gloucester ; but the Bishop refused to accept the said Resignation, and ordered the Plaintiff to continue to serve the Cure, declaring, That he would never Countenance such unjust Practices of the Defendant, but ordered his Register [399] to enter it as an Act of Court : That the Plaintiff had tendred his Resignation, and that the said Bishop had rejected it : That the Defendant arrested the Plaintiff on the said Bond for not Resigning ; so to be relieved against the said Bond is the Plaintiff's Suit.

The Defendant insisted, That the Plaintiff demanded more than his just due for Tithes : whereupon the Defendant refused Payment ; and that the Defendant requesting the Plaintiff to resign according to the Condition of the said Bond, the Defendant arrested him, which he hopes is just for him to do, and that this Court will not hinder the Prosecution, and that the Plaintiff hath no Colour of Relief in this Court against the said Bond ; and insists, That the Reason of his arresting the Plaintiff on the said Bond, was his Non-residence and litigious Carriage to the Parishioners.

This Court declared, That such Bonds, taken by Patrons from their Clerks to resign at Pleasure, may be good in Law, yet ought to be enjoined and damned in Equity, whensoever they are used to any ill Purposes : And the Defendant making ill Use of the said Bond, his Lordship decreed, That a perpetual Injunction be awarded against the Defendant, to stay Proceeding at Law upon the said Bond.

[400] KNIGHT *contra* ATKYNS.

2 Jac. 2, f. 604 [1686-87].

Marriage Agreement to have Monies laid out in Lands for a Jointure to such Uses, the Remainder to the Use of the right Heirs of the Husband. The Money is not laid out, the Husband dies without Issue; the Money decreed to the Plaintiff, being right Heir.

That the Plaintiff is Brother and Heir as well of John as Benjamin Knight, and also Executor of the said Benjamin; and the said John Knight being seised of a Plantation in Barbadoes of £1000 per Annum, by his Will declared his Debts to be paid, and gave several Legacies, and made his Brother Benjamin sole Executor, and gave him the Residue of all his real and personal Estate, and the said Benjamin proved the Will; and afterwards a Treaty of Marriage was between the said Benjamin and Sir Jonathan Atkyns, on behalf of Frances the Daughter of Sir Jonathan, upon which Treaty it was agreed, that Sir Jonathan should give the said Benjamin £1500 as a Portion with the said Frances, and for a Jointure, in case Frances survived, Benjamin was to add £1500, and the said Sums to be laid out in a Purchase of Lands, to be settled upon Benjamin and Frances for Life, and for a Jointure for Frances in lieu of her Dower, and after their Decease to the Issue between them, and for want of such Issue, to the right Heirs of the said Benjamin; and until such Purchase, the said respective Sums of £1500 to be paid into the [401] hands of the Feoffees, and the Increase thereof to the Uses aforesaid; but in regard such a Purchase could not be speedily found out, Sir Jonathan and Benjamin became mutually bound to each other by Bonds of £3000 Penalty, with Condition reciting, That there being suddenly a Marriage to be had between the said Benjamin and Frances, and for settling a future Maintenance upon Frances in case she survived, and upon the Issue between them; If therefore Sir Jonathan, his Heirs, Executors, &c., should pay, as a Marriage Portion with the said Frances, into the Hands of two Feoffees to be jointly appointed between them, £1500, which (with the like Sum to be paid by Benjamin) was to be laid out upon good Security, real or personal, and the Increase thereof for the Uses aforesaid; and in case the whole was not provided within a short Time, then so much as either Party should deposit, and the Remainder with all convenient Speed, then the said Bonds to be void: That such Provision was sufficient and in full of any Dower the said Frances might have to Benjamin's Estate: That no Feoffees being appointed, the £1500 still remains at Interest in Sir Jonathan's Hands: And the said Benjamin, for Payment as well of his own as his Brother John's Debts and Legacies, and to [402] oblige his real and personal Estate for Performance of the Marriage Agreement, did by Deed in 1681 convey unto Trustees all his Plantations, Houses, &c., upon Trust to himself for Life, and after his Death to satisfy the said Bond of £3000 for Payment of £1500 to Sir Jonathan, for the future Maintenance of the said Frances, according to the said Marriage Agreement, and in full of Dower, and to do all Things according as he by his last Will should direct: That the said Benjamin by Will 10 Dec. 1681, therein reciting the Condition of the said Bond, gave his Wife £1000 unpaid of Sir Jonathan's Bond, and his Trustees to pay £1500, with £500 he had received of Sir Jonathan in Part of his Wife's Portion, which Sums made in all £3000, and was to be laid out in a Purchase of Lands to be settled to the Uses aforesaid; and made Hulcot and Fowler Executors in Trust, to manage for the Plaintiff, whom he made his sole Executor, who afterwards took upon him the Execution of the said Will, and claims the said £3000 to be laid out in Lands, to be settled according to the said Marriage Agreement, which was in case Benjamin died without Issue, the said Lands so to be settled were to come to Benjamin's right Heirs, and the Plaintiff is instituted as Heir and Executor of Benjamin.

[403] The Defendant Pierce confesses the Marriage Agreement and Bonds, as in the Bill, and that the Marriage between the said Henry and Frances took effect, and the said Benjamin is since dead, and that since his Death, the said Defendant Pierce hath married the said Frances, and is thereby entitled to the Benefit of the Bond entered into by the said Benjamin to Sir Jonathan, and the Monies due thereon, and to the third Part of Benjamin's Lands.

The Plaintiff insists, that the said Frances dying without Issue, the Money in Sir John Atkyns's Hands ought now to be paid to the Plaintiff.

This Court (upon reading the said Bond and Condition, and the Deed and Will

of Benjamin) declared. That by the Marriage Agreement and Condition of the Bond, it was very clear that the said Frances having no Issue by the said Benjamin could only have an Estate for Life, or the Interest of the Money for her Maintenance; and that the Plaintiff is well entitled to have the said £3000, paying the Defendant Pierce Interest for the £1500 which the said Benjamin the Plaintiff's Testator was bound to lay out; and decreed accordingly.

[404] KETTLEBY *contra* LAMB.

2 Jac. 2, f. 1064 [1686-87].

Monies to be laid out in Lands for a Jointure by Marriage Articles.

That on a Treaty of Marriage between Richard Kettleby, the Plaintiff's younger Brother, and the Defendant Anne, now Wife of the Defendant Atwood, Articles were entred into and made between Thomas Lamb, Father of the Defendant Anne, of the first Part, and the said Richard Kettleby of the second Part, and the Plaintiff and others, Trustees of the third Part, whereby the said Lamb covenanted to pay £1500 to the said Trustees, as a Marriage Portion with the Defendant Anne his Daughter, and the said Richard Kettleby covenanted to pay £500 more, which being £2000, was agreed to be laid out in the Purchase of Lands, to be settled upon the said Richard for Life, and after on the said Trustees and their Heirs during the Life of Richard, to preserve the contingent Remainders, and after to the Use of the said Anne his Wife during his Life, for her Jointure, and after to their first, and so to the seventh Son of their two Bodies and their Heirs successively; and for Want of such Issue, to the Daughters; and for Want of such Issue, to the right Heirs of the said Richard Kettleby for ever; and that by the said Articles it [405] was agreed, that before such Purchase could be made, the said Trustees should place out at Interest the said £2000, and from Time to Time to pay over the Interest to such Person, to whom the Lands intended to be purchased are limited, as if the same had been purchased and settled accordingly; and there was a Proviso in the Articles, That if the said Richard died before a Purchase should be made, leaving no Issue of his Body on the Body of the said Anne his intended Wife, and Anne survived him, that in that Case the £2000, or so much thereof, as was not laid out in Lands, should either be laid out in the Purchase of Lands to be settled upon the said Anne for Life, with Remainder to the right Heirs of Richard, or else three Parts thereof, the whole to be divided into four Parts of such Monies as should be paid to the said Anne, her Executors, &c., at her Election, so as she made such Election within six Months after the said Richard's Death, otherwise at the Election of Richard's right Heir: That afterwards the Marriage took Effect, and £1500 of the £2000, placed with the said Lamb by the Trustees, who paid the Interest thereof to the said Richard Kettleby during his Life, and before the Money was laid out in a Purchase Richard died Intestate, leaving Issue one Daughter named Anne, who [406] likewise died in a Month after the said Richard; whereupon the Right of the £2000, or Lands to be purchased therewith after the Death of Anne the Wife, accrued to the Plaintiff Edward Kettleby, as right Heir of the said Richard Kettleby; so to have the £2000 invested in Lands, and settled according to the said Articles for the Benefit of the Plaintiff, is the Plaintiff's Suit.

The Defendant Atwood, who hath married the said Anne the Relict of the said Richard Kettleby, insists, That the said Anne his Wife is Administratrix to Richard her first Husband, and the said Anne her Daughter, and thereby well intitled to the personal Estate; and that according to the Proviso in the said Articles, the said Anne had made her Election to have £1500 of the £2000 to be at her own Disposing; and that she was well intitled to the other £500 as Administratrix to Richard and Anne her said Daughter; and that the Marriage Articles being meerly for the Benefit of the said Defendant Anne Atwood and her Issue, and the Plaintiff no Way intitled under the Consideration thereof, there was no Ground in Equity to compel a Performance, so as to give the Plaintiff the Defendant's Portion.

This Case being heard by the Lord Keeper North, he declared, That the £2000 [407] did belong to the Administratrix of the said Richard Kettleby, and ought not to be settled upon his Heir, and dismissed the Plaintiff's Bill; which Dismission being signed and inrolled, the Plaintiff brought his Bill of Review against the said Defendants, and for Error assigned, That whereas it was declared by the said Lord North, that

the £2000 did belong to the Administratrix of Richard Kettleby, and not to be settled upon his Heir : That the same ought to be decreed to be laid out in Land to be settled upon the said Anne only for Life, Remainder to the Plaintiff, as right Heir of Richard, and his right Heirs for ever, according to the Uses of the Articles.

To which the Defendant pleaded and demurred, insisting, the same was obtained on good Grounds and Reasons, and farther insisted, that since the said Dismission, and before the Bill of Review, the said Lamb had paid the said £1500 with other Money, unto the Defendant Atwood in Right of the said Anne his Wife, who was Administratrix to Richard Kettleby and Anne the Daughter ; and that in Consideration thereof, the said Defendant Atwood had made a Settlement equivalent thereto for a Jointure for his said Wife, and the Issue Male of their two Bodies, with a Provision for Daughters, and that they had a Son then Living, and prayed [408] the Judgment of this Court therein.

Which Plea and Demurrer was argued before the Lord Chancellor Jefferies, which his Lordship over-ruled, and ordered the Defendant to answer and he would hear the Cause *ab origine* ; at which Hearing, the Defendant Atwood and his Wife insisted, That the Plaintiff's Demand, being only a remote Remainder in Fee, as right Heir of the Husband, was not so valuable in Interest, as for a Court of Equity to decree a Purchase to be made for the Sale thereof, and to take the Money from the Wife and Administratrix to make that Purchase, when she ought to return the same as Assets ; or however, £1500 of the Money was her own Portion, and belongs to her by her Election within six Months ; and though, according to the strict Letter of the Articles, her Husband Richard Kettleby could not be said to die leaving no Issue, because he had a Daughter living at the Time of his Death, yet the Daughter dying within the six Months allotted for the Wife's Election, in case he had died leaving no Issue, there was great Equity to extend the Construction of that Clause of the Articles, so far as to give her back her own £1500 Portion.

The Plaintiff insisted, That such Remainders in Fee have been considered by this Court, and Purchases decreed to be [409] made and limited to such right Heirs ; and that the £2000 in this Case cannot be Assets, and in like Cases had been so adjudged at Common Law ; and in this Case the Articles have expressly provided, that the Money shall go as the Land ought to have gone, as if a Purchase had been made therewith ; and as for the Pretence of the said Defendant Anne's electing £1500, her Power of Electing did never arise, nor can her Power be enlarged by this Court, beyond the express Words of the Articles ; nor is there Reason for it in this, in regard the Articles provided, that she shall have a Dower besides ; and the said Anne, by Virtue of her two Administrations, hath a great personal Estate besides the £2000 in Question.

This Court declared, That the £2000 must go as the Lands ought to have gone in case a Purchase had been made ; and yet the Wife had no Power to elect £1500, Part thereof, because her Husband died leaving Issue, and so her Power of Election never arose, nor did any Circumstances appear to his Lordship in this Cause to induce him to enlarge the Construction of the Articles, touching such Power of electing, beyond the express Words thereof ; and decreed the said Dismission to be reversed, and that the Defendant Atwood and Anne his Wife do lay out the £2000 [410] for purchasing Lands in Possession in Fee simple, to be settled according to the Intent of the Articles.

And as for the Defendants the Trustees, in regard they relied upon the said Dismission signed and inrolled for their Indemnity, in paying the said £2000 to the said Atwood or his Wife, they are indemnified thereby.

PAGET *contra* PAGET.

3 Jac. 2, f. 2 [1687-88].

Blanks filled up after the Sealing and Execution of a Deed, yet good.

A Deed of Revocation, and a new Settlement made by that Deed, tho' after the Sealing and Execution of the said Deed, Blanks were filled up in the said Deed, and the said Deed not read again to the Party, nor released and executed, yet held a good Deed.

SMITH *contra* FISHER.

3 Jac. 2, f. 641 [1687-88].

Money devised to one for Life, with Limitations over, good.

That Susan Beale by her Will in Writing, after several Legacies thereby given, gave all the rest and residue of her Estate unbequeathed, which consisted mostly in ready Money, to be put forth to Interest by her Executors, and one Half of the Interest to be paid to the Plaintiff Anne Cole her Sister, during her Life, and the [411] other Half of the Interest unto the Plaintiff Anne Smith, Daughter of the said Anne Cole, and after her Mother's Decease, to have all the Interest during her Life; and if the said Anne Smith died without Issue of her Body, then the Principal of the Residue should be equally divided between the Defendants Mary Clever and Elizabeth Farmer.

The Question is, whether the Devise over to the Defendant Clever and Farmer, as aforesaid, was a good Devise.

This Court declared, that the said Will was a good Will as to the Limitations over to the Defendants Clever and Farmer; and decreed the Executors to account accordingly.

COM' DORSET *con.* POWLE.

3 Jac. 2, f. 148, 599 [1687-88].

Separate Maintenance.

This Case is, where by the Deeds and Agreement before Marriage the Countess of Dorset had an absolute Power to dispose of all the personal Estate she had at the Time of her Marriage with the Defendant, and the Proceed thereof; and had by her Will and otherwise well disposed of, and appointed the same to the Plaintiff; and this Court ordered the Defendant to confirm the same; but as to the Rents and Profits of the real Estate, [412] upon Consideration of the several Clauses of the Deed relating to the said Estate, and different penning of the same from the other Deeds that concerned the aforesaid personal Estate, his Lordship declared, that the said Countess had no Power to dispose of the same.

By Indenture tripartite, dated 28th of June, 31 Car. 2 [1679], made between the Defendant Mr. Powle of the first Part, Sir Thomas Littleton and Charles Brett Esquire of the second Part, and the Countess of Dorset on the third Part, reciting, That the said Countess was seised in Fee of several Manor Lands, Tenements and Hereditaments in England; and reciting there was a Marriage intended between Mr. Powle and the Countess, it was agreed, that if the Marriage took Effect, the Countess should during the Coverture receive and dispose to her own Use, and at her own Will and Pleasure, of all the Right and Title she had or claimed in the said Manor Lands and Premises, or in any other Manors or Lands of the Countess's in England, and of all the Rents and Profits thereof, so as Mr. Powle, his Executors, Administrators and Assigns, were not to intermeddle, nor have any Benefit or Advantage thereby in Law or Equity; but should join with the Countess from Time to Time in the Disposing thereof, as she should appoint; [413] and the Defendant Mr. Powle thereby covenanted, that if the Marriage took Effect, Mr. Powle, his Executors or Administrators, without the Consent of the Countess in Writing, would not incur the Premises, or receive the Rents and Profits to their own Use; but from Time to Time would upon Request, authorize such Persons, after receiving the same for the Countess's separate Use, as she should think fit, so as she might have nothing to do therewith, either in Law or Equity; and that upon Request, he would make reasonable Leases of the Premises, for such Considerations and Terms, and under such Covenants, as the Countess should think fit; and gave such Acquittances for the Rents as should be requisite and convenient, and at the Charges of the Countess; and her said Trustees should commence and prosecute any Suit necessary for the Recovery of any Part of her Estates, and in Defence of her Right thereto; and that the said Countess might dispose of the Premises and receive the Profits, according to the true Intent and Meaning of the said Indenture tripartite, without the interruption of Mr. Powle, his Executors or any claiming under him or them.

And by another Indenture tripartite, 28 June, 31 Car. 2 [1679], between the Countess [414] of the first Part, Sir Thomas Littleton and Mr. Brett, of the second Part, and Mr.

Powle of the third Part, reciting, that whereas there was a Marriage to be had between Mr. Powle and the Countess, and that by Agreement she was to have and dispose to her own Use, and at her Pleasure, all her Jewels, Plate, Goods and Chattels, both real and personal, and the Benefit thereof, so as Mr. Powle, his Executors or Administrators, were not to intermeddle therewith; the Countess by Mr. Powle's Consent, did make a Bargain and Sale to the said Littleton and Brett, of all her Jewels, Plate, Household stuff, Money, Goods and Chattels real and personal, upon Trust that they should dispose of the same, and the Proceed thereof, to such Persons and such Uses, as the Countess by any Writing or by her Will should appoint, so as Mr. Powle might not have any Power or Interest, in Law or Equity, to sell, charge, or dispose of the same, or any Part thereof; and for Want of such Appointment upon Trust, to deliver the same, or such Part thereof as should be undisposed of by the said Countess, to her Executors or Administrators; and Mr. Powle by the last Deed covenanted not to hinder the same; and also that they should be free from all Debts and Engagements of the said Powle: That Mr. Powle and the Countess [415] intermarried, and afterwards the said Countess, according to the said Agreement and Power, as long as she lived, disposed of all the Rents and Profits of her real Estate, and without Powle's intermeddling; That afterwards the said Trustees dying, Mr. Powle, by Deed with the said Countess, transferred the said Trust to other Trustees; and also covenanted not to intermeddle, but the said Premises to be solely in the Power of the said Countess: And it was agreed, that the Receipts of the Countess should be sufficient for the Premises or the Proceed thereof, notwithstanding the Coverture: That the Countess, by her self and the Trustees, received the Rents and Profits of the Premises, and disposed thereof without Mr. Powle: That the said Countess by Deed of Appointment in 1682, and by her Will in 1684 whereof she made the Plaintiff the Earl of Dorset her Son Executor, to whom she (after some Bequests and Appointments to other Persons) bequeathed and appointed all the rest of her personal Estate, and also gave to him all her Monies and Rents, and all Arrears of Rents in her Steward and Tenants Hands, to all which the Plaintiff the Earl (the said Countess being dead) is intitled.

The Defendant Powle insists, that as to the Rents and Profits of the real Estate, [416] he claims the same; and that he was so far from not intermeddling therewith, that he would not permit the Stewards to receive the Rents without Warrant from himself; and that he passed all the Accounts thereof, and rectified them after the Countess had signed them.

This Court declared, There was an absolute Power in the said Countess of disposing all her personal Estate, that she was possess'd of at the Time of her Marriage, and the Proceed thereof, and that she had, pursuant to such Power, well disposed of the same; and decreed the Defendant Powle to confirm the said Will and Appointment: But as touching the Rents and Profits of the real Estate, upon Consideration of several Clauses of the Deed relating to the said Estate, and different penning of the same from the other Deeds that concerned the personal Estate, This Court declared, the said Countess had no Power to dispose of the same, and all the Arrears thereof to be accounted for to the said Mr. Powle.

[417] The CASE of the DUKE OF ALBEMARLE;
With the Arguments thereon.

COM' MOUNTAGUE & AL' *contra* COM' BATH & AL'.

4 W. & M. f. 90 [1692-93].

Revocation—Will.

The plaintiffs, after a Trial at Law directed out of this Court, wherein the Point in Issue was, Whether a Settlement was well made and executed, and a Verdict for the Defendant, that it was good and valid in Law ? come into this Court to seek Relief upon the Equity reserved against the said voluntary Settlement, wherein was a Power of Revocation by Virtue of a Will afterwards made, the Question being, Whether in Equity the said Will was a Revocation of the Deed, tho' not strictly pursued ?

[418] The Bill was :

That Christopher, late Duke of Albemarle, being seised of several Manors, Lands and Tenements in several Counties, having married the Duke of Newcastle's Daughter, and being possessed of a considerable personal Estate, frequently declared, That he would make ample Provision for the Duchess (who then had but £2000 per Annum Annuity settled on her for a Jointure by George Duke of Albemarle, upon her Marriage with Duke Christopher) for the Support of her Dignity in case she survived him, and that if he should have no Issue Male, he would leave to her for her Life at least £8000 per Annum out of his real Estate ; and in Pursuance of such his Resolutions, and likewise for the settling of the Remainder of his Lands, upon his dying without Issue, on Colonel Monk and others, made and published his last Will in Writing, dated 1 July 1687, whereby—

He gives to his Wife, Coaches, Jewels, Plate, &c., and for advancing her Living and Support, if he have no Issue Male, and in full of her £2000 per Annum Rent-charge and Dower, he gives her his Lands in Essex, Stafford, Lancaster, York, Lincoln, Surrey, Devon, Hertford, Middlesex, Berks and Southampton, for her Life ; and if she accept the same, that she shall Release the [419] £2000 per Annum within three Years after his Death, or else that Devise to be void. The Remainder of his Lands in Berks to Sir Walter Clarges *pour vie*, and after in Tail Male ; Remainder to his Cousin Henry Monk in Tail Male ; Remainder to his own right Heirs.

To Beville Greenvile (Son to the Earl of Bath) his Freehold Lands in Surrey and Southampton, for Life, and then in Tail Male ; Remainder to his Cousin Thomas Monk *pour vie*, and then in Tail Male ; Remainder to his Cousin Henry Monk in Tail Male ; Remainder to his own right Heirs.

His Lands in Devon to Colonel Thomas Monk for Life, and then in Tail Male ; Remainder to his Cousin Henry Monk in Tail Male ; Remainder to his own right Heirs.

All his Lands in Ireland to his Cousin Henry Monk in Tail Male ; with Remainder to his own right Heirs.

Provided, That if he have any Issue, all Devises of any Sums of Money (except for his Funeral, his Father's Monument, Almshouses and Legacies to his Executors) shall be void ; and if he leave any Issue, the Premises devised to Sir Walter Clarges, Mr. Greenvile, Thomas and Henry Monk, and their Issue, shall go to his Issue (*viz.*), to his Sons successively in Tail Male ; if Daughters, in Tail with Remainders to the said Persons, as before.

[420] Provided, If he leave Issue Male, he deviseth to his Wife, as an additional Jointure to her Rent-charge, Lands in Devon and Essex for her Life, and makes the

Dutchess during her Life, and in case of her Death, the Dutchess of Newcastle Guardians of the Children he shall have.

And in case it happen, that Colonel Thomas Monk, or any Heirs Males of his Body, shall live to come and be in Possession of the Premises devised to him, he desires they will live at Potheridge, the antient Seat of the Family; and desires his Majesty to grant them the Title of Baron Monk of Potheridge, that it may remain in the Family in Memory of his Father and himself, and his Service his Father had the Honour to do the Crown in the Restoration; and makes the Duke of Newcastle, Lord Cheney, Jarvis Pierpoint, Sir Walter Clarges, Sir Thomas Stringer, Henry Pollexfen Esq. and others, Executors.

That the Duke gave Direction to Henry Pollexfen Esq. to make his Will, and when drawn, was fully approved of by the Duke upon mature Deliberation: Which Will, being in three Parts, he carefully locked up, and after, leaving two Parts of his Will to two Persons and kept the third, he went to Jamaica.

[421] That the Duke when in Jamaica, hearing Colonel Thomas Monk was dead in Holland, sent to the Earl of Bath, Sir Thomas Stringer and others, to send over for Christopher Monk, the Colonel's eldest Son, to educate him so as to fit him to bear the Character of one whom he intended the greatest Part of his Estate, if he died without Issue.

In September 1688 the Duke sickened in Jamaica, and there again published his said Will, and declared that, if he died, the Box and Will should be delivered to the Dutchess; and died in October following.

That the Dutchess, at her Return from Jamaica, found that the Earl of Bath set up another Will, dated 3 August 1675, whereby the Remainder of the greatest Part of the Estate was given to the Earl of Bath and his Heirs; and likewise a Settlement by Way of Lease and Release, in Corroberation of that Will, by which he seeks to avoid and frustrate the Will of 1687. That the Duke sent to the Earl of Bath for the Will of 1675 (if any such) to have it delivered to him, that he might make another Will: That the Will of 1687 was sealed at Sir Robert Clayton's the same Day after other Writings had been by him sealed to the Chancellor Jefferies of some Lands sold to him; and that the Dutchess, nor any of her [422] Relations ever knew or heard of the said Deeds, till after the Duke's Death; nor known to Sir Thomas Stringer, who was the Duke's standing Counsel. And the Plaintiffs farther insist, if there were such Deed, yet it ought not to avoid or impeach the said last Will, though the Power of revoking the same was not literally pursued, yet the same in Equity ought to be taken as a Revocation; and the rather, for that at the making of the Will, the Duke remained Owner of the Estate, and he looked upon himself so to be; for that he had, since the said pretended Deeds, sold some Part of the Estate to Chancellor Jefferies, without any Revocation; and the Earl of Bath paid no valuable Consideration; and that she ought to be protected in the Enjoyment of the personal Estate; and the specifick Legacies devised to her in the Will of 1687 tho' the Will of 75 (if any such be) was intended by the Duke, principally to hinder the Descent to his next Heir; and the Deeds (if such there be) were for the same Purpose; and that though the Deed recites, to confirm the last Will of 75, yet does in several Places controud it and alter it; whereby, and by the extraordinary strange and unprecedented Declarations, Provisoes and Covenants therein, the Plaintiffs believe the Deeds were never executed by the Duke, or if so, that [423] he was surprised therein; and pray Relief in the Premises.

To this the Defendant makes Answer, and sets forth the Will of 1675, whereby the greatest Part of the whole Estate was given to the Earl and his Heirs; and sets forth the Considerations of his so doing, as antient Kindred and Esteem between Duke George and the Earl of Bath, and several Services and good Offices that he had done the Family; and likewise sets forth, that being well satisfied with such his Disposition of his Estate, and finding that he had been often importuned to alter the same, and fearing lest the repeated Practices and Arts, attempted against such his Disposition, might some Time or other surprise him into a Compliance, consulted with Sir William Jones and other his Counsel, how to obviate such Practices, and to settle his Estate in such Manner, as that it might not be avoided, although for his Ease he should at any Time seem to yield to the Solicitations of his near Relations; whereupon in Anno 1681 the Duke makes a Settlement, wherein he begins; That for assuring of the Honour, Manors, &c. upon a Person of Honour, &c. and for the Corroberating and Confirming the said Will of 75, and to the End, that no pretended last Will should be set up by any

Person whatsoever, and for the natural Affection [424] that he beareth to the Earl of Bath, &c., grants by Lease and Release several Manors, Lands and Tenements, &c., some in Possession, and some in Remainder, upon the Earl of Bath in Fee, and so to Walter Chorges, &c. in which Deed there was this Proviso: That if the Duke shall, at any Time during his Life, be minded to make void the said Indenture, or any Estate therein contained, or to dispose of the said Honours, Manors and Lands in any other sort, or to any other Person or Persons, and his or their Heirs, or for any other Purposes, and the same his Mind, Intent and Purpose, should signify and declare in Writing under his Hand and Seal in the Presence of six credible Witnesses, (three whereof to be Peers of this Realm) and should pay to his Trustees, or any of them the Sum of six Pence, with Intent or Purpose to frustrate or make void the said Indentures; That then and not otherwise, and immediately after such Signification, Declaration, and Payment or Tender of Payment of six Pence as aforesaid, the said Use and Uses, Estate and Estates, Trusts, Confidence, Intents and Purposes, and all and so much of the Premises, whereof the Duke should make such Signification or Determination, should cease, determine and be utterly void to all Intents, Construction and Purposes [425] whatsoever; and that then, and from thenceforth, it should and might be lawful for the Duke by such Writing, or any other Deed or Writing, subscribed, sealed and testified as aforesaid, to declare new or other Use or Uses, Trust or Trusts of all or so much of the Premises, whereof the Duke should make any such Signification or Declaration, or otherwise to dispose of the Premises, or any Part thereof at his free Will and Pleasure; any Thing in the Deed to the contrary notwithstanding.

And for the further Prevention of the Mischief and Inconveniencies that might attend any future or sudden Surreptitious Will, which might at any Time defeat his recited Will (which he declares to have made upon mature Deliberation) covenants for himself, his Heirs, Executors and Administrators (with the Duke of Newcastle and his Trustees) that he would not revoke, annul or discharge the said Will, or any the Legacies thereby devised, unless by some Instrument sealed and executed in the Presence of many, and such Witnesses, as are in the said Proviso specified, declared and described for credible Witnesses within the said Proviso, according to the Intention, literal Sense, and true Meaning of the Duke expressed in the said Proviso.

He denies the said Deed was obtained [426] by Surprise; but that the Duke executed the same in the Presence of many credible Witnesses; and that the Duke left the Deed and Will in his Keeping.

And as to so much of the Bill, as requires the Defendant to give an Account of what Part of the said Duke's personal Estate came to the Defendant's Hands, he is advised by the Rules of this Honourable Court, that he is not compellable to Answer thereunto; for that it appears by the Plaintiff's Bill, that at the Time of the exhibiting thereof, the Plaintiffs were not intitled to make such Demand, or to have such Account, it thereby appearing of their own shewing, that they have not proved the said Will of 87, but that the same was and still is under Controversy undetermined in the Prerogative Court; whereof or as to that Part of the Bill he demurs.

As to the Objection, That it was a concealed Will and Deed, the Defendants insist, that it was done silently, but the Duke would have it kept secret, that he might be free from Trouble and Importunity.

And they insist, That as to the last Will of 87, That the Duke advised with Counsel, to know whether a Will made after the Settlement would avoid or impeach the Settlement, was answered that it [427] would not, and that Proviso must be strictly pursued, whereupon he was well satisfied; and that the said Deed ought to be supported, and not set aside in Equity, being made upon such meritorious Consideration of Blood, Merit, &c.

The Plaintiffs insist, That the said Deed (if any such) being a voluntary Settlement only, that the Will of 87 is a good Revocation thereof in a Court of Equity. So that the great Question was, if the said Deed (it being found to be valid at a Trial at Law) is revoked by the said last Will, according to equitable Intention or Construction.

This Cause having been debated and argued several Times by learned Counsel, and afterwards by three Judges, (viz.) my Lord Chief Justice Holt, the Lord Chief Justice Treby, and Mr. Baron Powell, it was agreed by them, that the Deed was a good Deed, well executed, and not revoked by the Will of 1687.

The Lord Chief Justice Treby's Argument in short was thus:

In 1675 the Duke made his Will, and declares, in respect that the Earl of Bath

was his Kinsman, and had done many Kindnesses to him and his Family, the Earl should have the greatest Part of his Estate, and gives several Legacies to one [428] Monk; and then he makes a Deed of Settlement in 1681, though the Limitations by the one and the other differ: but it is not made to revoke, but to confirm the Will. Both the Will of 1675 and Deed of 1681 do agree in giving the greatest Part of the Estate to the Earl of Bath, but the Proviso in the Deed makes the Dispute: and then there is a Will of 1687 wherein a larger Estate is given to the Dutchess and Colonel Monk, &c. and desires the Honour of Potheridge may be established on the Monks. The Plaintiffs Bill is to establish the Will of 1687 and set aside the Deed of 1681 and Will of 1675. And the Deed on the Hearing of the Cause was directed to be tried, and a Verdict for the Defendant, and the Plaintiff hath acquiesced under it, and so this Deed must be taken as a good Deed and Conveyance without any Suspicion, for the Right was tried, and the whole Contents tried, and if it were good at Law, whether there be Cause to set it aside in Equity is the Question?

He was of Opinion, That the Deed was a good Deed, and ought not to be impeached in this Court.

The Plaintiffs Arguments against the Deed are:

1. Surprise.

2. Concealment.

[429] 3. That the Will of 1687 is a Revocation in Equity.

4. That there is a Trust.

As to the Surprise: He observed, they did not make Use of the Word Fraud in gaining the Deed, but that it was something put upon the Duke for Want of Deliberation. He said, he was not satisfied that there was any Surprise upon the Duke, for he was not languishing at that Time under any Sickness, but it was done and executed in good Company, and after Dinner, with great Consideration both before and at that Time. They pretend a Want of Circumstances in the Execution; whereas Sir William Jones was advised with before the Deed sealed, and present at the Time of the Sealing: Several other Circumstances were insisted on by the Plaintiffs, but none are sufficient to set aside the Deed. The Deed of 1681 and the Will of 1675 are not inconsistent, though they differ in the Limitation of the Estate: But by both the greatest Part of the Estate is given to the Earl of Bath. Tho' they could not find Instructions for drawing the Deed, tho' the Deed was not found to be read, tho' no Counterpart was sealed; yet none of these by any of the Precedents have either been singly or altogether allowed as Causes to set aside a Deed in Equity. He was of Opinion, that the Deed doth confirm the [430] Will of 1675 in the settling and assuring the Estate, Part on the Dutchess, and Part on the Earl: and as to particular Limitations, the Duke might alter his mind from the Will, and do it according to the Deed.

The third Thing they insist on by Way of Surprise is, That it was done contrary to the Duke's Intention: Whereas the Defendants have proved, that it was according to his Intention, and the other Side say not, neither before nor after the making of the Deed; for that there were several Wills made by Duke George, and not a Word of any Limitation of any Estate to the Earl of Bath. Which is answered by the other Side, That the Wills are in few Words, and thereby all given to Duke Christopher, and not any Provision made for any younger Son or Daughter; neither in these Wills, nor in the Will of 1675 is there any Thing given to the Father of this Monk.

Another Objection, That the Duke never intended any Thing to Sir Walter Clarges, for that he was fallen into his Displeasure, and what is given is a remote Remainder; but there were Proofs of continued Kindness to the Earl of Bath. And the greatest Proof, that there was no Surprise, was the Presence of Sir William Jones at the Execution of the Deed, who [431] was of great Ability and Integrity, and would not be guilty of a Surprising; and he was satisfied that there was nothing but fair Dealing in the Execution of the Deed.

As to the Will of 1687, perhaps it might be intended not to give his Estate to the Earl, and that there was great Advice taken on that Will.

But what was the Meaning of the Duke in making the Will of 1687 if it must signify nothing?

The truest Answer that hath been given is, That he advised whether a Will would revoke the Deed, and when he understood that it would not, but that he had put all out of his Power, (except by a strict Revocation) then he gratified the continued Importunities of his near Relations, and endeavours by that to render himself easy; so

he conceived the Deed well executed, and is pursuant to the Will of 1675, and cannot be set aside on the Point of Surprise.

The next Point insisted on is Concealment, and they insist on a Clause in the Earl's Answer, where the Duke sent for the Deed in Order to make a new Settlement : The Will he might have revoked without the Deed ; but as the Plaintiff saith, the not doing of it was a Concealment ; and the Argument is good if [432] the Fact were true : But it's not so, for it doth not appear that he ever intended to revoke the Deed ; and both the Will of 75 and the Deed of 81 were delivered into the Earl's Hands just before the Duke went abroad ; and the Concealment was not from the Duke, but the Dutchess ; and the Precedents cited of *Clare contra Com' Bedford*, and *Row contra Pott* come not up to this Case.

The next Point insisted on is Revocation. The Will of 1687 (say the Plaintiffs) is a Revocation in Equity, though there was not the Quality or Number of Witnesses described and limited in the Proviso. It's no Revocation, neither was it intended so ; the Duke wrote a letter to the Earl, that he had done him no Wrong, and he left the Keys with him, and imployed the Earl in selling the Cockpit and Albemarle-House, and the Duke continued in the same Mind to Monk, and Sir Walter Clarges, and there seemed no Reason why he should not be of the same Mind as to the Earl ; and there was a great Provision made for the Dutchess by the Will and Deed, but not a Word of Mr. Monk in either, but only in his last Will. Where there are two voluntary Conveyances, he that hath the Estate by Law shall hold it. Where a Party shall be relieved where there is a Defect, they shall be relieved where there [433] is a Deceit or Falsity ; and the Precedents are, that they have been relieved in such Cases, where it is to pay Debts or to provide for Children ; several Precedents have been cited, as *Prince and Green*, *Ferrers and Tanner*, *Webb and Webb temp. Eliz.* Doctor Hamilton *contra Maxwelllin*, 1655. *Bowman and Yates*, *Wallis contra Crimes and Scot*, *Thwayts contra Deg*, *Arundell contra Phillpott*.

As for the Trust, nothing was said by him of it, for it cannot be presumed, that there was any resulting Trust, for that was to undo what he had done before. The Defendants are in Possession by a Verdict upon the Deed, and there is no Reason to disturb them.

Lord Chief Justice Holt : This Case depends on a Will of 1675 and a Deed of 1681 and a Will of 1687, and the Question is, whether the Will of 1687 doth revoke the Deed of 1681, it being not pursuant to the Power : He was of the same Opinion with Baron Powell and Lord Chief Justice Treby. The Deed is a good Deed, and so all the Evidences and Circumstances relating to the Deed ought to be taken to be true, (viz.) that Sir William Jones was advised with in the Draught, and was present as a Witness, and that the Will of 1687 is a good Will ; but not to be [434] relieved against the Deed of 1681, which must be taken to be a good Deed, and he reduced what he had to say to four Heads.

1. Of the Frame and Manner of the Deed.
2. Whether on the Evidence the Deed were unduly obtained.
3. Of the Circumstances and Conditions of the Persons.

4. Of the Person of the Duke himself, and the Circumstances he was in when he made his Will of 1687, for whether the Plaintiff shall be relieved against the Deed is the Question.

As to the first : It's said the Will of 75, and the Deed, make but one Conveyance, and that is fetch'd from Law ; for at Law, a Fine and Recovery, and Deed to lead the Uses, are but one Conveyance. So as to the first, from the Contradictions and Misrecitals in the Deed which have been insisted on, there is no Cause to relieve against the Deed.

As to the second, on the Manner of obtaining the Deed, he said, he could not find any undue Obtaining of the Deed, but that Sir William Jones's Hand was in the Proviso of the said Deed ; and that the Deed was not executed by a Surprise, for the Duke's Counsel was present at the Execution of the Deed ; and here is no Fraud [435] to set it aside. As to the Case of *Winn and Bodvile*, which has been cited, there was a great Fraud and Practice ; but there is no Fraud or Circumvention here, but the Deed is fairly obtained, and there is nothing but a presumptive Evidence against it, which ought not in Equity to be an Evidence against the Deed ; so as there appears no Evidence that the Earl surprised the Duke, or that the Duke was surprised.

As to the third Point, touching the Circumstances and Conditions of the Persons.

The Earl was a near Relation and had done many Kindnesses to the Duke and his Family, and was especially entrusted by him; and though the other Persons that claim by the Will of 1681. may be of Relation to him, yet he that hath the best Title hath the Right. And so it is in the Case of Persons, where both claim under two voluntary Conveyances.

As to the fourth and last Point, touching the Circumstances the Duke was in when the Will was made. The Duke, when he made the Will, was under a restraint by the Deed of 1681. for his Power was Executed, and the Duke had restrained himself. And the Court of Equity hath no Power to examine into the Reasons and Considerations for doing it; and there may [436] be Reasons for a wise Man to restrain himself: for he may not know what Surprise may be put upon him; and as there may be Reason for it, so it shall be presumed there was good Reason. Further, there is no Evidence of an Intention in the Duke to Execute the Power, for he had an Opportunity to have done it; and because a Man may one Way dispose of his Estate, that therefore he may do it any Way, is strange; and if that may be done, it will over-throw all the Conveyances that are made.

They on the other Side pretend the Duke had forgotten the Deed. It was made but in 1681. and well attested by credible Witnesses; and if he had forgotten it, his Counsel had an Abstract of the Deed, and because a Man had forgot a Deed, that ought not to be a Cause in a Court of Equity to set that Deed aside, for Memory may fail, but a Deed is Permanent; so there ought to be no Relief against the Earl, and those that claim by the Deed of 1681.

Lord Keeper: There be three Suits in this Court; the Dutchess her first Bill is to set aside the Deed of 1681, and the second Bill by the Monks much to the same Effect, and on the same Evidence; and the third Bill by the Earl, complaining of the Will of 1687. On the hearing of the Causes the 8th day of July 1691. before the then Lords [437] Commissioners, and on a Trial directed, touching the Validity of the said Deed of 1681, there was a Verdict for the Deed, and this Verdict hath not been stirred. The Cause comes now to be heard on the Equity reserved on the whole Matter. I declare the Deed doth stand unrevoked at Law, and the Defendant the Earl of Bath is well entitled under that Deed, for here are no Creditors nor Purchasers, or any Children to be provided for, and the Benefit that comes to the Earl, is the Essex and the Northern Estate.

The Court did declare, that there was not any sufficient Matter in Equity appeared to set aside the Deed, therefore dismissed the Bill of the Earl of Montague and Christopher Monk, so far as they seek Relief to set aside the said Deed of 1681, and as to the other Matters, Equity to be reserved.

REPORTS and CASES Taken and Adjudged
in the COURT OF CHANCERY, in the
Reign of Kings Charles I., Charles II.,
James II., William III., and Queen Anne.
Vol. III. [1635–1710].

BRETTON *contra* BRETTON.

12 Car. 2 [1660–61].

Devise to younger Children how to be construed.

Money was bequeathed to younger Children, where there were divers Daughters and one Son, who was the Heir at Law, and a fair Inheritance, and yet was by Birth a younger Child : It was decreed, that he was not a younger Child within the Devise, and should not take by it, he being Heir at Law.

[2] DAVIS *contra* WAKEFIELD.

Mich. 13 Car. 2 [1661]. 27 Nov. Mr. of the Rolls.

An Injunction into the Exchequer.

A Bill was exhibited in Chancery, and a Plea allowed to it ; the Plaintiff declines that, and brings a new Bill in the Exchequer for the same Matter : ordered, That the Plaintiff elect in which Court he will proceed ; if he elect in the Exchequer, the Bill in Chancery is dismissed ; if in Chancery, an Injunction is awarded to stay his Proceedings in the Exchequer, *nisi causa*.

SIR SAMUEL JONES AND WILLIAM JONES, EXECUTORS TO SIR WILLIAM JONES,
contra BRADSHAW.

Easter Term, in Court, 13 Car. 2 [1661].

Payment by Decree not pleadable at Law, is to be allowed by Decree.

Mary Cotton bequeathed £500 to one Dormer, and made the Testator her Executor and died ; and he sold Lands of his to the Plaintiff Sir Samuel, and left £500 of the Purchase Money in Sir Samuel's Hands, who gave Bond to the Testator in his own Name for it : The Testator made his Will, and the Plaintiffs Executors, and died ; they inventoried the £500 as Part of the Testator's Estate ; afterwards Dormer obtained a Decree against the Plaintiff for £500 upon this Equity, that that £500 was left [3] in Sir Samuel's Hands with Interest, and upon Trust that he should pay it to Dormer, the Court declaring that it was not Assets of Sir William Jones's Estate : Afterwards the Defendant Bradshaw brought an Action against the Plaintiffs on a Bond of their Testator, and the Plaintiffs not having Assets in respect of the £500 upon Dormer's Decree ; and that Decree and Payment upon it not being pleadable or to be given in Evidence at Law, thereupon the Plaintiffs exhibit their Bill here against the Defendant, setting forth the Case *ut supra* : And the Question was, Whether the Plaintiffs should have Allowance for the Payment of the £500 against the now Defendant : And it was decreed they should, and that the Matter should go to an Account, and the £500 so paid to be allowed the Plaintiffs on Account. And Sir John Maynard said, That if a Man should sell his Land and leave Part of the Purchase Money in the Purchaser's Hands, and gives or appoints this Money to be paid to a Stranger and after makes his Will, the Stranger shall have the Money, and it shall not be Assets. *Vide* Hob. 265.

[4] DAVIE *contra* BEVERSHAM & Ux'.

Mich. 13 Car. 2 [1661]. Lord Chancellor and Mr. of the Rolls.

Lands contracted for, let pass by Devise of the Purchasers. Vendor, after Contract for Purchase, stands Trustee for Vendee.

Henry Davie agrees for the Purchase of certain Copyhold Lands which were surrendered out of Court to his Wife, but before Admittance dies, having other Copyholds; and having made his Will after the said Contract, and thereby devised to the Plaintiff, who was then and at his Death his visible Heir, all his Copyhold, after his Death, his Wife being *previent Ensient*, after his Death is delivered of the Plaintiff's Wife; who then becomes the Heir to the Devisor; the Plaintiff, taking it for granted that the Copyholds so contracted for, did not pass by the Will, suffered the Heir to be admitted thereunto, and held the same of the Heir for twenty Years, and paid her the Rent for that Time, and had agreed so to do, so long as he should hold them: But afterwards Differences arising between the Heir and him about other Matters, the Plaintiff exhibited his Bill (*inter alia*) to have these Copyholds decreed to him; and upon the Hearing, it was declared by the Court, That it was clear the said Copyholds, so agreed for, did pass by the Will to the Plaintiff, for that the [5] Purchaser had by the Contract only an Equity to recover the Land, and the Vendor stood trusted for the Purchaser, and as he should appoint, till a Conveyance executed: And the Case of the Lady Fohamb 1651, was cited, where it was ruled, that if upon Articles for a Purchase, the Purchaser dieth and deviseth the Lands before the Conveyance executed, the Lands do pass in Equity; but in the principal Case, inasmuch as the Plaintiff had admitted the Title to be in the Heir, and paid her Rent, and agreed so to do, the Court would not decree, but declared, if the Plaintiff had come in Time, it was proper to decree.

HALL *contra* HIGHAM.

Hill. 14 Car. 2 [1663].

Costs given in general, shall be Costs at Law and Chancery.

The Plaintiff's Bill is to be relieved against the Penalty of a Bond: And it is ordered he shall pay Interest and Costs, which will extend unto the Defendant's Costs at Law as well as in Chancery. *Vide Report*, Trin. 1663.

ANONYMOUS AFTER TRIN.

14 Car. 2 [1663]. Lord Chancellor. Upon a Demurrer.

[S.C.] 1 Chan. C. 11. Where it behoveth the Plaintiff to make Oath of the Want of a Deed and where not, in Order to a Discovery.

The Bill was barely for Discovery of a Deed; the Defendant demurred, for that the Plaintiff had not made Oath [6] according to the Course of the Court, that he had not the Deed. Serjeant Glyn for the Plaintiff insisted, That the Oath was not required by the Course of the Court in this Case; and he took this Difference, That when the Bill alledgeth the Want of a Deed, and seeketh to be relieved upon the Matter of that Deed by a Decree, there such Oath is necessary; but where the Bill seeks no Decree, but barely to have the Defendant discover whether he hath such Deed or no, or to have the Deed produced at a Trial, in this Case, the Plaintiff ought not to be put to his Oath; for it is not to be presumed the Plaintiff would exhibit a Bill in either of the later Cases, if he had the Deed. Note; this Difference was well approved by the Lord Chancellor, and thereupon the Demurrer over-ruled.

LADY DACTES *contra* CHUTE AND HOUGHTON.

Pasch. 15 Car. 2 [1663]. Lord Chancellor, Master of the Rolls.

Marriage determines an Agreement made by Baron with Feme before.

The Plaintiff being a Widow, seised of a Jointure of £700 per Annum, and Chute, the Defendant's Father, made Suit to marry her, and she consenting, he before Marriage agreed with her by Deed in Writing, That it should be lawful for her, or such as she should [7] appoint, during the Coverture, to receive and dispose of the Rents of her

Jointure as she pleased. This Deed was put into Houghton's Hands, he being formerly the Plaintiff's Agent : Then the Plaintiff and Mr. Chute married, he having first agreed with Trustees of hers to settle her a Jointure ; and they lived together ten Years, during all which Time Houghton received the Rents of the said Jointure of £700 a Year, and constantly, with the Approbation of the Plaintiff, accounted for and paid the same to Mr. Chute her Husband ; and the Plaintiff in all that Time never appointed Houghton to receive the Rents for her, nor ever claimed any Benefit by the Agreement left in Houghton's Hands : But at the ten Years End Mr. Chute dying, having made the Defendant his Son his Executor ; the Plaintiff exhibited her Bill to have an Account from Houghton, and charged £1000 to be resting in his Hands, unaccounted for, that was received in Mr. Chute her Husband's Life-time, and she made Title to the same by the said Agreement before Marriage, made by Mr. Chute with herself. And upon hearing, the Cause *inter* Earl of Suffolk and Greenville being cited, and urged in the Argument of the Defendant's Counsel, the Court declared, The aforesaid, Agreement before Marriage was immediately [8] extinguished by the Marriage, and that the Plaintiff could not be relieved thereupon ; but ordered Houghton to account before a Master, for what he had received after Mr. Chute's Death.

SIR EDWARD HEATH *contra* HENLEY AND WHITWICK.

21 May, 15 Car. 2 [1663], upon a Plea. Lord Chancellor and Justice Windham.

Money received upon an implied Trust, not within the Statute of Limitations.

The Plaintiff was Son and Executor of the late Chief Justice Heath, who was made Chief Justice at Oxon during the Difference between the King and the Parliament, but never sat as Chief Justice in Westminster Hall. And the Bill was to have an Account of Money received by the Defendants, being Prothonotaries of the King's Bench ; which was alledged to belong to the said Chief Justice, and which Monies they by their Office ought to receive for the Chief Justice by an implied Trust, *Virtute Officii*. The Defendants pleaded the Statute of Limitations 21 Jac. and upon the arguing thereof, it was insisted by the Plaintiff's Counsel, That this Trust was not within the said Statute. And it was answered on the other Side, That a Guardian was within the Statute, and he was a Trustee ; but the Defendants were ordered to Answer.

[9] ROBERTS *contra* WILKS & AL^s.

Pasch. 15 Car. 2 [1663]. Lord Chancellor.

Injunction into the Exchequer.

The Plaintiff exhibited his Bill, to which the Defendant put in an insufficient Answer, and so delayed the Plaintiff ; and then exhibited a Bill in the Exchequer, in the Nature of a cross Suit, and posted on that Cause there : Wherefore the Plaintiff here moved for an Injunction to stay Proceedings on the Bill in the Exchequer.

SIR GEORGE BENION *contra* STONE.

23 May, 15 Car. 2 [1663]. Lord Chancellor, Lord Chief Baron Hale, and Justice Windham.

A presumptive Trust, whether it shall affect a Purchaser.

A House being purchased by Deed inrolled in Chancery, and £2000 paid by Sir George Benion, in the Name of his Son, then an Infant of five Years old ; Sir George's Estate being all exposed to Sale by the Parliament for Delinquency, this House was sold as Part of it, by the Trustees for Sale of Delinquents Estates, to one who sold it to Stone. Stone afterwards gave £500 to Sir George's Son, being then of Age, and Sir George's Wife to convey the House to him, which they did for that Consideration ; and first made Oath before a Magistrate, that they were not [10] Trustees for Sir George. Sir George exhibits his Bill to be relieved against Stone, and suggests a Trust in his Son and Wife for him : And it was then insisted, that in Respect of the Infancy of the Son upon the Purchase made, and the Father's Payment of the Purchase Money, and the Sale of the House for Delinquency as Sir George's, it should be presumed a Trust for the Father : My Lord Chancellor inclined to decree it on this Point ; but Sir George's Counsel offering Stone the £500 again, Time was given to the Parties

to consider thereof ; and if they did not agree, the Court declared they would advise with some Judges, and deliver their Opinion ; for Hale and Windham declared it a Trust, for which Sir George was relievable ; but Stone accepting the Offer of £500. it was decreed he should convey on Payment of it.

GODSCALL *contra* WALKER & WALL.

11 May, 15 Car. 2 [1663].

Consideration of Judgment in Debt, examined in Chancery, being got from one newly come to Age.

The Bill was to be relieved against several Judgments in Debt from Sir John Godscall an Infant ; and by a Practice between the Defendants, Walker and Gouldsmith, and Wall the Attorney, and the Infant's Guardian, and drew into Examination the Reality of the Debt, for which [11] the Judgments were, and how the same arose ; and decreed, that it be referred to a Master, to examine the real Consideration in Money or Wares, for which the said Judgments were had ; and thereupon the Court declared further Order should be taken.

PARRY *contra* BOWEN.

26 June, 15 Car. 2 [1663]. Lord Chancellor.

[S. C.] 1 Chan. C. 23. A Lease for more Years than the Lessor had Power, to be good for so many as he had Power.

Resolved, that where a Person hath Power to lease for ten Years, and he leaseth for twenty Years, that the Lease shall be good for ten Years in Equity, and said to be so settled several Times in this Court.

JEW *contra* THACKWELL.

31 Oct. 15 Car. 2 [1663]. Lord Chancellor.

[S. C.] 1 Chan. C. 31. The Apportionment of Rent in Equity, where it cannot be at Law.

The Plaintiff was Lessee of divers Lands, whereupon one entire Rent was reserved : afterwards the Inhabitants of the Town, where Part of the Lands lay, claim Right of Common in Part of the Lands so let ; and upon Trial of their Right, are found to have Right of Common there. Now this being but a Right of Common recovered, was not an Eviction of the Land in Law, because the Soil was not recovered ; and [12] so no Apportionment of this Rent could be at Law ; and therefore this Bill was to have the Rent apportioned in Equity : And Serjeant Maynard insisted, That such Apportionment had frequently been here decreed. But in this Case it appeared, that notwithstanding the Right of Common, the Lands were worth the Rent reserved and better ; and therefore the Court would not decree, but the Bill was dismissed.

WOLLSTENCROFT *contra* LONG.

6 Nov. 15 Car. 2 [1663]. Lord Chancellor.

[S. C.] 1 Chan. C. 32. Debts on Bonds and simple Contract, and Legacies being charged on Lands, to be paid in equal Proportion.

Debtor upon Bonds and simple Contract makes a Conveyance of Lands upon Trust, to sell for Payment of his Debts ; It was declared to be the constant Practice, and so ruled and decreed here, That all the Debts should be paid in Proportion ; and that if the Lands were not sufficient to pay, all the Creditors should lose in Proportion : And so it is where Lands are given to pay Debts and Legacies, they shall be paid in equal Proportion, because the Land is made liable to one as well as the other, by the Debtor himself ; but otherwise it is in Case of Debts on Judgment, that in their own Nature charge the Lands.

[13] BAKER *contra* BEAMONT. *Eodem die.*

[S. C.] 1 Cha. C. 32. Habeas Corpus.

The Defendant being brought into Court by *Habeas Corpus* directed to the Marshal of the Marshalsea, the Plaintiff informed, That the Defendant was formerly committed

to the Fleet for Breach of a Decree of this Court, by which he was to vacate a Judgment which he had against the Plaintiff, and turned himself over to the King's Bench by an *Habeas Corpus*, in a sign'd Action set up by himself, and thereby getting Liberty to go abroad had taken the Plaintiff in Execution upon the said Judgment, and clapt him in Exon Gaol: And the Defendant now refusing to discharge the said Execution, ordered, That the Defendant stand committed to the Fleet, and be confined to his Chamber; and an *Habeas Corpus* was granted to the Plaintiff, whereby to remove him, which the Court declared should be made of as long Continuance as it could.

THIRVETON *versus* COLLIER.

Lord Chancellor, Master of the Rolls [1664].

[S. C.] 1 Chan. C. 48; [1] Eq. Ab. 24, c. 2. Parties interested, not privy to an Agreement, not bound by the Decree.

The Bill was to have a Decree for an Inclosure upon an Agreement: It appearing by the Bill, that there were by the Agreement to be eighteen [14] Allotments, and but fifteen Parties to the Suit; and so was objected by the Defendants, That all the Parties to the Agreement were not Parties to the Suit; and also, that other Persons claimed Common in the Ground to be inclosed, that were not Parties either to the Agreement or Suit: And so to decree that Agreement, would be to do a manifest Wrong, and be Occasion of Suits and Troubles.

Whereunto it was answered by the Plaintiff, That tho' there were eighteen Sharers, some of the fifteen were to have two Shares, so as they made up the eighteen, and that there were others had Common but by Reason of Vicinage: But nothing of this alledged by the Plaintiff appeared.

Decreed nevertheless, That the Agreement for the Inclosure should be performed; and a Commission then was awarded to set out each Person's Lot; and the Court said, That if there were any that had Interest and were not Parties to the Agreement, they could not be bound by the Decree, and so at no Prejudice: And however that it should not be in the Power of one or two wilful Persons to oppose a publick Good.

[15] WARD *contra* LAKE.

12 May, 16 Car. 2 [1664]. On a Demurrer. Lord Chancellor and Judge Brown.

[S. C.] 1 Chan. C. 50. Demurrer to a Subpœna in Nature of a *Scir' fac'*.

The Demurrer was to a Subpœna in the Nature of a *Scire fac'*; and it was, because he that brought the Subpœna did not thereby alledge himself to be Heir or Executor to him in the Decree. Resolved, That there never was a Demurrer of this Nature before; and the Subpœna was no Record, nor any where filed, and so not to be demurred to, but the Cause to be shewn at the Return of the Writ upon the Order: And the Order mentioned him that brought the Writ to be both Heir and Executor; and therefore this Demurrer was conceived very ridiculous and over-ruled accordingly.

JACKSON *contra* EYRE.

23 May, 16 Car. 2 [1664]. Lord Chancellor.

See 1 Chan. R. 229. No Costs or Damages on a Bill of Review.

Upon a Motion, the Question was, whether on a Bill of Review, whereby Money was decreed back from the Defendant to the Plaintiff, which the Defendant had formerly gotten from the Plaintiff by a former Decree, the Plaintiff should pay Damages for that Money: And this having been formerly moved, Directions were given to search for [16] Precedents, whether Damages had been given on a Bill of Review, and no Precedents were now produced: And it was confidently affirmed, there was no Precedent of any Damages or Costs given on a Bill of Review; and compared it to a Judgment in a Writ of Error, where the Judgment is, That the Party shall recover *quicquid amisit per judicium præd.* but no Damages or Costs. And in this Case it was ruled there should be none.

BOLTON *contra* ANNE.

17 July, 16 Car. 2 [1664]. Lord Chancellor, Master of the Rolls.

[S. C.] 1 Chan. C. 55. A Judgment (for a Matter discharged by the Act of Oblivion) vacated.

A Lessee of the Crown made an Under-Lease at a Rent during the Usurpation: The State avoided the first Lessee's Estate, and exposed the Crown's Interest to Sale. The Under-Lessee applies to the Lessor for Protection: He bids him shift for himself. The Under-Lessee pays his Rent to the Purchaser from the State for some Time: And after the Under-Lessee purchased his Tenement from him that purchased from the State. Upon the King's Restoration, the first Lessee brings Debt against his Under-Lessee for the Arrears of Rent from the Time he discontinued Payment to him: and had Judgment by Default. And now to be relieved against the Judgment, which [17] was by the Bill alledged to be by Surprise, though no Surprise appeared. The Under-Lessee brought his Bill in Equity, though no Surprise was apprehended in obtaining the Judgment. And decreed, that the Judgment be vacated, for that the Rent was discharged by the Act of Oblivion, of which the Lord Chancellor said, a Court of Equity was as proper an Interpreter as the Judges at Law.

JUSTICE TYRREL ON A PLEA AND DEMURRER.

Bill after Verdict in an Action of the Case, on Suggestion of a Matter in Defendant's Knowledge, which the Plaintiff could not prove at the Trial.

The Bill was after a Verdict in an Action of the Case; and the Equity was, That the Defendant had writ a Letter which the Plaintiff would not produce at the Trial, which would have discharged the Action, and set forth the Substance of it, and that the Matter lay only in the Defendant's Cognizance, and so ought to be answered; and that the Plaintiff's Witnesses were beyond the Seas, &c. The Plea was of the Verdict, and that the Effect of the Letter was given in Evidence at the Trial, and the Demurrer was for Want of Equity. On Debate whereof it was insisted, That there was not any Precedent of a Bill in the like Case after Verdict, but before Verdict it might be proper for a Discovery.

Peyton *contra* Humphries was cited for the Plaintiff; but answered, That that was [18] a Matter discovered after the Trial, but no such Matter was here. And as to the Allegation of the Plaintiff's Witnesses being beyond the Seas, that the Plaintiff could not have them at the Trial; it was answered, That upon an Affidavit of that at Law, the Court would have staid the Trial; and this Case was referred to Precedents.

PROUD *contra* COMBES.

15 Nov. Car. 2.

Account stated under Hand and Seal, set aside.

The principal Case was now heard at the Rolls: The original Bill was to be relieved against an Account stated between the Mortgagor and the Heir of the Mortgagee, under Hand and Seal, upon Suggestion that it was agreed upon sealing, that if there were any Mistake in the Account, the same should be reviewed and rectified; the Defendant denied the Agreement, and pleaded the Account stated, and three Meetings in Order to it; and the same perused first by the Plaintiff and a Friend on his Behalf, and then fully consented to and sealed: Issue was taken on this Plea, and the Plea proved; yet it appeared to the Court by the *quantum* of the Sum, that the Account was made up of Interest upon Interest, and the Court taking the Agreement to be proved (howbeit it was [19] not) decreed the Account stated to be set aside, and the Parties to go to an Account *ab Origine*.

Observe; the Reason why the Review did not lie was, because as the Decree was drawn up, there was no Error in it.

HAYNE *contra* HAYNE & AL'.

29 April, 17 Car. 2 [1665]. Lord Chancellor.

A Release after Replication cannot be read at Hearing, but is to be examined by a new Bill.

Pending the Suit after Replication and Issue joined, the Defendant got a Release, and at the Hearing of it brought a witness into Court *viva voce* to prove it: It was insisted by the Plaintiff, that this Release could not now be read, because the Reality of it could not be tried, for it might be fraudulent or by Surprise. Then the Court offered a Trial at Law upon any such Issue. In Answer to that it was said, That an Issue ought to be first joined in this Court upon the Point to be tried, before the Court could direct a Trial: After a serious Consideration in this Point, at Bench and Bar, it was ordered, The principal Cause should stay, and a new Bill to be exhibited against the Release, whereupon the Reality of it might be examined and both Causes to be heard together.

[20] POOLE *contra* PIPE.

1666. Lord Chancellor Hyde. 18 Car. 2.

An antient Award performed by one Party, decreed.

The Plaintiff had Land descended to him from his Brother who had bought it; but the Defendant brought an Ejectment upon a Lease for 500 Years, and an Award being made concerning the Title under which the Plaintiff claimed; and the Party that had the Lease had not performed, but kept the Lease, and it came to the Defendant; and the Bill is to hold the Land. And decreed, If it had been enjoyed under the Award, 14 Jac. and a perpetual Injunction against the Lease.

DETA & AL' *contra* DICKINSON.

19 Car. 2 [1667-68]. Lord Chancellor Hyde.

A Decree ordered to be new enrolled.

A Docket and Inrollment of a Decree lost, and ordered to be new inrolled.

OWEN *contra* WHITE & AL'.

6 Nov. 1667. Justice Moreton in Court.

A Devise of Mortgages to the Executors, carries the Money due upon them from the Heirs, tho' forfeited in Fee.

The Bill was preferred by the Mortgagor against the Heir of the Mortgagee and his Executors, to whom the Mortgagee had devised all his Mortgages, that he might pay his Money and [21] have a Reconveyance; and the Defendants interpleaded to whom he should pay his Money; and decreed, That the Executors Devises should have the whole Money; and the Heir decreed to join in this Reconveyance, notwithstanding his Counsel insisted that they might have a Proportion of Money, it not being devised to the Executors and their Heirs for ever: But yet he was decreed to re-convey.

[ANONYMOUS.]

10 Nov. 1666. Lord Keeper Bridgeman.

Injunction against a Parliament-Man, upon Affidavit of a Subpoena served.

Upon a Motion for an Injunction, for Want of an Answer, upon Affidavit of a Subpoena served upon Mr. Otway a Parliament-Man, after deliberate Consideration upon the said Case, did grant an Injunction, but did order them not to enter an Attachment against them;

But denied to grant an Injunction for quieting Possession of an Office, though Affidavit was made of three Years quiet Possession before the Bill exhibited.

If an Infant suffer a Decree against him by Consent, he may at any Time reverse it for that Error of his being an Infant; otherwise if he be Defendant by an adversary Bill, and a Decree pronounced.

[22] WYNDHAM *contra* WYNDHAM.

Lord Keeper Bridgman, and Justice Twisden.

A Decree by Consent of a Personal Estate binds a Purchaser for valuable Consideration.

Ordered, that a Decree for a Lease and other personal Estate by Consent shall bind Purchasers for valuable Consideration; otherwise (said the Lord Keeper) you will, like Gunpowder, blow up the whole Court of Chancery.

A Trustee hath been examined as a Witness, Anthony Keck.

MOYSER *contra* PEACOCK.

Hill. 1667. Master of the Rolls.

Bill for 3s. 4d. per Annum dismist.

A Bill was to have ten Groats a Year, and the Arrearages to be paid for a pretended Rent issuing out of Defendant's Houses, but dismissed at the Hearing for Want of Equity.

Yet the Master of the Rolls said and allowed the Plaintiff to use the Depositions in this Cause at a Trial at Law, in Case of the Death of the Witnesses, tho' the Bill did not pray to perpetuate the Testimony.

An original Bill or Bill of Revivor, if the Defendant hath not appeared, but stands out all Process of Contempt to a Serjeant at Arms returned, no Decree can be had against him; or the Bill [23] taken *pro Confesso*, unless he had appeared and stood in Contempt for Want of an Answer.

No Process of Contempt is to be taken out against a Defendant for Disobedience of an Order, unless he be served with a Writ of Execution of that Order, under the Seal of the Court.

BAKER *contra* KELLET.

15 Jan. 19 Car. 2 [1668]. Lord Bridgman.

Mortgagor must pay what due on Incumbrances, and not what Assignee paid for them.

The Plaintiff's Bill is to discover the Defendant's Title to Lands of her Father's, and what they paid to buy in several Incumbrances chargeable thereon, and to have a Reconveyance on Payment of so much as they paid for the same. The Defendant demurred, for that he ought not to take less than was due on the Incumbrances, and therefore demands Judgment, whether he shall Answer what he paid; and allowed, because the first Mortgagees were no Parties.

[24] SAVAGE PER GUARDIAN *con.* WHITEBREAD.

20 Car. 2 [1668-69].

An Infant not to be concluded by a Slip in Counsel misleading.

Sir Thomas Savage, the Plaintiff's Father, sold Land to the Defendant's Ancestors, and covenanted that they were free of Incumbrances, and gave a collateral Security by other Lands also, and the Purchaser having entred on the Security for Damnifications, the Bill was to have the collateral Security reconveyed; whereto the Defendants having set forth divers Incumbrances on the purchased Lands, and (*inter alia*) a Lease of twenty-one Years of Parcel thereof; the Plaintiff replied generally; and at the Hearing, a Reconveyance was decreed on Satisfaction of the Damnifications: And upon the Report, the Plaintiff's excepted against the Lease, that it was no Incumbrance, because they had proved the Purchaser had Notice of it at the Time of the Purchase; whereto the Defendants insisted, that the Notice was not in Issue in the Case: Yet Lord Keeper Bridgman would not conclude the Infant by a Slip of her Counsel in not putting it in Issue upon the Replication, but ordered a Trial, whether the Purchaser agreed to take the Lands charged with that Lease.

[ANONYMOUS.]

[25] Hill. 20 & 21 Car. 2 [1669].

A Bill ordered to be taken as filed before a Trial upon an Action of Debt on Account, and so set aside.

The Bill is to be relieved against an Action brought by the Defendant against the Plaintiff as Executor, for Money due to the Defendant upon a Trade between the Testator and him; and charges, that the Defendant was in the Testator's Debt, and prays a Discovery of the Truth: The Defendant pleaded, that the Differences being referred to Arbitrators by the Testator and him, he gave the Testator an Account, whereon rested due £164, 17s. 2d., and no End being made, he had sued the Plaintiff, the Executor, and obtained a Verdict for £100 Damages besides Costs, and says he is advised such Bill is to be admitted before a Trial, and not after a Verdict, and only Damages recovered, and that Judgment is since entered: But the Plaintiff, on a Petition, got an Order, that the Bill shall be taken as filed before the Trial, and the Plea be set aside: but that the Defendant may plead, answer, or demur *de novo*. The Defendant pleaded the said Matter again, and that he had no Notice of the Bill, nor was served with a Process till after the Verdict, nor that the Bill was filed before the Verdict, yet must Answer.

[26] PITT *contra* SCARLET.

Trin. 20 Car. 2 [1668].

Obligee may sue in Chancery to discover Assets before a *Plene Administravit* pleaded.

The Plaintiff brought a Bill to be relieved as Obligee in a Bond, against the Defendant as Executor of the Obligors, and to discover Assets for Payment, the Defendant demurs, for that the Plaintiff had brought no Action at Law against him, whereto the Defendant had pleaded *Plene Administravit*.

BOOTH *contra* SANKY.

Mich. 20 Car. 2 [1668] & Trin. 21 Car. 2 [1669].

Promise to deliver up a Bond decreed.

That the Plaintiff was indebted unto the Defendant, and one Browne was indebted to the Plaintiff: Browne gave a Judgment to the Defendant for the Debt, and the Plaintiff gave Bond to pay it if Browne did not; and to have up the Bond, upon a Promise of the Defendant's that if the Plaintiff would at his Charge extend Browne's Land, he would deliver up the Bond, was the Bill; the Defendant denied the Promise, but upon a Verdict that he did make such Promise, and Proof of the Extent, the Bond was decreed to be delivered up, altho' Browne failed in his Verdict.

[27] DEVERING *contra* COOPER.

13 April, 20 Car. 2 [1668].

A Cause heard after thirty Years, the Inrollment being lost.

An Inrollment of a Decree in 10 Car. 1 [1638] being lost, the Counsel after so long Time ordered to be re-heard.

LABYNE *contra* ALLEY.

22 Feb. 20 Car. 2 [1668].

A Decree ordered to be inrolled, if a Party died before Easter.

A Decree made and ordered, that if the Defendant died before Easter, yet that the Plaintiff may afterwards inroll it.

HILLIARD *contra* LEICESTER.

Trin. 21 Car. 2 [1669]. Baron Turner.

Tenant for Life shall not have a Discovery upon what Account a Fine is levied.

The Plaintiff's Wife being the Daughter of one Constable and his Heir, she married the Defendant's Father, who is dead, and the Land being descended to her, she and the Plaintiff brought a Bill, and alledged that the Defendant Leicester claimed

some Estate in Reversion after her Death, and had levied a Fine to the other Persons, who had brought a *Quid Juris Clamat* against her, and therefore prayed a Discovery of what Settlements were made, that he might know whether to plead an Estate in Fee or for Life to the *Quid Juris Clamat*, and [28] to what Uses and to what Considerations the Fine was levied : The Defendant demurred, for that the Defendant had not sufficient Title, whereby the Court could make a Decree as touching the Fine.

VOLL *contra* SMITH.

Mich. 21 Car. 2 [1669], at the Rolls.

A Parol Agreement 20s. in Hand decreed.

The Bill is, that the Plaintiff agreed with the Defendant, for the Purchase of a House for £290 to be paid, and paid 20s. in Hand, and tendered the rest at the Day : and relieved.

BLUCK *contra* GORE.

Pasch. 21 Car. 2 [1669].

A Purchaser claims by the Bill by good Assurance and Conveyance, good without setting forth what.

The Plaintiff alleges by the Bill, that M. W. and K. W. by good and sufficient Conveyance and Assurance in the Law, had granted to him and his Heirs their third Parts of the Premises in Question, and prays Relief against the Defendant who was in Possession by Mortgage from an Ancestor : The Defendant demurred, for that the Plaintiff set not forth what Kind of Conveyance or Assurances were made to him, or when executed, so as the Court might judge whether the Plaintiff had any Title ; and therefore demanded Judgment ; and whether he should be called to any Account [29] for any Profits, it appearing the Plaintiff was never in Possession ; and over-ruled.

PYNE *contra* MATTHEW.

Mich. 21 Car. 2, at the Rolls, Nov. 24, 1669.

A Division made of Tenancy for Life or Jointenants.

The Plaintiff seised of three fourth Parts of the Farm of Southbark Com' Devon' and Countess of Bath seised of the other Fourths, and she lets her Parts to the Defendant for Lives or Years determinable on Lives ; and he took the Profits of all. A Division is decreed to be made by Commissioners during the Defendant's Term and Title.

NORCLIFF *contra* WORSELY.

Mich. 21 Car. 2, at the Rolls. 23 October 1669.

Sequestration, Settlement, Conveyance decreed as agreed, &c.

Tho. Worsly, the Great Grandfather, 21 Jac. by Articles covenanted upon the Marriage of Tho. his Son, the Grandfather, to settle Lands upon Tho. the Grandfather in Tail, and Tho. the Grandfather dying before the Great Grandfather, leaving Issue Tho. the Father, before any Settlement made, Tho. the Father and his Mother, who was to have Part of the Lands for her Jointure, exhibited a Bill against Tho. the Great Grandfather to have such Settlement, and it was decreed, 20 Oct. 15 Car. 1 [1639].

[30] Tho. the Great Grandfather having conveyed away the Land, another Bill was brought against him and John his second Son by Tho. the Father, and a Decree made the 18 Feb. 1651. that the Conveyance should be made according to the Covenant ; and that they should account for the Profits to him, which were after settled at £2304, 14s. 4d.

That Tho. the Father having Issue Tho. the Son, afterwards married Penelope the Plaintiff's Wife, and Tho. the Father, having Possession without a Conveyance, and dying, left the said Penelope his then Wife Executrix ; and she being married to the Plaintiff, he claimed the £2304, 14s. 4d., and 13 July, 12 Car. 1 [1636], obtained a Sequestration against the Defendant to sequester his Lands for the same ; and had sequestered the said intailed Lands, which belonged to Thomas the Son, an Infant, as Issue in Tail, as the Estate of John, and disturbed the Tenants ; whereas the Plaintiff ought to have Recourse to John's peculiar Estate : Tho. the Son moved and prayed the Order

for Sequestration might be discharged; whereupon the Court declared, the mean Profits was a personal Duty upon the Great Grandfather, and John ought to be satisfied by them, and not out of the Lands, decreed: Ordered unless Cause; and upon shewing Cause, [31] ordered, that the Sequestration extend not to any of the Land decreed per Lord Keeper Bridgman.

GLANVILLE *contra* JENNINGS.

Mich. 21 Car. [1669]. Justice Rainsford.

A Bond to a Marriage broker, good.

The Bill was to be relieved against two Bonds, one given by the Plaintiff, and the other by his Wife to the Defendant; for that, the Defendant told the Plaintiff, That the Plaintiff's Wife (who was the Defendant's Kinswoman) was a good Fortune, and that he would help her to the Plaintiff for Wife; but that if he did he must give the Defendant something for his Pains: Whereupon he sealed a Bond to the Defendant of £400 Penalty to pay £200 absolutely. And then the Defendant went to the Woman, and upon the same Ground got another Bond from her for the like Sum: And that the Equity was, That it was a Chowse or Fraud, and that the Woman had nothing, nor the Man had nothing neither.

But the Defendant proved, that the Plaintiff confessed, that he had £1200 with his Wife, and therefore that the Bond given by him was good; but the Woman being cheated, for that her Husband had nothing, but was a broken Merchant, her Bond was decreed to be delivered up.

[32] BORRINGTON *con.* BORRINGTON.

14 Nov. 21 Car. 2 [1669], at the Rolls.

Deeds containing the Title of others, not to be produced.

A Recovery was suffered by Tenant in Tail, but defective as to much of the Land for Want of a good Tenant to the *Præcipe*, it being out on Estates for Lives, and he, that suffered the Recovery, devised the Lands to the Defendant and his Heirs, in Trust to pay Debts and Portions: The Bill is by the Heirs at Law to have the Counterparts of the Lease for Lives in Being at the Time of the Recovery, from the Defendant, to go to Law for the Title. The Defendant answered, and confessed several Counterparts; but said, He being a Purchaser hoped he should not produce them to impeach his own Title, to enable the Plaintiff to go to Law; and he had brought the Counterparts into Court; whereupon it was ordered, that they be delivered back to him, and the Plaintiffs to take what Remedy they can at Law; and if upon a Trial a Verdict pass for the Defendant, then to bring back such as concern the Land recovered.

[33] PEW *contra* CADMORE.

2 Dec. 21 Car. 2 [1669].

Decree suspended.

The Plaintiff was an Administrator, and after a Decree pronounced died before Entry of the Order, and the Entry is suspended by the Administrator *De bonis non*, &c.

ATTORNEY GENERAL *contra* SIR GEORGE SANDS.

Pasch. 21 Car. 2 [1669], in the Exchequer.

How Trusts to be forfeited.

Sir Ralph Freeman purchased a Lease for Years of several Manors, and afterwards purchased the Inheritance thereof in the Name of Sir George Sands, his Son-in Law, in Trust for Sir Ralph and his Heirs; and afterwards Sir Ralph made his Will, by which he appointed, that both Mr. Freeman, whom he made his Executor, and Sir George Sands, should join to convey Part to Freeman Sands, and Part to George Sands (the two Sons of Sir George Sands) and to their Heirs, and the Residue to all the Sons of Sir George, by his then Lady Sir Ralph's Daughter, and their Heirs, who should be living at the Time of the Death of Sir Ralph, and then died.

Sir George had, at the Time of Sir Ralph's Death, only Freeman (who soon after died without Issue) and George Sands, [34] but afterwards Sir George had another

Son called Freeman. Mr. Freeman the Executor refused the Executorship, whereupon Administration was granted to Sir George Sands; afterwards no Conveyance being made, either of the Lease or of the Reversion of George Sands, by Sir George, who had both in Trust for Sir George according to the Will, Freeman Sands killed George his Brother, and afterwards was attainted for Murder. *Quære*, Whether any of these Trusts, either of the Lease for Years, or the Reversion which was in Sir George in Trust as aforesaid, were forfeited by this Felony to the King, of whom the Lands were holden, who by his Attorney sued Sir George Sands in the Equity Side of the Exchequer, to answer the Profits to the King, supposing the Trust to be forfeited by the Felony.

The Case was several Times argued at the Bar: and this Term Chief Baron Hale and Baron Turner, Rainsford being removed into the King's Bench, and Atkins disabled by Age, both argued that the Trust was not forfeited.

In their Arguments 'twas agreed, that *Cestui que* Trust in Fee or Fee tail forfeits the same by Attainder of Treason, and the Estate to be executed to the King in a Court of Review, by the Statute of 33 H. 8, 27 H. 10.

[35] 2. An Alien *Cestui que* Trust of an Estate, the Trust belongs to the King: and the Chief Baron said, It was the Opinion of the Judges in Holland's Case, Trin. 23 Car. 1, where the Chief Baron was of Counsel: for an Alien hath no Capacity to purchase but for the King's Use.

3. As to the King's Debt: by the Common Law and the Practice of this Court, which is Part of the Common Law, *Cestui que* Trust being indebted to the King, the King should have Execution of this Trust: For before the Statutes 4 H. 7 (27 & 10) H. 7, 5, made in the Time of H. 6, there be Precedents in the Court, that the Writ of *Extendi facias* for the levying of the King's Debt was of the Debtor's Lands, or any other Land of which any other Person was seised to his Use. And this was the Reason of Sir Edward Croke's Case, where the Interest of the King's Debt did attach upon the Power of the King's Debtor, to revoke a settlement by him made of the Estate. Pasch. 4 Jac. 1, Ford's Case: Certain Terms were taken in Trust for a Recusant, and held liable to the King's Debt of £20 a month: So that where the King's Debtor hath the profitable Part of the Estate, the King shall not lose his Debt by any Fiction.

[36] 4. 'Twas agreed, that the Trust of the Reversion could not be forfeited for Felony, which the Court held clear: and cited for Authority, 3 Co. Marquess of Winchester's Case. 12 Co. 12, 5 Ed. 4, 7, 2 Cro. 513, 33 H. 8, cap. — And if Inheritance, 'tis not forfeited for Felony by Felons, appears by 27 H. 8, cap. 10, and there is no Fine due to a Lord as long as he hath a Tenant: And therefore till the Statute of 19 H. 7, cap. 15, the Lord could not seise the Lands of which his Villain was *Cestui que* Use: and if it be demanded, what should become of this Trust if *Cestui que* Trust die without Heir? 'tis answered, The Land shall be discharged of this Trust, as if Tenant in Fee of a Rent-charge dies without Heir, or be attainted of Felony, the Land is discharged.

5. If a Lease in Gross, the Trust thereof shall be forfeited for Felony or Outlawry in a personal Action; as the Earl of Somerset's Case, in Hob. Daccomb's Case. 2 Cro. Babington's Case, and Sir William Raleigh's Case. A Lease for Years, if it be of never so long continuance, if it be assigned in Trust for J. S. and his Heirs, yet it shall go to his Executors; yet Trusts are ruled according to the Style and Course of Courts of Equity. A real Chattel in Law survives to Husband, [37] but not the Trust of such a real Chattel, Co. Lit. Chapter Remitter: So if a Man, who is *Cestui que* Trust, binds himself and his Heirs in a Bond, this Trust is not Assets to the Heir, tho' since questioned in Lord Chancellor Hyde's Time: but clearly the Trust of a Lease for Years is Assets to charge an Executor in Equity: So a Trust assigned over to wait the Inheritance, still goes to the Heirs or Heirs of the Body, because kept on Foot for special Purposes; and this hath great Resemblance to the Case of Charters, which go with the Inheritance to the Heirs; but if granted over, the Parchment and Wax shall go to the Grantee and his Executors. 4 H. 7, 10. And in the present Case no Trust of a Chattel is forfeited to the King, because the Lease for Years was not in Freeman who was attainted of Felony, nor the Trust in him as a Chattel, for then he must have been Executor or Administrator to George the Son: and how was it Sir Ralph's Intent the Lease and Inheritance should be confounded, and not kept separate? And again, Freeman could have his Trust but as Heir to George, and as long as he hath the Inheritance in him, and no longer, it shall go to the Heir as a *novum pignus*. Partage by Founderage, Charters, &c., and the Mischief otherwise will be great, to have such weighty

Terms, [38] forfeited by Outlawry ; and so Judgment was given against the King's Attorney.

[Mews' Dig. Tit. Criminal Law, B. I. 1. S. C. Hard. 488 ; Freeman, 129 ; Nels. 130. See *Barrow v. Wadkin*, 1857, 24 Beav. 1 ; *Sharp v. St. Sauver*, 1871, L. R. 7 Ch. 353]

PARY *contra* JUXON.

Pasch. 21 Car. 2 [1669]. Lord Keeper Bridgman.

The Bill was against the Defendant, the Executor of the late Archbishop Juxon, and charged, That the Bishop having the next Presentation to the Mastership of St. Cross, did in his Life-time direct Sir William Juxon his Executor, to give it Doctor Pary ; and upon the Hearing, the Lord Keeper directed a Trial at the King's Bench Bar, whether it were in Trust in Sir William Juxon or not. And at the Trial in the King's Bench, the Judges declared, A Trust might arise by Parol, and that the Executor might become Trustee by the Will of the Testator, tho' nothing mentioned in the written Will, or what is proved in the Spiritual Court ; and the Verdict there was found for Doctor Pary.

Note ; Doctor Pary being a Member of the Convocation, had his Privilege allowed him in this Suit, as a Privilege in Parliament. *Vide plus infra*. [3 Chan. Rep. 40.]

[39] NURSE *contra* GUILLIM.

Mich. 1669. Lord Keeper Bridgman.

A Plaintiff a good Witness to prove a Contempt.

Nurse was examined as Witness, tho' Plaintiff in the Case, to prove Service of the Decree ; and upon Debate, his Deposition was allowed toward the proving the Defendant in Contempt, and then ruled, That the Plaintiff's Oath is sufficient to convict the Defendant, unless the Defendant in his Examination swear clear contrary ; and then the Defendant's Oath being against the Plaintiff's it shall not convict the Defendant ; and the Defendant in this Cause, upon Exceptions to the Master's Report, was found in Contempt.

BACKHOUSE *contra* MIDDLETON.

Hill. 21 & 22 Car 2 [1670]. Lord Keeper Bridgman.

A Purchaser cannot revive.

Backhouse being a Purchaser, exhibited a Bill of Revivor against the Defendant, and revived the Suit by Order, and the Defendant joined in examining Witnesses, and the Cause coming to be heard, the Bill was dismissed, for that the Plaintiff, as Purchaser, cannot maintain a Bill of Revivor, for that there wanted other Parties at the Hearing. And it was now moved on an original Bill, exhibited [40] by the Plaintiff, That he might use the Depositions taken in the Cause on the Bill of Revivor : But upon hearing of Counsel on both sides, the Court denied those Depositions to be used in the new Cause, because in Truth there was no Cause depending ; for the Bill of Review, being brought by a Purchaser, was void ; and so the Depositions were taken where there was no Bill and Answer depending, and consequently no Indictment of Perjury could be brought against the Witnesses.

DR. PARY *contra* JUXON.

Husband and Wife Plaintiff in the Wife's Right, if the Husband die, may proceed without Revivor by the Wife.

It hath been judged, where a Plaintiff and his Wife in the Right of the Wife, exhibited a Bill, and the Husband died, the Wife, if she please, may proceed without a Bill of Revivor ; so adjudged in the Commissioners Time, *ex relatione Magistri Amburst* ; and therefore Dr. Pary's Wife went on, notwithstanding the Death of her Husband.

SEYMOUR *contra* NOSWORTHY.

Mich. Hill. 1669-70. Lord Keeper Bridgman.

A Plea of a Purchaser for a valuable Consideration, must be from the Plaintiff's Ancestors, or else not good.

Defendant pleaded himself a Purchaser for a valuable Consideration : but ruled not a good Plea, in regard he did [41] not plead himself a Purchaser from some of the Plaintiff's Ancestors, for a Purchaser from a Stranger without Title was held no good Plea ; and the Defendant was therefore ordered to answer.

WITHAM *contra* WITHAM.

Hill. 22 Car. 2, 4 May, 1669. Master of the Rolls.

An attachment for Words against the Court.

The Plaintiff moved to commit the Defendant : for that when the Plaintiff told him he came to serve him with an Order from the Master of the Rolls, the Defendant said, The Master of the Rolls kiss my Arse ; but the Master of the Rolls only ordered an Attachment for the Familiarity, but said, He believed the Lord Keeper would have committed him.

GLADWYN *contra* SAVILL.

20 May, 1670, 22 Car. 2. Lord Keeper Bridgman and Justice Wylde.

Purchasers after a Man found a Bankrupt, shall not in Equity discover any Thing to weaken their Estate.

The Plaintiffs and Defendants are all Creditors of one Steer a Bankrupt, who was a Lead-Merchant, and was found a Bankrupt the 19 Jan. 18 Car. 2 [1667] by the Commissioners, and the Commissioners assigned the Estate to the Plaintiffs and others, in October, 19 Car. 2 [1667], but the Defendants being in Possession, the Plaintiffs brought Action of Ejectment, [42] wherein the Deeds (Debts) were dated in February and March after Steer was found a Bankrupt. The Plaintiffs in the Action became Nonsuit, for the Defendants had Verdicts and Judgments ; so that in Effect Steer was no Bankrupt in those Conveyances, which made the Plaintiffs bring a new Bill, to discover whether the Defendant did not know, at the Time of the Deeds, that Steer was a Bankrupt, and the Fraud of obtaining them, and to have new Trials and a Commission to perpetuate their Witnesses Testimony : the Defendants plead their Deeds and Verdicts, and that Steer was really indebted to them at the Times thereof, and demanded Judgment, whether they shall discover any thing to weaken their Estates, or whether the Plaintiffs shall examine against them as Purchasers ; and upon long Debate allowed, That the Plaintiffs may at any Time bring any new Action.

BARKER *contra* EAST.

20 May 1670, 22 Car. 2. Lord Keeper Bridgman and Justice Wylde.

One Coroner only Returns a Jury. Q. If Ground for a new Trial.

The Defendant brought an Action of Trover in Easter Term 1668 and the Record being brought down, the Wife withdrew it, and to prevent a Challenge the next Term, suggested upon the [43] Roll, That one Gladwyn, who was *Cestui que Trust* to the Defendant, and a Creditor to Steer the Bankrupt, to whom the Defendant was Assignee, was Sheriff ; whereupon a *Venire* was awarded to the Coroners, who all used to return the Writs ; but Wilkinson, one of the Coroners, being newly come to the Office, did not join in the Return of the Jury, the Defendant got a Verdict *ex parte*, supposing both Coroners had returned both *Venire* and *Distringas* ; whereas Wilkinson alone returned the Jury of indifferent Persons, tho' he promised not to return the Writs alone, but to take Fletcher's Advice, who had appointed a Meeting ; yet Wilkinson, before the Time appointed, returned the Jury ; and Fletcher perceiving it, refused to sign the Writs. And the Plaintiff, perceiving the Defendants could not have gone on, made no Defence, the rather, for that Wilkinson persuaded him to keep his Witnesses at home, and afterwards returned the Writs in both Coroners Names ; and so the Defendant obtained Verdict, which being a personal Action the Plaintiffs cannot try again :

And therefore bring a Bill and seek to discover nothing criminal, but to have a new Trial, their Witnesses being beyond Seas, or in Places remote. The Defendants demur, for that Wilkinson's pretended Misdemeanour [44] is examinable in the Court where the Action was brought, and not elsewhere; and that no Equity was shewn to induce a new Trial; and allowed.

YEAVELY *contra* YEAVELY.

Lord Keeper Bridgman. *Luncæ 19 Maii, Anno Regni Car. 2. vicesimo secundo* [1670].

Inter Jacobum Yeavely, Quer. & Ric'um Yeavely & Al' Def'.

This Cause being this Day heard and debated upon a Bill of Review, brought by the said Plaintiff to review and reverse a Decree heretofore made in two Causes, one wherein Katherine Yeavely, the Relict of Thomas Yeavely then deceased, an Attorney, was Plaintiff, against Anthony Yeavely, the Plaintiff's Father, and Heir at Law to the said Thomas Yeavely deceased, Defendant; and in the other whereof the said Anthony Yeavely, the now Plaintiff's Father, was Plaintiff against the said Thomas Yeavely the Attorney: And the Scope of this Bill being, That the said Thomas Yeavely, the Plaintiff's Uncle deceased, being seised in Fee of several Lands and Tenements in the Bill mentioned, of the Value of £200 per Annum, 1 Car. primi [1625-26], dying so seised, leaving the said Anthony Yeavely, his Cousin; [45] and Katherine, the Relict of the said Thomas, the Plaintiff's great Uncle, together with the Assistance of one Thomas Yeavely the Attorney, did set on Foot a Will supposed to be made by the said Thomas the great Uncle, seventeen Years before his Death, whereby the Premises in Question were settled on the said Katherine for Life, the Remainder on the said Thomas the Attorney, and the Heirs Male of his Body, Remainder over to other Persons, and that the said Katherine, and Thomas the Attorney, brought their Bill in this Court against the said Anthony, the Heir of the said Testator, to have the Deeds from him touching the Premises; and the said Anthony exhibited his Cross Bill against them, suggesting his Title as Heir at Law, and praying Examination of Evidences, in which Cause several Proceedings being had, and at last a Submission of Parties, by the then Lord Keeper Coventry, being proposed thereupon. In Michaelmas Term 1638 one Moiety of the Premises was decreed to Thomas the Attorney and his Heirs, and the other Moiety to Anthony and his Heirs, unless a Tenure in *Capite* by Knights Service appeared by the end of the Term; in which Case two third Parts was to go to Anthony and his Heirs, and the other Part to Thomas and his Heirs: And 14th Dec. 1638 tho' the [46] Tenure was insisted upon, yet a Decree passed for the Moieties; and yet the Plaintiff's Father petitioning against the signing and inrolling the Decree, the same was stayed during the Life of the Lord Coventry; and the said Katherine and Anthony died before the said Decree was signed and inrolled: But the same was afterwards, by Order of the Lord Keeper Finch, signed and inrolled; and that the Premises decreed to Thomas the Attorney are since, by his Death or otherwise, descended or come to the Defendants the Yeavelys and German Buckstone, the said Buckstone pretending Title by Fine levied in Mich. Term 1653. And that the Plaintiff did, shortly after the Attainment of his Age of twenty-one Years, make his Entry and claim into and upon the Premises, and hath now brought his Bill of Review: and for Error contained in the Decree set forth, (amongst other Things) That the Bill, on which the Decree was founded, is only for Evidences touching the Premises in Question, and not for the Lands, and charged the Lands to be intailed; and yet the Decree doth decree the Lands themselves, and an Estate in Fee-simple: And for further Error doth charge, That the Plaintiff Katherine died before the hearing of the Cause, and Anthony the Defendant, under whom the Plaintiff [47] claims, died before the Decree was signed and inrolled, and no Bill of Revivor exhibited; and therefore to have the said Decree reviewed and reversed, is the Scope of the Bill. And the Counsel for the Defendant in this Bill of Review, admitting the Plaintiff's Entry and Claim; and that albeit the Plaintiff's Father were dead before the Decree was signed and inrolled, which nevertheless was not admitted, yet that the Plaintiffs ought not to have any Relief, nor the Decree reversed; the same being made by Submission of Parties to the Lord Coventry, who after hearing both sides, the 31st of Octob. 1638 decreed, That if Anthony, the Plaintiff's Father, should make appear a Tenure in *Capite* before the End of that Term, then the Lands in Question to be divided into three Parts; the Plaintiff's

Father was to have two Parts, and Thomas Yeaveley, the Attorney, one third Part ; but if such Tenure should not be made appear, then the Land to be divided by Moieties, and the Plaintiff's Father was to be discharged of the Costs : And though the Plaintiff's Father, the said 14th of December 1638 still insisted upon the Tenure, yet the Decree passed for Moieties : And a Division was afterwards made by Sir Robert Rich, then one of the Masters of this Court, as appears by his Report of the 19th of March [48] 1638, and the Decree not being yet compleated, and Anthony the Plaintiff's Father endeavouring to wave his submission, upon Pretence that he had sold a great Part of the Premises to Ashenhurst and Bretland, another Reference was made to Sir Robert Rich, to examine, whether the Purchaser came in *pendente lite*, who certified the said Purchases to be *pendente lite*, and that they ought to be bound by the Decree : Which Certificate the Lord Coventry declared to be just, and 13th December 1639 ordered the Decree to pass, both against the Plaintiff's Father and against Ashenhurst and Bretland, without further Motion, unless Cause were shewed to the contrary, the first Day of the next Term ; before which Time the Lord Coventry died. And 8th Febr. 1639, no Cause being shewed, tho' Notice given, the Decree passed in the Time of the Lord Finch, and was then signed and inrolled, and both Parties have sold away all or most Part of the Lands divided to them : But the Plaintiff's Counsel insisting, That his Father died in January before the signing and inrolling the Decree, and that the Decree was therein, as well as for other Matters, erroneous : upon Debate thereof, and hearing what was alledged on either side, his Lordship declared, That he would not reverse the said Decree, other [49] than as to the Signing and Inrolling thereof. And if the same shall be so far reversed, the Defendants must be left to a new Bill or Bills of Revivor, as they shall be advised, to enforce a Performance of the Decree. And upon reading the Proofs, touching the Time of the Death of the Plaintiff's Father, the same appeared very doubtful : It was therefore ordered, That the said Parties do proceed to a Trial on this Point at Law, Whether the said Anthony, the 8th of February 1639, the Time of signing and inrolling the Decree, was dead or not ? Which Trial is to be had at the next Assizes to be holden for the County of Darby ; for which Purpose the said Defendants are to appear gratis, naming an Attorney, and accept a Declaration, and plead to Issue ; and the Sheriff of the County was to attend the Prothonotary with the Books of Freeholders, who is to return forty-eight Persons, out of which each is to strike out twelve, and the remaining Twenty-four to be impanel'd as an indifferent Jury to try the said Issue : And after the Trial had, the Parties are to resort back to this Court for such further Orders as shall be just. And at the Trial either Party is at Liberty to make use of the Depositions taken in this Court, of such Witnesses as are either dead, or being sick, or beyond Seas, cannot be brought to [50] the Trial ; and in case the Parties do differ upon the Issue, then Sir. Mo. Brampton, Knt. &c. is to direct the same. A Verdict was afterwards found, that the Plaintiff's Father was dead before the Decree inrolled ; and a new Trial directed, Mich. 1670. Vide fol.

BAGG *contra* FORSTER.

22 May, Car. 2.

Bill for performing Marriage Agreement : Plea to part, and Demurrer to part, and both allowed.

The Bill being, That James Bushel was seised of the Premises in the Bill, a Treaty was had in August 1648 for a Marriage between him and Dorcas, the Plaintiff's Mother ; and before the Marriage, August 31, 1648, became bound to Francis Goodwyn and Francis Holloway, Trustees nominated by Dorcas, in £1000, that if he conveyed and assured the said Lands and Premises to them and their Heirs within two Months after ; or else if he and his Heirs purchased so much other Lands, as amounted to £100 per Annum *ultra* Reprises, within three Months, and make the like Conveyances thereof, then the Bond to be void. And that afterwards the Marriage took Effect ; but James did not, as the Plaintiff can any Ways discover, at any Time convey the Premises, or purchase other Lands : But yet, after the Time mentioned in the Condition of the Bond, by Indenture dated 20th Novemb. [51] 1648, in Consideration of the Love he bore to the said Dorcas, and other Considerations therein expressed, covenanted with the said Goodwyn, That he and his Heirs, and all others, being then seised of the said Premises, should from thence stand seised to the Use of himself for Life, without Impeachment of Waste, and afterwards to Dorcas for Life, and after

to the first and tenth Sons, and their Heirs Males, and after of his own right Heirs : And that after the Bond of Conveyance, James had Issue by the said Dorcas a Son, which died without Issue : and afterwards James died without other Issue, and Dorcas afterwards married the Plaintiff Bagg's Father, and they had issue the Plaintiff, their only Son and Heir : and about two Years since Dorcas died, and the Plaintiff ought, according to the Agreement made upon the said Marriage, to enjoy the Premises to him and his Heirs, in regard James died in Dorcas's Life-time without Issue, and he is Heir of Dorcas, and therefore ought to have an Execution of the said Marriage-Agreement, according to the Condition of the said Bond ; and that the Defendants, in whom the Estate in Point of Law is, may convey to him accordingly, is the Scope of the Bill : Whereunto the Defendant Forster, as to two third Parts of the said Premises, hath pleaded, [52] That he is a Purchaser for a good and valuable Consideration, without Notice of the said Bond : and he and his Wife, who are intitled, as she is Heir at Law, and to the other Part of the Premises, have demurred ; for that it appears of the Plaintiff's own shewing, that the Bond being entred into 1648, twenty-two Years since to Goodwyn and Holloway, Trustees for the Plaintiff's Mother, that James in November following, by Indenture between him and the said Goodwyn, made a Settlement of the same Premises to himself for Life, and after to the Plaintiff's Mother for Life, and after to their first and other Sons in Tail, with Remainder to his own right Heirs : and that there is no Issue of James and the Plaintiff's Mother living, but the Plaintiff a meer Stranger to James, and a Child of Dorcas by another Husband : Which Conveyance, being so accepted as advised, ought reasonably to be intended a Performance of the said pretended Agreement, and Condition of the pretended Bond and Agreement, at least that the Plaintiff shall have no Relief in Equity ; and for that Goodwyn the pretended Obligee in the Bond, nor the Executors nor Administrators of James Bushel, for ought appears by the Bill, are made Parties either as Plaintiffs or as Defendants thereto : and for that no Title in Equity [53] appears in the Bill for the Plaintiff, therefore they demur thereto. Upon Debate whereof, and hearing what could be alledged on either side ; it is ordered, That the said Plea be allowed, but the Plaintiff may reply thereunto as he shall be advised : And as touching the said Demurrer, the Court being assisted with Mr. Justice Wylde adjudged the same to be good and sufficient ; and the Plaintiff is to pay to the Defendant the ordinary Cost of allowing a Demurrer, but with this Proviso nevertheless, that the Plaintiff may be at Liberty to amend his Bill, or to bring in any new Bill upon the said Marriage-Agreement, as he should be advised.

MOOR *contra* MORGAN.

Trin. 1670. 22 Car. 2. Lord Keeper Bridgman.

Customs in Ireland not allowed here.

The Bill, as Executrix to Sir Anthony Morgan, is to have a Statute out of the Defendant's Hands for £8000, which the Defendant kept, being his Relict : The Defendant pleads, That the Statute was entred into in Ireland, and the Money defeazanced to be paid there, and that the Statute was there, and being an Irish Debt, and Sir Anthony dying without Issue, the Defendant, as his Relict, by the Custom of Ireland is intitled to a Moiety of it : Which Custom cannot be determined [54] in this Court, as advised, and that she had exhibited her Bill in Ireland to have the same : But the Plea was overruled.

BUTLER & AL' *contra* COOTE & AL'.

26 Oct. 1670. 22 Car. 2. Lord Keeper Bridgman.

Executors must not pay their own Legacies first, if not enough to pay all ; for all must be in Proportion.

The Plaintiffs, as Legatees, came to have an Account of the Testator's Estate, the Defendants being Executors ; and the Defendants submit to the Court, whether they may not pay their Legacies in the first place, and then there will want Assets to pay the Plaintiffs. Ordered, That after Debts paid, all Legacies to be paid in Proportion with Damages, so far as the Estate will extend : And not like the Case at Common Law, where the Executors pay their own Debts and Legacies first, or him that first sues his whole Legacy before others.

RAWLINS *contra* RAWLINS.

8 Dec. 1670. 22 Car. 2. Mr. Justice Tirrel.

A Defendant after a Verdict in Trover must not Answer upon what Ground the Jury went.

A Bill was to be relieved after an Action of Trover brought for Bonds, the Plaintiff had cancelled, tried, and Judgment had thereupon; for that the Penalties of some were recovered, and [55] others were paid, to which the Verdict and Judgment were pleaded and allowed; and 16 Jan. 1670, confirmed by the Lord Keeper Bridgman; only the Defendants must answer, Whether they know what the Jury gave their Verdicts upon, the Penalties or Money paid, and no further to proceed if they do not know and consent; but afterwards ordered 13 Decemb. 1670, 22 Car. 2, by Justice Arthur, that the last Order be discharged, and the Plaintiff may reply.

PRAT *contra* ALLEN.

An antient Mortgagee demurs to the Redeemer's Bill, &c.

The Bill was, that the Plaintiff's Great Great Grandfather devised a Lease to the Plaintiff's Great Grandfather and his Heirs, with a Proviso to be void, unless he paid Alice, Katherine, and Elizabeth three Daughters, £40 a-piece at their Marriage; and in Default of Payment, devised the House to the Daughters and their Heirs.

The Plaintiff's Great Grandfather being seised of a Close worth £20 per Annum, in 1602 died, and Margaret his Relict and Nicholas his Son, the Plaintiff's Grandfather sold the House to Gouning in Fee, and for Security against the Legacies, 6 Nov. 1602, devised the Close for 500 Years, upon Proviso that if [56] Margaret and Nicholas or his Heirs paid the Legacies, to be void! The Plaintiff's Grandfather paid one £40 to Alice, and before the other is due, Katherine and Elizabeth died, leaving a Son two Years old, and Katherine a Daughter, the Plaintiff's Mother, four Years old; and Margaret leaving only an Estate for Life, and had no personal Estate; the Close was forfeited for Non-payment of the other two forty Pounds, and Gouning entred in 1615, and ever since enjoyed, and in 1626 the Close came to the Defendant's Uncle, who had Notice of the Mortgage, who about 1653 settled it on the Defendants.

That the Plaintiff's Uncle died within Age without Issue, and Katherine the Plaintiff's Mother, his Sister and Heir, continued Covert till 1662, and the Bill is to redeem, and to have an Account of the Profits since the Plaintiff's Uncle's Death. The Defendant pleaded, answered and demurred, and by Plea set forth a Purchase 1656, for £240 by the Defendant's Uncle, of the Close from Gouning, for the Remainder of the 500 Years, and by Answer denied Notice of the Mortgage.

And demurred, for that the Close had been enjoyed sixty years under the Lease; and upon the Antiquity he ought not to [57] account. Arguments were two, why old Mortgages ought not to be redeemed.

1. Because the Parties will be involved in long Accounts; but the Bill prays Account out of the Defendant's Receipts.

2. A Power of Claim; which in this Case was not, for there was Infancy and Coverture till 1662.

And therefore the Plaintiff is to reply to the Plea and Answer, and the Benefit of the Demurrer is saved till the hearing.

GASCOIGNE *contra* STUT.

20 May, 22 Car. 2, 1670. Lord Keeper Bridgman.

A Lease sold by the Sheriff, upon Execution of a Judgment, the Vendee must account for the Over-value.

The Bill was to have a Judgment vacated; whereupon a Lease was extended and sold by the Sheriff to one Parker, in Trust for the Defendant, the Conusee of the Judgment, and to have the Bill of Sale set aside, and an account for the Profits since the Sale and Writ of Restitution of the Possession, the Lease being alledged to be of far greater Value than extended at.

The Defendant demurred, for that it is inconsistent with the Rules of Equity, after a Judgment executed by Seizure of a Chattel Lease duly appraised and sold by the

[58] Sheriff, to dispossess a real Purchaser of what he hath purchased for valuable Considerations, upon a bare Pretence, that it is of greater Value than it was appraised and sold by the Sheriff, who is no Party, nor any Offer by the Bill to reimburse the Purchaser what he is really out : Also the Defendant by Answer denies tampering with the Sheriff to have the Lease sold at an Under-value : Whereupon it was ordered, That the Plaintiff reply to the Answer notwithstanding the Demurrer, and proceed to Examination of Witnesses and hearing the Cause, but no Costs allowed. And upon the hearing before the Lord Keeper Bridgman, 5 February 1671, a Decree was made to account and re-convey.

HANBURY *contra* WALKER & AL'.

Lord Bridgman and Justice Wylde. *Veneris die Decembr.* 22 Car. 2 [1670].

Inter Joh'em Hanbury Ar' & Annam Mariam infant' per prædict' Joh'em Hanbury Ar', & præx' Amic', quer', Theophilum Walker & al' Defendentes.

Guardian in Socage, &c.

The Matter upon the Plaintiffs Bill, and Demurrer thereunto put in by the Defendant, coming this present Day [59] to be argued before the Right Honourable the Lord Keeper of the Great Seal of England, assisted by Mr. Justice Wylde, in the Presence of the Counsel learned on both Sides : The Scope of the Plaintiffs Bill being, as Grandfather and next Friend of the said Infant, to call the Defendant to account for her personal Estate, and the Rents and Profits of her real Estate : The said Plaintiffs, by their Bill, charged the Estate real to be about £500 per Annum, and her personal Estate to be worth £5000, and that the Defendant Theophilus Walker, who claims to be Guardian to her the said Infant, as great Uncle on the Mother's Side, is a Bachelor that failed in his Estate, and is become Journeyman to another ; and is a Person disaffected to the Discipline of the Church of England, and doth conceal the Plaintiff, the Infant, from her said Grandfather and his Wife ; and endeavours to instruct her in his own Courses to the Dislike of that Discipline ; so that the Defendant Walker is not a fit Person to have the Education of the said Infant, or the Management of her Estate ; and the Infant is in Danger to suffer much, both in her Estate and Education, by the Defendant, as she is like to do by Joseph Hawksworth her former Guardian : Whereupon the said Defendant, for Demurrer, saith, That he, by the [60] Law of the Land, hath the Right, both to the Guardianship of the Infant, during her Minority, he being the next of Kin by the Mother's Side, who hath no Benefit by the Death of the said Anna Maria ; and that the said John Hanbury having no Right, either to the Wardship or to the Infant's personal Estate, he cannot give the Defendant a Discharge ; and therefore the Defendant conceives he ought not to be compelled to give any Account to him of the said Infant's Estate. Upon the Debate of the Matter, and hearing what was alledged on either Side, his Lordship declared, That this Court ought to take Care of Infants and their Education, and of their Estates, and to see the same preserved and secured for them : And conceiving the Plaintiff, the Grandfather of the Infant, to be a good *Prochein Amy*, the Defendant being charged to be a mean and insolvent Person, doth think fit, and so order, That the Defendant Walker shall answer to so much of the Plaintiffs Bill as demands an Account of the said Infant's Estate, and where the said Infant is, and how she is bred, without Costs ; but this is to be without Prejudice to the legal Interest the Defendant hath to the Custody of the Infant and the Management of her Estate ; and the Defendant may proceed in the Management of [61] the Infant's Estate, for the Benefit of the Infant as before. And 24 February 1670, the Defendant having answered and confessed, That he had given over his Trade, and had a Salary from another, and that the Infant's Estate was £300 a Year.

The Court ordered him to account yearly, but saw no Cause, till a Default in him, to make him give Security.

HUNT & UXOR *contra* JONES.

Trin. aut Mich. 1670. Per Lord Keeper.

Civil Law shall determine Administration between Mother and Child, before Equity will decree long Leases.

The Bill was to have a long Lease assigned, which came to the Plaintiff by Virtue of an Administration of her former Husband, but there were Children of the Intestate ;

and it was referred to the Civil Law to determine the Administration before a Decree : For the Stat. of H. 8 is, That Administration be granted to the Wife or Child : and the Wife having it, send back to see if the Civil Law doth not proportion the Administration.

READ *contra* HOWET.

Hill. 1670. Per Lord Keeper Bridgman and Justice Wyld.

But where no Issue, a long Lease decreed to the Wife, against her Husband's Kindred.

The Case was, Joseph Warren made a Lease to Trustees, to the Use of Edmund the Son ; which Edmund had [62] Issue, Edmund, Joseph, and Jane ; the Lease came to young Edmund, who had married Read's Wife (her former Husband being dead), and he died without Issue, and she is Administratrix. The Bill was to have the Trustees assign to her, and is against the Heirs of Edmund, and young Edmund having left no Issue, it was decreed accordingly.

MARCH *contra* LEE.

Mich. 1670. Lord Keeper and Judges, Chief Baron Hale & Al.

[S. C.] 1 Chan. Ca. 161. Incumbrance prior, mesne, and puisne, lies in prior, and shall hold till satisfied both.

The Bill was to be let into Drake's Estate after prior Incumbrances to the Defendant satisfied : but Defendant pleaded, That there were prior Incumbrances of all the Plaintiffs claimed to the Defendant, and that the Defendant had a puisne Incumbrance to the Plaintiff of Part of a Statute for collateral Security : And the Question was, whether the Defendant should hold all, both to satisfy the prior Incumbrance, and what was his own Security, or only to satisfy his own Money ? and he having a Statute extended, it was by all adjudged for the Defendant, on a Demurrer.

[63] CULLUM *contra* DOVE.

19 Maii, 22 Car. 2 [1670].

Report.

Money, after a Decree inrolled certified due to the Executor of the Plaintiff : and upon Exceptions to the Report, they being no Party in Court, disallowed : But these Precedents did not satisfy ; and thereupon the Bill is dismissed, unless Cause.

TILLEY *contra* EGERTON.

27 Octob. 22 Car. 2 [1670]. Lord Chancellor, Lord Chief Justice Bridgman.

See Vol. 1, [Chan. Rep.] 181, S. C. Mortgagor agrees to convey his Equity of Redemption ; but yet before the Agreement executed or Money paid, the Heir to have the Money, and not Administratrix.

Nic. Tilley, the Defendant's Father, being seised in Fee of a Messuage, &c., in Com' South'ton, by Deed in 1642, mortgaged it to Egerton in Fee, for Security of £150 with Interest ; afterwards, in the Presence of Egerton, the Plaintiff purchased the Premises of Nicholas Tilley, and paid him Part of the Purchase Money in Hand, and gave Security for the Residue ; and in 1651, the Plaintiff did agree with Egerton for the Redemption and Purchase of the Premises : and that in Satisfaction thereof, the Plaintiff should pay him £6 for ten Years, and then £120 at the ten Years End, the Premises to be conveyed to the Plaintiff, and the Deeds to be delivered up to him : and upon the said [64] Agreement, the Deed of Mortgage, and other the Writings concerning the Premises, were delivered up, by the mutual Consent of the Plaintiff and John Egerton, to Joseph Collier an Attorney, to draw the Agreement into Writing, to the End it might be sealed by the Plaintiff and John Egerton : But before the Agreement was drawn into Writing, John Egerton, 1653, died, leaving the Defendant his Heir ; and Julian his Wife, the other Defendant, took forth Letters of Administration ; the Heir and Administratrix contested by their Answer, whose should be the Money, the Bill being for an Interpleader : and it was decreed for the Heir. *Vide* St. John, Executor to Grobham, against Warchall and Others, touching the same Point, decreed 16 March, 11 Car. 2 [1659].

DOLMAN *cont.* PRITMAN.

1670. Master of the Rolls.

No Interest allowed in Chancery for Book-Debts. Executor not bound to pay Legacies, without Security to refund, if not sufficient to pay all. Attachment against a Witness if he will not appear; and suppress his Deposition, if examined on the other Side.

Lands being devised by Mr. Houghton to pay his Debts, the Plaintiffs were the Creditors, who brought their Bill against the Heir and Executor to have the Lands sold, and had a Decree for the same: And now the Creditors, by Book and simple Contract, moved to have Interest for their Debts allowed by the Master, which had been standing out twelve [65] Years, there being Estate enough to pay all: But the Court denied it, saying, Shop-keepers sold at a Price accordingly, when they were not paid in ready Money; but the Order was not entered.

An Executor is not bound to pay Legacies, without Security to refund, in case there be not sufficient to pay Debts and all Legacies. *Per. Anth. Keck.*

If a Witness will not appear and be examined upon the Return of a Subpœna, the Party may take an Attachment against such Witness; and if examined on the other Side suppress his Deposition.

LLOYD *Bar' contra* POWIS.

19 June 1671. Lord Keeper.

A Bill of Revivor against a Defendant as Heir, dismissed with Costs, cannot be Costs of the original Suit.

The Plaintiff had brought a Bill against the Defendant's Father for Lands, and revived it against the Defendant as Heir, and afterwards dismissed it with Costs: And the Question was, Whether the Defendant should have the Costs expended by his Father before the Revivor? And ruled he could not, for they were dead with the Person.

[S. C. Dick. 16; Nels. 147.]

[66] WRIGHT *contra* DORSET.

24 Jun. 1671. Lord Keeper Bridgman.

No Revivor against Jointenants.

Lord Keeper declared, That if Jointenants or Tenants in Common exhibited a Bill, and any of them died pending the Suit, there need no Revivor.

COOK *contra* DELEBERE.

24 Julii, 1671. Lord Keeper Bridgman.

Certiorari Bill.

The Plaintiff brought a Certiorari Bill; the Defendant pleaded a Decree in the Mayor's Court, and an Inrollment, which was said to be only pronuncial; and it was referred to a Master to certify, whether it was before the Bill.

CUTTS *contra* PICKERING.

4 Maii, 1671, 23 Car. 2. *Bar'* Turner.

A Solicitor ordered to be examined against his Client.

The Defendant claimed an Estate by a Will for ninety Years, and after the Word Years was a Rasure, where was thought to have been written if he so long live: And the Question was to know how to find out this Fraud and Alteration, and for that End the Plaintiffs had exhibited Interrogatories to examine Mr. Joseph Baker, the Defendant's Solicitor upon; and Mr. Baker demurred, for that he [67] knew nothing, but as he was Solicitor for the Defendant, and as trusted by him; and demanded Judgment, whether he should be examined against his Client? And the Demurrer coming now to be heard, it was over-ruled; and afterward the Defendant appealed to the Lord Keeper, who, on the 8th of May, confirmed the Order.

SIR RALPH BOVEY *contra* SKIPWITH.

Pasch. 1671, 23 Car. 2. Lord Keeper, Wylde, Rainsford, Twisden and Wyndham.
See 2 Vol. 142 [*Bovee v. Skipwith*]. [S. C.] 1 Chan. Ca. 201.

The same Case, as the Security upon Drake's Estate *ante* [*Bovee v. Skipwith*, 2 Chan. Rep. 142], but Skipwith had but a Judgment and not extended, and therefore could reach but a Moiety of what was in the prior Incumbrance, and not in Skipwith's Security.

But this Case was harder, for Skipwith's original Title was but to Part of the Lands, and then he bought in precedent Incumbrances of all precedent to Bovey, who was before Skipwith : and yet Skipwith must hold all till satisfied all due to him before Bovey came in. By the Opinion of the Lord Keeper Rainsford and Wylde (Twisden and Wyndham not concurring).

And the whole Bar being of their Opinion, the Inconvenience and Mischief of [68] the Case being much pressed by Mr. Keck, who offered, That the first Incumbrance should protect what Skipwith had a Title to originally against Sir Ralph, to satisfy what was due to him; but over ruled *ut ante*, upon the Precedent of Marsh and Lee : And afterwards Skipwith's original Security was recovered at Law against him by the Heir of Drake : so that he had no Title to buy the precedent Estates.

HIGGINS *Except.* TOWN OF SOUTHAMPTON *Respons.*

26 Janurii, 1671. Lord Keeper, Wylde, and Wyndham.

Charitable Uses charged on Lands *in Capite*.

John Mill (whose Heir the Exceptant had married) in 1636 devised £37 per Annum to charitable Uses, to be issuing out of his Manor of Welston ; whereupon a Decree was made and Exceptions (*int' al'*) that the Manor was held *in Capite* ; and so but two Parts to be charged, which would not satisfy the Bequest.

Quære, Whether more than two Parts of Lands held *in Capite*, may be charged by the Statute 43 Eliz.

And upon a long Argument, after several Cases cited, as Mountague's in Cur. Ward., one in Jac. Temp., and Aiscough's in Croke, 1302, 14 Car. 1 [1638-39], and others ; the whole Court was clear of Opinion, That the whole were chargeable ; for that the [69] Statute is an enabling Statute, and the Testator had only mistaken the Conveyance ; for had it been by a Grant it had been good, and being by Will, they conceived the Statute did make good the Act of the Devisor.

PHEASANT *contra* PHEASANT.

24 Julii, 1671. Lord Keeper Bridgman.

Dower.

The Plaintiff is Reliet of Judge Pheasant, who had brought a Writ of Dower of Lands, and recovered a third Part of a Pepper-Corn, the Lands being purchased by the Judge, and an Assignment of a Lease for 1000 Years, made in Queen Elizabeth's Time, at a Pepper-Corn-Rent assigned to the Trustees, and the Bill is to have her Dower in Equity, setting forth the Judgment in Dower ; but that the Defendant sets up the Lease, which was intended to wait on the Inheritance ; for that Possession never went with it ; and that the Judge received the Profits all along. To which the Defendant answered, That the Judge by his Will directed the Lease should be kept separate from the Inheritance, to prevent Incumbrance or Dower, or both as they believed ; and demurred, that she ought not to be relieved ; Whereupon Cases were cited, as if the Inheritance had [70] escheated, and that the Chancery ought not to relieve the Trust : And Box and Lane, and Bennet's Case, and Robinson and Fletcher's Case in 1653 where a Wife brought a Writ of Dower against the Heir, and a Conveyance was set up to a younger Brother ; and the Court ordered the Deed to be given in Evidence, but would advise : And after several Arguments before Ch. Justice Hale and Vaughan, this Case was amicably composed, so no Judgment given in the Point.

STUCKLEY *contra* COOK.

24 Julii, 1671. Lord Keeper Bridgman.

£20 promis'd a Wife to procure a Release from her Husband, the Money being paid is
Nudum pactum.

The Bill was, That the Plaintiff bought of the Defendant a Close for £1100, and paid Part and secured the rest ; and that the Defendant promised the Plaintiff's Wife, That if she could procure a Release of the Money from the Plaintiff, he would give her £20, and that a Release was made, but that the Defendant denied to pay the £20, and the Plaintiff had no Witness, and to be relieved was the Bill. The Defendant demurred, That it was no Consideration, for that the Debt was released by Law, by Payment and Security ; and allowed.

The Lord Keeper declared it *nudum pactum* ; for that the Release was no more [71] than by Law and Conscience ought to have been done.

PUREFOY *contra* JONES.

16 October 1671. Lord Keeper Bridgman.

No Injunction to quiet Possession of an Office in another Court.

Lord Keeper declared he would grant no Injunction to quiet Possession of an Office in another Court.

KNIGHT *contra* BEE.

12 Oct. 1671. Lord Keeper Bridgman.

Bona Notabilia a good Plea.

The Plaintiff, as Executor or Administrator, out of an inferior Diocese, came to be relieved for a Debt ; the Defendant pleaded, That there was *bona notabilia*, so that the Plaintiff could give no Discharge, and allowed *ex parte* : But my Lord Keeper declared he was not satisfied of the Law ; but there being no Body for the Plaintiff he would not defend it. And 2d of November following it was re-heard before Judge Archer, who again allowed it.

[72] DIGBY *contra* CORNWALLIS.

4 Dec. 1671. Lord Keeper Bridgman.

Executor may be sued both in Chancery for an Account, and also proceeded against in the Prerogative, and enforce an inventory.

Cestui que Trust of a personal Estate may sue in Chancery to have an Account against the Executor or Administrator, and at the same Time sue in the Prerogative Court to enforce Executor or Administrator to bring in an Inventory.

TREDCROFT *contra* WHITE.

Mich. & Hill. 1671. Lord Keeper Bridgman.

Gratuities not to be proved.

Ruled, that for Gratuities given by a Steward, as in Marquess of Winchester and Withers's Case, no Proof to be of Payment, but allowed upon the Party's Examination that he gave them, and he not to be examined to the Particulars, nor to whom given. *Quære.*

And also in this Case, Part of the Decretal Order (as it was signed and inrolled) was left out of the Entiring Book in the Register's Office, which directed an Allowance to the Defendant : And in respect of the said Omission in the Order, the Master made no such Allowance, but upon Exceptions to the Report the Allowance was made.

[73] YEAVELY *contra* YEAVELY.

30 Feb. 1671. Lord Keeper Bridgman, Lord Chief Justice Hale, Justice Wylde, and Baron Wyndham.

A Decree not to be enrolled after the Plaintiff's Death.

The Case appeared upon the Order in fol. , and a Verdict is for the Plaintiff. That his Father was dead before the Signing and Inrolling the Decree : and it coming

to hearing 11 Nov. 1671, before the Lord Keeper, and Chief Justices Vaughan and Hale, before any Determination of the Cause, they would be satisfied with Precedents, where a Decree signed and inrolled after the Death of the Party hath been, for that Cause only of the Death of the Party before Signing and Inrolling, reversed.

And this Day they produced for Precedents, viz. Frere Plaintiff against Ewre Defendant, which was heard 20 Januarii, 9 Car. 1 [1634], where the Defendant Ewre would have had the Administration of Frere to sign and inrol a Decree pronounced in Frere's Life-time; and upon a Reference to the Six Clerks, they certified they could not by the Course of the Court.

[74] 13 April, 20 Car. 2 [1668]. An Inrollment of a Decree in 10 Car. 1 being lost, the Cause, after so long time, ordered to be re-heard.

22 Febr. 20 Car. 2 [1668]. A Decree made, and ordered, That if the Defendant died before Easter, yet that the Plaintiff may afterwards inrol it.

2 Dec. 21 Car. 2 [1669]. The Plaintiff an Administrator; and after a Decree pronounced died before Entry of the Order, and the Entry is suspended by the Administrator *de bonis non*, &c.

19 Maii, 22 Car. 2 [1670]. Money, after a Decree inrolled, certified due to the Executor of the Plaintiff; and upon Exceptions to the Report, they being no Parties in Court, disallowed: But these Precedents did not satisfy, and thereupon the Bill is dismissed, unless Cause.

RICH *contra* SYDENHAM.

23 Maii 1671. Lord Keeper Bridgman.

An unconscionable Security for a small Sum should not be helped in Equity to any Thing to attach upon.

The Plaintiff lent Sydenham and Stidulph £200, and they gave him a Judgment of £1000 to pay £800 within three Months after either of their Fathers died, or they were married: Stidulph's Father died, and Sydenham married [75] a Coheir of Porter, who had a good Estate, but it was in Trustees Names in Point of Law, and the Plaintiff's Bill was to subject that Estate to his Judgment: But it was held no equitable Consideration, and therefore his Bill was dismissed.

WILLIAMS *contra* SMITH.

Hill. 1671. Lord Keeper.

Relief against Securities got from young Heirs.

Bill to be relieved against several Securities got from young Mr. Williams presently after he came of Age: Wherein were cited,

In Lord Coventry's Time grounded on a Precedent in Lord Ellesmere's Time (Miller and Carter's Case), where an Account was directed to make appear what was paid upon Security so got.

Godscall and Walker the same; also Walter and Somers the same.

But here Smith had a Recognizance and a Mortgage, and a Bond for different Sums; and there appearing no Surprise on Williams when the Mortgage was made, and nothing appearing but that he was a sensible Man, the Money on the Mortgage is decreed with Interest; but on Payment thereof, Smith to assign, and not to enable himself to recover the Money on the Bond of Recognizance by the Mortgage.

MORGAN Plaintiff, PINDAR Defendant.

[76] 9 Car. 1 [1633-34]. Per Lord Coventry; an Award examined, tho' executed by several Releases.

COOPER *contra* , in 1671 or 1672.

An Award set aside.

A Butcher of Croydon Defendant, and the Plaintiff call'd him a Bankrupt, and a Reference was made to Arbitrators, who awarded £495 Damages upon the Plaintiff's Bill: It was ordered, That notwithstanding the Award, a Trial should be had, what the Defendant was damnified: and he had a Verdict but for £10. And the Plaintiff was relieved against the Award.

[S. C. 1 Eq. Ca. Abr. 50. See *Earl v. Stocker*, 1691, 2 Vern. 251.]

CHAMBERS *contra* GREENHILL.

9 Julii, 1672. Lord Keeper Bridgman.

A Demurrer was to a Bill of Review, exhibited on new Matter ; for that it ought not to be admitted where the Matter was of the Knowledge of the Defendant at the Time of the Answer and Hearing, tho' there was then no Proof of it ; But afterward the Proof came to light. And herein was cited Colt & Colt, where the Defendant sets forth Deeds that made a Title per Answer, but were lost afterwards, and a Decree against them : But coming to [77] light afterwards, the Bill of Review was admitted. But the Lord Keeper said, this Case was not like the other ; and so in Effect dismissed the Bill, but then gave Time to produce Precedents.

STRICKLAND *contra* LOCK.

12 Julii, 1672. Master of the Rolls.

Plea of a former Decree over-ruled.

The Case is, a Lease was made in 1642 to Trustees, in Trust to raise several Sums, and the Overplus to go to the Heir of the Lessor : The Plaintiff's Brother, Son and Heir and Nephew of the Lessor, exhibited a Bill per Guardian in 1663, to have an Account of the Profits against the Lessees, and dies ; and the Plaintiff per Guardian revives the Suit : And the Account is settled ; and the Plaintiff at nineteen Years old, and his Guardian take £93 Surplus of the Profits from the Lessees pursuant to the Decree.

The Plaintiff coming of Age takes Administration of his Brother, and exhibits a Bill original, without taking Notice of the former Suit : And the Defendant, surviving Trustee, pleaded the former Decree and Payment in Bar ; and the Question was at arguing, Whether the Plaintiff, having had an Account as Heir, shall have it again as Administrator ? and the Plea over-ruled.

[78] PORTER *contra* HUBBART.

Hill. 1672. Lord Chancellor, Vaughan, and Rainsford.

Assignee not to be in a better Condition than the Mortgagee.

A Cause re-heard after almost four Years Prosecution, after hearing ; and it being touching Redemption of a Mortgage, how Interest should be abated and an Account stated, the Case was,

That the Plaintiff's Father Mortgaged the Manor of Alfarthing, 1636, for £5000 to Dawes, who entred in 1641, no Interest being then paid ; and he enjoyed it till 1649, and then the Executor of the Mortgagee assigned it to the Defendant's Father for £7000, Part of a Debt owing by Dawes, that was a Farmer of the Customs.

The Defendant's Father enjoyed till 1663, and charged the Lands with above £5000, And in 1667 the Plaintiff brought a Bill to redeem, which was heard in 1669 by Justice Rainsford, and a Redemption decreed, and Interest from 1642 to 48 to be moderated to £4 per cent., and Profits to be accounted for.

The Defendant appealed to the Lord Keeper Bridgman, who, assisted with Moreton, Tyrrel, and Wylde, ordered Interest to be set against the certain Profits, from 1641 to 49, the Defendant's Father's Purchase, but casual Profits to be accounted for.

[79] And what the Interest of the £5000 came to before 1641, to be taken as Principal in 1649 at the Assignment ; and Interest to be computed from that Time for the £5000, and Interest then due.

The Plaintiff, after four Years Proceedings upon this Order appealed to my Lord Shaftsbury, *ut supra*.

Who upon the Hearing declared, That no Assignee of a Mortgage should be in a better Condition than the Mortgagee ; and ruled Interest to be paid but for the first £5000 from the Beginning ; tho' Precedents were cited, *viz.*

Warder and Sayer, Mich. 13 Car. 2 [1661], by Master of the Rolls. Hamond and Conningsby, Mich. 18 Car. 2 [1666], Lord Chancellor, and Master of the Rolls. Smith and Pemberton, East, 17 Car. 2 [1665], Lord Chancellor, as express in the Case.

But it is otherwise if the Mortgagor came into the Assignment.

And as to the Abatement of Interest, it was alledged, That an Ordinance about 1653 gave Power to abate Interest for the troublesome Times between 42 and 48 as the Circumstances required: And Precedents were cited, viz.

Mansell and Jenkins, 22 Julii, 21 Car. Master of the Rolls.

[80] Upon a Mortgage in 1634, and then a Redemption decreed, and Interest mitigated to £4 per cent. from 42 to 48, but there both Parties were in the King's Service, and the Lands sequestred for the Mortgagee's Delinquency, so that no Profit was made of the Land.

Lord Cobham and Lord Ross, 15 Julii, and 1 Julii, 15 Car. 2.

The Lord Chancellor Clarendon and Master of the Rolls; to redeem a Mortgage made in December 1642, where it was so mitigated, that there the Mortgagee promised to enter, and agreed so to do, but did not, whereby the Lands were sequestred.

Lord Cornwallis and Miller, 1668, made upon the Precedent of Mansell and Jenkins, and without Opposition, being upon an Extent and for a Tailor's Bill.

And the Case of the Earl of Derby, &c., where Interest was quite taken away.

But these where upon the Reason, that the Rents of the Lands were lost, or but little could be made: But in this Case of Porter's, the Lands yielded as much all that Time as at any other, and the Mortgagee in Possession in 1641, so that there was no Loss by the Land more than Taxes.

[81] But Mr. Porter's Father was in the King's Army, being a Bed Chamber Man, and was a Sufferer in his Person; and therefore Interest was moderated to £6 per cent. from 1642, not only to 48, but from thence to £5, and so until this Time.

But *Quære*, By what Power could it be moderated from 1648 to 1651 contrary to the Law, and never one Precedent in it? *Vide ante*.

But Mr. Keck argued, That it ought to be but at £6 from 1636, for that by the Act made 1660 or 1661 to settle it at £6, it looked back to all Contracts before that Time; and that it was the Constant Practice in the Exchequer; and that he was overruled in it by the Lord Chief Baron Hale, who drew that Act, and said that it was the Intention of it.

And the Lord Chief Justice Vaughan argued for the total taking away the Interest between 1642 and 48, for that most Men then buried their Money, and so made no Interest of it.

But then a Man might have taken it up as Occasion served, when as lent upon a Mortgage, he could not have it when he would. And these rules being given, an Account was directed both of casual and accidental Profits from 1641.

[82] YOUNG *contra* COOKE.

9 Apr. 1673. Lord Chancellor Ashley and Justice Atkins.

Relief on an Award.

Upon a Demurrer to a Bill, to be relieved against an Award-Bond for excessive Damages given; and ordered, That the Defendant should answer, but the Benefit of the Demurrer saved to the hearing: Upon which the Cases of Morgan *contra* Pinder, and Cooper *contra* the Butcher of Croydon, were cited.

SMITH *contra* HANBURY.

16 Octob. 1673. Justice Ellis.

Dower on an Equity of Redemption.

The Plaintiff bought the Equity of Redemption of a Mortgage in Fee, and upon an Account directed of Profits taken under the Mortgage, by an Order on hearing, 26 November 1670, it was also ordered.

That the Master examine, whether the Wife of the Mortgagee did recover Dower out of the Premises, and what Satisfaction was made for that Dower, and certify how he finds the same.

The Master stated the Matter specially, That the Wife recovered Dower, and it was paid, the Sheriff having set it out.

[83] And then the Question was, Whether this should go to discharge the Mortgage? And she having recovered by Law, and received it without Opposition of the

Mortgagor or his Heirs, it was ruled, That it should not go towards Discharge of the Mortgage, tho' the Heir of the Mortgagee did not prevent her Dower.

And it was said, That the Heir of the Mortgagor might recover it of the Doweress : But *quære*, whether the Statute bars it or not ?

But note : in this Case, she was a Party to the Bill, but not brought to hearing.

SHERMAN *contra* COX.

Lord Keeper Finch. 24 Octob. 1674. 26 Car. 2.

Equity of Redemption barr'd.

Robins mortgaged his Estate.

Aug. 5, to Smith for ninety-nine Years,

Nov. 5, to Partridge for forty Years,

1654 and 55, to Sherman the Plaintiff's Husband for £1500, and afterwards to one Browning : Browning buys in the two first Mortgages.

1664. Sherman the Plaintiff, Administrator *durante Minoritate*, exhibits a Bill against Robins and Browning, and sets forth a Title to discover Defendants Title and redeem, and the Defendants answer ; but [84] no further Proceedings were by the Plaintiff ; Browning has Notice of the Plaintiff's Title.

1666. Browning exhibits a Bill against Robins alone, to redeem or be precluded.

1667. He obtained a Decree, and the Account stated of what was due by a Report : And afterwards Robins got a Reference, and the Time set to pay the Money or be barred.

All this Time Robins was in Possession.

1667. After Preclusion of the Defendants, Cox bought Browning's Interest.

1669. The Plaintiff brings a Bill to redeem.

The Defendant pleads his Purchase and the Equity of Redemption barred.

Quære, Whether Browning should have made the now Plaintiff Party to the Bill to preclude, and whether the Plaintiff ought to be let in to redeem ?

Lord Keeper declared.

The Case was to be judged by comparing them on both sides, and so to chuse the least Inconvenience.

1. He said it was extream mischievous to the Mortgagee to make all Parties, that had Interest, Parties ; for so every Mortgagee, in case of often Mortgages, was continually a Bailiff, and his Work never at an End.

[85] 2. But said, That he would be helped at last in having his Principal, Interest and Cost : For he may come in as to the first, second, third, fourth, &c., Mortgages. But in the other case, if the Plaintiff should not be relieved, it would be an irreparable Loss and Ruin ; and therefore thought Trouble and Pains less prejudicial than Ruin and Total Loss.

So over-ruled the Plea.

But declared, That the Account stated, and Report *per* Decree, should bind, unless the Plaintiff should prove a great Collusion ; and declared, He would consider of a Way to make Men take Care to redeem Mortgages, either by making it a Rule,

1. That Interest upon Interest should be allowed, &c., Or,

2. By taking away the Rule, that Mortgagees should answer for what they should or might receive without their wilful Default : And he ordered, That the Mortgagee's Account upon Oath should bind, unless disproved by two Witnesses.

In arguing this Case were cited divers Cases about 1672.

Roscarriek and Barton ; where Barton had a Decree for Preclusion of an Equity of Redemption of a Mortgage of a dry [86] Reversion made in 1648, after a Woman's Death, who lived till 1668, and Roscarriek's Bill was to redeem as Issue in Tail.

And upon the Plea, the Question was, Whether the Plaintiff, as Issue in Tail, should have been Party to the Decree that precluded the Equity ? And resolved he need not, for that Barton could not have forced him to redeem, for the Mortgagor might have Issue ; and so the Plaintiff had no Title till the Mortgagor died.

At the Rolls.

Lord Hollis. Where it was declared the third, &c., Mortgagee, that had bought in the first Mortgage to bar Equity, was not obliged to make the second Mortgagee Party to that Bill and Decree.

EDWARDS *contra* ALLEN.
19 Jun. 1675. Lord Finch.
Estate for Life in a Devise.

A Devise to such of the Children of A, viz. B, C, and D as shall be living at the Death of E.

Is but an Estate for Life to the Children.

But adjudged, That in that Case, the Word Children extended to Grandchildren.

[87] Taylor and Hodges, 4 Car. 1 [1628-29], was cited, where a Devise to four Sons was adjudged, That the three younger had but an Estate for Life, and the elder being Heir, the Inheritance belongs to him.

ELLARD Plaintiff and WARREN Defendant.
Term. Mich. 1681.
Sequestration.

A Decree against the Defendant for £500, was prosecuted to a Sequestration, and the Sequestrators in Possession of Lands of the Defendant, which the Defendant held for a Term; and upon Motion ordered, That the Commissioners of Sequestration do sell the Term towards Satisfaction of the Decree.

HARVEY *contra* HARVEY.
Sequestration.

A Decree against the Defendant, and a Sequestration upon it, and the Sequestrators in Possession of a great House in St. James's Square, which was the Defendant's for Life: And upon Motion ordered, That the Master allow a Tenant for the House, and the Sequestrators to make a Lease, and the Tenant to enjoy.

[88] COUNTESS OF SUFFOLK *against* HARDING & Ux'.
Jun. 1635.

Value of Lands charged with a Rent, no Cause for a Bill of Review.

Upon a Bill of Review, the Defendant had a Decree for £1800, and £200 per Annum out of a Manor, which the now Plaintiff pretends not to be worth £50 per Annum, and to charge the Countess with the Rent and Arrear, who was no Party to the Grant of the Rent-charge, and therefore brought a Bill of Review.

Answ. That the Value was no new Matter, and that it was not excepted to in the former Suit, and therefore now remediless; as in the Case of an Executor, who if he do not plead at first, that he hath not Assets, shall not afterwards, when the Debt is decreed against him, be admitted to plead not Assets. Ordered, That if the Countess give not Security to perform the Order of the Court, the Bill be dismissed.

GREENHILL *against* CHURCH.
11 Feb. 1635.
Relief on an Award.

The Bill was to be relieved against an Award submitted to by the Parties, and Bonds given to perform it. Court declared, They would neither confirm nor overthrow such Awards, unless [89] Circumvention or Corruption were proved. But otherwise if the Award was made by Order of Court.

NICHOLS *against* CHAMBERLAIN.
21 May 1646. Before Commissioners.

A Debt due from an Executor to a Testator, Assets in Equity to pay Legacies.

Chamberlain was indebted to Aiskew £1000, and Aiskew makes his Will, and deviseth divers Legacies, and makes Chamberlain his Executor, and dies. The Plaintiff, a Legatee of Aiskew, demands his Legacy, and Chamberlain denies to pay it, and saith

he hath no Assets, pretending the Debt he owed to be released by his being Executor, and so not liable to pay Legacies : And it was ordered, That it was Assets. And upon an Appeal to the House of Lords, it was referred to Baron Trevor, Judge Pheasant, and Rolle, who certified it to be a Charge in Equity.

EARL OF SUFFOLK *contra* SIR RICHARD GREENVILL & UN'.

16 Jun. 17 Car. 1 [1641]. Lord Keeper, Justice Hutton, and Whitlock.

The Defendant, the Lady Greenville, whilst she had a Decree against the Plaintiff for £600 per Annum ; against which Decree the Plaintiff prayed to be discharged, in respect of a Deed of [90] Assignment of the Benefit of that Decree, made by the Lady before her Marriage, unto one Cutford, upon a verbal Agreement, between the Defendants before their Marriage that she should have the Power and sole Dispose thereof, which Cutford and the Lady had released to the Plaintiff ; and the Plaintiff not having the Deed to produce, and alledging the Defendant Sir Richard had gotten it and concealed it ; and the Defendant denying it, ordered, That the Defendants and Cutford be examined upon Interrogatories for Discovery of the Deed or a Copy thereof ; and accordingly were examined, and the Matter not being at all clear'd thereby, nor what was the Contents of the Deed, more than at the former Hearing, the Court maturely considered the Points in Question ; and conferring now together, were unanimously of Opinion, That there was neither sufficient Matter nor Proof, at last Hearing or now, to bar the Defendant Sir Richard of the said Decree, or relieve the Plaintiff ; and that the Arrears of the £600 per Annum decreed to the Lady, being in its own Nature a Thing in Action, and so to be come by merely by the Process of the Court, cannot in Law be assigned over ; so that the Assignment to Cutford (if proved) was void in Law, and being so ought not to be mentioned against the [91] Rule of Law in a Court of Equity, no Consideration appearing to Support the same, which should make it better in Equity than at Law. The said Sir Richard's verbal Agreement, in Consideration of the said Marriage, being in Subversion of the Grounds of Law and Right of Marriage ; and that unless the Agreement had been transacted by a legal Assurance, and good in Law, it was not fit for a Court of Equity to give any such Power to a *Feme Covert* as the Lady pretended to. And whereas Things in Action, tho' not assignable, were sometimes turned over by Letter of Attorney, all the Court declared, That if it had been so, yet presently by the Marriage the Letter of Attorney had determined ; and that all Covenants, Promises and Agreements, made by Sir Richard to his Lady, before Marriage, touching her Disposal of her Estate, were extinguished by the Marriage : And that if Cutford had an effectual Letter of Attorney, and the same had Continuance, he could not in his own Name release to the Plaintiff : And therefore that being void, he remained a Party interested, and ought not by his own Oath, being but a single Witness (none but he Swearing to the Contents of the said Deed), to be admitted a Witness for that Purpose, there being also other Exceptions against him, in [92] respect of former and continued Differences between Sir Richard and him : And the Court held it very dangerous to admit the Contents and Sufficiencies of Deeds to be proved by Testimony of Witnesses, the Construction of Deeds being the Office of the Court ; and the Fact touching Execution pertained only to the Proof of Witnesses ; and so the Bill was dismissed, and Sir Richard at Liberty to prosecute the Decree against the Earl.

OFFLEY *contra* JENNEY AND BAKER.

19 Octob. 1647.

The Plaintiff and Offley, Jenney the Defendant's Son, an Infant of five Years old, are Executors of Sir John Offley, and the Plaintiff exhibits his Bill to be relieved for a Debt ; and a Demurrer thereto, because the Infant Executor was no Party : And the Bill being amended, another Demurrer was, That the Infant did not charge in the Bill by his Guardian ; and the Father not being thought fit to be Guardian, the antientest Six-Clerk is ordered to be Guardian.

All Executors must sue and be sued.

[93] SMITH *contra* ATTERBY.

24 Car. 1, 1649.

A Deviseth Lands to his Wife for Life, and after to his eldest Son, with Condition: That if his Wife should be with Child, £80 should be paid by the eldest Son and Heir at Law to the Child after the Mother's Death. The Wife had a Child; and after the Mother and eldest Son convey away the Land to a Purchaser; and upon Notice proved of the Will, a Decree was made for the Daughter for her Money devised, and declared. It was a Trust devised to go with the Lands; and yet this Will was void in Law as to the Legacy, seeing he who was to have the Benefit of the Breach of the Condition, was the Party (as the Heir) which should pay the Legacy.

The Ground of the Statute of Wills, which is 32 H. 8, cap. 1, is for the good of Children and Posterity: In this Case there were no Children, but the nearest of Posterity.

[94] ROBINSON *contra* FLETCHER.

1653. Lords Commissioners.

A Deed decreed not to be given in Evidence to bar a Title of Dower.

The Plaintiff, formerly the Wife of one Fletcher, who had, before his Marriage, been questioned for Treason, and thereupon made a Deed to his younger Son of his Lands, and then marries the Plaintiff; and being acquitted afterwards dies, and the Plaintiff brings a Writ of Dower against the Heir, whereupon the said Conveyance is given in Evidence to bar her: And thereupon she brings a Bill in this Court, and it is decreed, That that Deed shall not be given in Evidence.

EARL OF CARLISLE *contra* GOBLE & UX' AND OTHERS, EXECUTORS OF ANDREWS.

Hill. 1659. Lords Commissioners, Widdrington, Tyrrel, and Fountaine.

The Plaintiff mortgaged Lands to Andrews in Fee for £1000, and covenanted and gave Bond to pay the Money, and forfeited the same. Andrews dies, leaving Goble's Wife his Heir at Law: Goble and his Wife exhibited a Bill against the Plaintiff to have the Money paid, or that the Plaintiff be foreclosed of the Redemption. It was decreed on that Bill, [95] That if the Plaintiff the Earl did not pay them the Money by a Day, that then he should be foreclosed, and the Land be held absolute against him. Afterwards the now Plaintiff, discovering that Andrews the Mortgagee had made a Will and an Executor, which was lately proved, and had thereby given the Mortgage Money to his Executor, exhibited this Bill against the Defendants (the Time given for Payment of the Money being past) setting forth the Matter *ut supra*; and that the Executor is no Party to the Decree, nor was it then known that there was either Will or Executor, and so to be relieved against that Decree, and to be directed to which to pay the Money, and have the Bond up, was this Bill: which was an original Bill, and not a Bill of Review. To the Bill the Defendants pleaded the Decree; and on hearing the Plea, it was argued, That it is a Case of extraordinary Consequence, and if the Executor have the Right by Bond, Covenant and Will, the Court cannot take it from him; and if the Heir had the Land, the Plaintiff was liable to the Executor for the Money upon the Bond and Covenant, and so to a double Payment, which was hard: And the Court was of Opinion, That in this Case no Bill of Review would lie; for that the Executor was no Party to the first Bill: [96] And was also of Opinion, That in this Case the Plaintiff could not have his Land again, for that it was forfeited since the Decree; and if the Executor had the Right to the Mortgage Money, he might by Bill obtain a Decree against the Heir for the Land; or if it were sold for the Price of it, yet the Court would not put the Executor to take that Course, for that he had a Remedy at Law for the Bond and Covenant, which the Court could not hinder him of. Ordered, That the Heir should answer without Prejudice to his Plea: Afterwards at another Day the Plaintiff moved to be admitted to a Bill of Review. Ordered that the Heir bring the Deed of Mortgage into Court, and that the Bond be also brought in, and that the Heir should sell the Land, and bring in the Money, there to remain whilst the Executor and Heir interpleaded for the same.

[97] *HATRED contra DEVAUX AND COLLADEN.*

1659. Commissioners Widdrington, Tyrrel, and Fountaine.

A Defendant injoined not to plead the Statute of Limitations.

The Plaintiff, being left to his Action of the Case at Law, moved, That inasmuch as the Bill here was exhibited within the Time limited by the Statute of Limitations, and that pending the same, the Time was elapsed, the Defendant might be ordered not to plead the Statute at Law.

Maynard for the Defendant. The Bill is only to examine Witnesses, to preserve their Testimony, and not to be relieved; and this Court cannot controul an Act of Parliament; and the Plaintiff ought to have lodged his Original in Time, as he might.

Fountaine. If he had done so, the Defendant would have brought it on by Proviso before it was ready; and it was the Practice of this Court in like Cases to injoin the Defendant from pleading the Statute, and cited a Case between Chambers and Abdy, which he said was soon after the Statute was made.

Widdrington. It was a Doubt in Doctor and Student, whether the Chancery could relieve against a Statute Law.

[98] *Hoskins* for the Plaintiff. It was the Lord Coventry's Rule in like Cases, That if the Defendants would not consent to waive that Plea at Law, he would retain the Cause in this Court, and decree it here; ordered, That the Court be attended with Precedents. And upon Sight of Precedents, ordered a Case to be made, and the Court would advise with the Judges thereupon.

[99] **CASES in CHANCERY, Decreed by
WILLIAM COWPER LORD KEEPER;
and now Lord Chancellor of Great Britain.**

CROSBY *con.* JONATHAN MIDDLETON, COLLISON & AL'.

A Bill in Equity to be relieved against an Accident or Fraud in the Writer of a Bond, who left out one of the intended Obligors Names; who yet afterwards had proposed better Security, the other Obligor being broke and run away.

A Bond for £5 was sealed and delivered by the Defendant Jonathan and his Brother Thomas, for whom he was to be bound; but Collison, who drew the Bond, left out Jonathan's Name: Thomas and the Plaintiff had several Dealings together for many Years afterwards, till Thomas [100] broke and went to Jamaica in a Ship, whereof the Plaintiff was Part-owner, and after that sold his Part to one Raycocks in May 1700. Mr. W. being come to the Defendant Jonathan, and having folded down the Bond shewed him the Condition, with his Hand and Seal, and demanded the Money or fresh Security; which he agreed to, and propos'd Mr. Raycocks, who demanding a Sight of the Bond found the Mistake, and dissuaded the Defendant from entring into new Bonds: Mr. Bird the Lawyer advising him that the Bond was void against him; whereupon the Plaintiff exhibits his Bill to be relieved against the Fraud in Collison, and to have a Performance of the Defendant and Jonathan's last Agreement. And Mr. Vernon for the Plaintiff insisted, They were proper in a Court of Equity to be help'd against an Accident or Fraud: To which the Lord Keeper agreed. Mr. Dobbins for the Defendant, That the Party was never bound, had committed no Fraud; but on the contrary was circumvented into the last Agreement: For had he known that his Name was not in the Bond, he never would have treated: Urged the Presumption, That it was paid, and the Staleness of the Demand. If a man made a voluntary Deed or Gift in Writing which is not effectual, this Court [101] will not assist, and they have not proved the Allegation, that they had refused to lend Thomas the Money, unless the Defendant would become bound for it, nor any Treaty thereon, nor Money lent, nor Contract proved, nor Bond nor Evidence, nor any Demand nor Interest paid in forty-nine Years; and that would be a sufficient Time to ground a Presumption of Payment, even at a *Visi prius*, if the Parties had been able, and we prove Dealings of Thomas with the Plaintiff almost ever since.

Lord Keeper the Defence will not prevail, for his Hand and Seal is sufficient Evidence, and the Omission of his Name in the Bond a sufficient Accident for Equity to relieve against. I must decree it against you upon the first Agreement, for forty nine Years is not a sufficient Time to ground a Presumption of Payment in Equity, as you would have it: but you may take an Issue and try Payment or Non-Payment next Assises. Issue accordingly.

[102] **SIR CHARLES ORBY & AL' contra LORD MOHUN.**

Lord Chief Justice Trevor's Argument to the Question, arising upon a Settlement by Lease and Release of C. Earl of M.

In this Case the Lord Keeper desired the Assistance of the two Justices: And the Lord Chief Justice Trevor first begun, and said, The Question in this Case does arise upon the Settlement of Charles Earl of Macclesfield, who by Lease and Release of the 23d and 24th Apr. 83, settled all his Lands in Cheshire on Sir Henry Hobart and R.

Mason Esq. and their Heirs, to the Intent that a common Recovery should be suffered to the Use of himself for Life ; Remainder to Charles Lord Brandon his first Son for Life ; Remainder to Fitton his second Son for Life ; Remainder to their Respective Issues Male ; Remainder for ninety-nine Years to the Trustees, for raising £12,000, to be disposed of, as Earl Charles should by Writing or Will appoint : And there is a Power in the Settlement, whereon the Question arises, whereby it is reserved to Earl Charles, Lord Charles and Fitton, severally, as they shall come into Possession, to make Leases for three Lives or twenty one Years, or any other Number of Years, determinable on three Lives, in this Manner : First, of all or any of the Lands antiently and accustomedly demisd, whereof fines have been [103] usually taken, reserving the antient, usual and accustomed Rents or more. Secondly, Of all the other Lands, reserving the most improved Rents that can be got, and that the Tenants should seal and execute Counterparts of their Leases. It happened, that there was no Recovery suffered, but there is a Clause in the Settlement, providing, That till a Recovery had, the Trustees against whom it was to be, shall stand seised of all the said Estates, in such Manner as the Recoverers might be, after such Recovery had.

Earl Charles afterwards devised by his Will, That the Sum of £8000 should be paid to the Lady Gerrard, and £4000 to his Son Fitton, immediately after his Death, and directed the same to be raised and paid pursuant to the said Trust, and soon after died ; and so the Estate came to Lord Charles Brandon, who being also intitled to the Remainder in Fee, as being Heir to his Father (to whom and his Heirs such Remainder was limited by the Settlement), devised the said Remainder to my Lord Mohun, and died afterwards without Issue ; and so the Estate came to Fitton, Earl of Macclesfield, for Life, who made two Leases thereof, one Lease of the Estate not antiently and accustomedly let, reserving thereon the [104] best improved Rents ; the other bearing Date 21 December 1702, wherein, taking Notice of the Power in the whole, and as to both Parts of the Power, and that pursuant thereunto, and to execute the said Power, he demised all the Lands in the said Settlement to Sir Charles Orby and Mr. Orby, severally and not jointly, reserving the several antient and accustomed Rents, and does not specify what those Rents are.

I am to give my Opinion herein, and to that End must take Notice, That there were two Points insisted upon by the Counsel for the Plaintiffs : First, As to the £4000 (for my Lady Gerrard made Lord Charles her Executor, and he made the Lord Mohun his Executor, so the £8000 is not in Dispute), and the Question is touching Interest ; and I think upon the Power Earl Charles had of the £12,000, it ought to carry Interest, for the Land was charged, the Term vested, and the Trustees might mortgage or sell to raise it, and it was to be paid at the Time appointed, and he has appointed immediately after his Death : The Term is in the Nature of a Mortgage, and though not mortgaged, nor any Sale made, yet it is not material, for it was payable at the Time of his Death, and so must carry Interest from that Time it was due, and [105] remains in their Hands as a Mortgage ; for it would be only a Transferring to put it into other Hands : But I conceive a Deduction of Interest must be made for the Time that Fitton had the Estate in his own Hands ; for he must not have Interest, because he received the profits himself, out of which it was to be paid.

2dly, Touching the Leases, and which is the main Question, Whether they be well made in Pursuance of the Power in the Settlement ? And as to the first of the Leases I shall not speak much, because it seems to be given up by the Counsel for the Plaintiff, and that a Reservation at the most improved Rent is so uncertain, that they will not at the Bar contend for it, for that Reason. As to the other Lease, in Case a Recovery had been suffered, and thereby a Power had come to him according to the Settlement, whether the Lease would be good at Law ? That's the Question before us. And Sir Charles Orby's Counsel lay down, as a Foundation that they go upon, That altho' it be a Lease by one Deed of all the Lands that were antiently and accustomedly demised, and also of all the other Lands that were not ; that is to say, a Demise of all the Lands within the Power, if that should be construed as one Lease, and one entire Reservation, it must be void as to the [106] Remainder-Man ; yet the Rent issuing out of all must be apportioned, and so it would be in Nature of several Leases in Construction of Law, because *reddendo singula singulis*, the antient, usual and accustomed Rents shall be construed to be reserved, for the Lands antiently and accustomedly let ; and no Rent being reserved for the Lands not antiently demised, 'tis void as to them. Now I am of Opinion, 'tis void as against the Remainder-Man for all the Lands ; and it is to be

considered, in what Manner the Rents are reserved : The words of the Lease are, Reserving therefore the several antient, respective and accustomed Rents, and the Word (therefore) goes to all the Lands : for the Case cited out of 3 Cro. 340, Tanfield and Rogers, and Winter's Case in Dyer, 308, which is the same in Effect, where the Demise was of all the demesne Lands and Sale of the Manor, *ac etiam totum Manerium de Chanfield ac omnium Terr' & Tenement' eid. maner' spectan' habendum* the said Site and Demesnes, and also the said Manor and Premises, reserving or yielding for the said Site and Demesnes, one Sum, and for the Residue another Sum, does not come up to this Case, or this Case does not come up to it ; for reserving therefore is for the whole : But say they, it afterwards comes, and says, What several and respective antient and accustomed [107] Rents are payable : That might do, if it might be construed payable out of Part, when reserved out of the whole. But in Knight's Case, in the 5th Rep. it is resolved, That what comes after the Reservation shall not sever it : And it was in that case ruled, That what was after the Viz. was but a Description of the Value. I mention this only, because I am doubtful whether it can make it several, as this Case is ; but I deliver no Opinion for that upon it, because I go upon another Reason, and taking it to be a several Reservation, I am of Opinion it's a void Lease.

In the first place, I consider the Reservation of the Rent in general Terms, without ascertaining any Rent ; and it has been argued at the Bar, That it is a good Reservation, because it is certain by Reference or Relation to a Certainty, *Certum est id quod certum reddi potest*. Now I agree, the Argument will hold to some Purposes, and such a Lease may be good when it is made by Tenant in Fee-simple, because by making out the antient Rent, he may recover the same, and may distrain, and avow, and aver for the antient Rent ; but as such a Lease may be good, when it is made by Tenant in Fee-simple, so it may in like Manner be good, and the Reservation thereupon void, if such Tenant in Fee [108] cannot set forth the antient Rent ; or if he can set it forth, yet it will be void, if he cannot prove what the antient Rent is ; for he must make out, that it is the antient Rent : Now here this Lease was not made by him who was Master of the whole Estate, and therefore will differ very much from what may be made by Tenant in Fee ; for in case of Tenant in Fee, the Lease will be good, and the Reservation good or void according to the Proofs he can make of the antient Rent : But in this Case before us, there must be such a Reservation as may or shall be, and is effectual to all Intents and Purposes, and must not be by any Means uncertain ; and by this Lease the Remainder-Man possibly may or may not be able to ascertain and prove what is the antient Rent, and aver that such a Sum as he avows for, is the antient Rent reserved ; so that he is under a Necessity of doing all these things, and if he fails in any one of these, he cannot recover his Rent ; and it may not be in his Power so to do, for it depends upon Evidence, which is uncertain, and upon Matter of Fact, which is also uncertain ; and it may be the Rents antiently reserved were not the same Rents at all Times, but sometimes greater, and at other Times lesser Rents reserved ; and this Power is over [109] Lands where Fines have been taken, and consequently the Rent must be more or less according to the Greatness or Smallness of the Fines ; and no Doubt on the Trial, the Tenant may shew that another Rent, than what the Remainder-Man avows for, was antiently reserved, and so Nonsuit him upon the Evidence as often as he shall think fit to contest it whereby he may come to lose his Rent. And this is the first Reason I go upon, That because of the Generality of the Uncertainty of such Reservation of the Rent, this Lease cannot be good against the Remainder-Man.

My Lord Mohun's Counsel cited for their first Authority, the Case in Cro. Car. Owen and Aprees, which is very imperfectly reported there ; for which Reason Mr. Attorney General got a Copy of the Record. I have seen the Record, and the Reason given in the Book seems to be a Mistake, for it is said to be a Lease of three Manors, usually let at £32 yearly ; but whereon the Bishop reserved the usual and accustomed yearly Rents, and the Rents and Services at the Days and Times usually accustomed ; and because he doth not shew any Rent in certain, the Lease is held void. Now that was not the only Reason, for my Lord Chief Justice Vaughan in Thredredde and [110] Lynas's Case, which is in the 3 Keb. 380, mentions another Reason, that is, That whereas there were three Manors usually let, the Lease was but of two ; for there's an Exception of one of them by the Record it self ; it should seem to me they went on both these Reasons : The Case in Truth was upon a Lease of two Manors, excepting the third under the antient and accustomed Rent, not specifying any : Now the three

Manors had been usually let at £32 yearly ; therefore taking both these Reasons together, the Lease was certainly void, because there never was any antient Rent for two, but for three Manors ; for if there had been £32 for two, that had undoubtedly been good : And because I conceive they did not go in that Case upon any of these Reasons singly, I think that Case can be no Authority, nor is it of any Weight with me for my Opinion herein.

The Counsel on the other Side cited the Case of Lewson and Piggot, which was made on a Power reserved by a Settlement by Mr. Venables of Cheshire, to make Leases of Lands antiently demised, reserving 12d. for every Cheshire Acre ; and thereupon a Lease was made by him of all the Lands antiently demised, reserving all the Rent intended to be [111] reserved. The Cause comes to be tried in the King's Bench, where the Tenant who was Plaintiff recovered, notwithstanding the Reservation was in such general Terms : And the Lord Chief Justice Holt, and Lord Chief Justice Treby agreed it was a good Lease ; and gave their Opinions accordingly : But that does not come up to this Case, for the Reservation by the Power intended may be ascertained, at least twelve Pence for every Cheshire Acre : 'Tis known what is a Cheshire Acre, and by Admeasurement may be at all Times ascertained, and depends not upon uncertain Evidence. There is another Thing in my Opinion in this Case, which carries a great deal of Weight with me, and that is, tho' this be but one Deed, it must be construed, as the Plaintiff's Counsel would have it to be, several distinct Leases under such distinct Rents, as formerly all the antient demised Lands were usually set at, severally under several and distinct Rents ; And it must be considered, That this is a great Estate, & *non constat* how many Manors are contained therein ; so that there the Remainder-Man (for I must have Recourse to my former Argument) must upon this Avowry aver what Lands were particularly demised upon that Lease, or otherwise his Avowry will not serve him ; for if he should avow for [112] more or less, either of these two Mistakes will destroy it, because it is a several Lease ; so that it seems to be at a mighty great Uncertainty, and to be a Lease and Reservation directly contrary to what the Power meant and intended, and not in any Wise made for the Advantage of the Remainder-Man ; as the Power by providing, That a Counterpart should be sealed by the Tenant, seems to intend ; by that it must be inferred, that it was so provided to the End that the Remainder-Man should know what certain Rent was reserved, and that upon what certain Lands in each Demise : Now this Deed may amount to twenty several Leases, and here is but one Counterpart for all ; so that he cannot by any Manner of Probability, say it may be impossible for him, to make out the several Rents and Lands. For first, he must have all the antient Leases, which cannot be presumed ; for when the Leases are expired, the Counterparts are usually given up and not regarded, and so may be lost ; and therefore the Remainder-Man would be put to infinite Uncertainty and Inconveniences ; and it cannot be presumed, that by the Settlement it was intended that he should be liable to any such Obstacle ; but on the contrary, that he should not meet with any of them ; and therefore it prudently [113] foresaw the Inconvenience, and provided a Remedy against it, that there should be a Certainty by Counterparts of every several Lease ; and in such Case he would be enabled to come at his Rent ; but here is no more than one Counterpart for twenty several Leases, and not one Rent for any of them ascertained, so that he had as good have none, and it can be of no Account at all to him.

One Thing more I must take Notice of that has been offered, and that is, say the Plaintiff's Counsel, This Lease, had there been a particular Rent reserved, would not avoid any of the Inconveniences I mentioned, nor serve the Remainder-Man's Purpose ; for tho' there be an antient Rent reserved in certain, he must aver it is the antient Rent : But I think that the Remainder-Man need only aver, That it is the antient Rent or more, and that's enough for him to aver in that Case. But I must only shew that there is a vast Difference, where a particular Rent in certain is reserved and where not ; for in this Case he must not only aver the antient Rent, but also prove it to be so ; and if the Tenant should prove another antient Rent, that won't make the Lease void, but bar the Plaintiff in Avowry : But in case of a particular Reservation, he must truly aver the same to be the antient [114] Rent, yet when he shews the particular Rent under the Tenant's own Hand, 'tis incumbent on the Tenant to prove that it was not the ancient Rent : And if he should not so prove, it will be presumed for the Plaintiff ; and if he should, the Consequence will be, That he will thereby avoid the Lease, which is absurd to think that any Tenant will endeavour, when it is made for

his Benefit ; and if not the Rent, yet the Land in that Case will be recovered ; but in this Case neither ; so that there is a great Difference between those two Cases, in one he must not only aver, that it is the antient Rent, but must also prove it so : in the other he need only aver it to be the antient Rent or more, and shew the Counter part ; and the Tenant, if he will, must make the Proof (for it lies on him) to the contrary, which if he should, would avoid his own Lease : and so it is every Way better for the Remainder-Man to have a particular Demise and a particular Reservation. Upon the whole, I think this Lease is not agreeable to the Intention of the Settlement, and so cannot be good at Law.

Holt Chief Justice : The Case has been truly stated and opened at large by my Brother Trevor, and I agree the Point as to the Interest of the £4000 to be paid [115] from the Time of the Death of the Testator, for the Money is then due, 'tis then the Charge commences, and he that takes the Profit must pay the Interest : and there ought to be a Deduction for Interest for all the Time that Fitton enjoyed the Lands because he had the Profits that should have paid himself the Interest : and therefore he must take it by Way of Retainer. As to the Lease : I am of Opinion that it is a good Lease for all the Lands antiently and accustomedly demised ; for the rest, the Counsel of the Plaintiff do not contend : The Case is upon a Settlement made, wherein there is a Power for the Tenant for Life to make Leases of the Lands antiently letten upon Fines taken, reserving the antient and accustomed Rent, and a Lease of these Lands is made in the very Words of the Settlement.

And first, I will consider, whether a Lease made by such a Power be good, reserving or rendring Rent in this Manner ; and in Order thereunto, I will,

Secondly (tho' it does not go directly to the Matter in Dispute), but for the Good of Posterity, and which may give more Light hereafter, explain what is meant by these Words in a Settlement or Lease, Antient and Accustomed Rent.

Thirdly, I will consider where Lands antiently demised severally, and where [116] Lands not antiently demised severally are altogether compiled in one Deed, whether that be not as well as if they had been demised by several Deeds ?

And First, considering the Power, 'tis thereby said, Yielding the antient and accustomed Rent ; and it is not denied, but that the Power is certain : Now will any one say, That a Reservation pursuing the very Words is not as certain ? If not, I am sure the Power must be void ; and if it be not uncertain in the Power, I am sure it must be so in the Reservation ; for the same Words must have the Sense in both, and general Words, tho' they do not refer to any certain Particular, are sufficient : And so is the Case of Ameredith, cited in the Abbot of Strata Marcella's Case, 9 Rep. 29 b. and is indeed the very Case to Point. King Henry 8. being seised in Fee of the Manor of Stephenam, and Hundred of Cartridge in the County of Devon, late Parcel of the Possessions of Margaret Countess of S. did (*inf' al'*) grant the same to his Queen Katherine for Life : and by another Patent granted to her for Life in the said Manor and Hundred *Catalla felonum, &c., Fines, &c., of Royal Offices, &c., Annum, diem & vastum, &c.,* with many other Royal Privileges and Exemptions to Queen Katherine : and afterwards the same came by Descent to [117] Queen Mary, who in the first Year of her Reign by her Letters Patent granted the same Manor and Hundred to the Earl of Huntingdon and his Wife ; and that they within the said Manor should have *tot, talia, tanta, eadem & hujusmodi libertates, privilegia, Franchasias, Jurisdiction', &c., quod, qualia, quanta, &c., quæ præd' Comitissa Sarum, aut aliquis vel aliqui præmissa aut aliquam inde parcellam ante habentes, possidentes, aut seisciti inde existentes unquam habuerunt, tenebant aut gavisî fuerunt, &c., infra præmissa, &c., ratione vel prædictu alienjus Chartæ Doni seu concessionis, seu aliquarum literarum Patentium, &c.,* in Tail, Remainder over in Fee : And the Question was, If the Patentee should have all the Franchises, &c., which were granted as aforesaid to Queen Katherine : And there was the same Objection, That the Reference was general and too uncertain : But the whole Court of Exchequer resolved it was certain by Reference to the Charter of Queen Katherine, tho' it does not refer to the Charter, but by general Words *prout aliquis seu aliqui, &c.,* and that such general Reference was as much in Law, as if the Charters had been all recited therein. Now if such a Grant was good in the Queen's Case, much more shall it be in the Case between Subject and Subject, and it would be a great deal harder [118] to construe it void in this, than the other.

2dly, It is a good Lease for this Reason, That by this Reservation, the Rents are certain as they can be ; and 'tis not the reserving a Sum certain that makes the same

certain, for even upon a certain Sum, or particular Rent reserved, it must be averr'd to be antient and accustomable Rent or more ; it is not what is reserved on't as to the Sum, that is requisite, but that it be the antient Rent or more ; so that the bare Reservation of a Sum only, does not make it good in Whitlock's Case, in the 8 Rep. 69 b, there is the Pleading ; and tho' he may take his Remedy by Debt or Avowry, yet 'tis plain in Avowry the Tenant must aver, what is the antient Rent, unless the Defendant will take upon him to aver the same, so that there will be no such hazard as is presumed ; and therefore I am of Opinion a Reservation by such general Words is good. My Lord Chief Justice Trevor agrees with me, That if it had been made by Tenant in Fee-simple, such a Lease with such a Reservation might be good ; if in one Case, I don't see why it should not in the other : But take it, that he must aver that Sum, that he declares for, to be the antient Rent. Sir John Molyne's Case in the 6 Rep. 6, &c., is a Case in Point ; for [119] there *tenendum de nobis, &c., per servitia inde debita & de jure consueta*, must be made by Averment, as in this Case ; there is an Objection made, That it will be troublesome and inconvenient to him in Remainder ; I don't see how, and if it were, he ought to take the Estate as 'tis intended him : But it is said, he will or may be at a great Loss to find out and prove what was the antient Rent : I would know who can do it better than he to whom all the Counterparts, Rent-Rolls, and Evidences of the whole Estate must come together with the Land : All the writings are of Course in his Hands, so that the Trouble, if any there be, cannot signify any Thing ; no Body can know so well as himself ; and if he will distrain he must aver, and may easily give Evidence what was the antient and accustomable Rents. I take the Reason of Owen and Aprees's Case in 1 Cro. to be clearly with me : 'Tis not intelligibly reported by Mr. Justice Croke ; but that was not his fault, for it is mistaken in the Transcribing only, because he wrote a very ill Hand : Mr. Attorney has got a copy of the Record : and the Case was this : There were four Manors usually let at £32 yearly, and the Bishop leases three of them, rendring the antient Rent : Now that was nothing, and so not good, for [120] no such antient Rent had been reserved for the three Manors as £32, and it could not be help'd by Apportionment ; but it had been good by reserving it in this Manner, that is to say, Rendring the antient and accustomable Rent, usually reserved for the said three Manors, and also for the fourth, and that is this very Case before us. It is argued, That such a Lease cannot be made, so as to take effect, by any but the Tenant in Fee : Now pray see the difference ; this is the same in Effect, being made by a Power derived from him that has the Fee, and the Lessee is in mediately, though not immediately, which will make no Difference here from him that has the Fee : And that it is the express Resolution of Whitlock's Case, in the 8 Rep. 71 a, for the Power is reserved to the Tenant for Life, and none other who in case the Settlement had not been made, would have been the Tenant in Fee ; and the Power reserved to him savours strongly of that he would have had with it, the Fee.

'Tis as if Charles Earl of Macclesfield had made it before the Settlement, or if he had made it after the Settlement, when he was in the same Plight in all Respects, as Fitton was when he made it ; That would have been the same Thing ; for being made only Tenant for Life, who was [121] invested with the Fee ; 'tis the very same Thing to all Intents in this Case, and as good as if it had been made by him that was immediate Tenant in Fee-simple in Possession.

Now there remains only to shew how this antient Rent must be ascertained, and what was meant by those words, Antient and accustomable Rent in this Settlement ; and I take it, that's the Rent, and shall be at all Times so understood, that was reserved at the Creation of the Power, where a Lease was then in Being, or that was last before that Time reserved, where no Lease was then in being : for he that creates the Power, intends no more than that the Lessor and Lessee shall not be able to put the Estate in a worse Condition, but keep it in the same Plight and Condition at least, as it was in when so settled. Now suppose antiently there had been Variety of Rents reserved ; as for Instance, 10s. before for many Years antiently reserved, and 20s. some few Years before the Settlement ; and at the time thereof the Lands were not in Lease ; in that Case the 20s., and not the 10s., though a much antienter Rent, shall be the antient Rent ; for the Length of Time in that Case is material : And for this I depend upon a Case of undoubted Authority, and [122] which can never be shaken, and that is the Case of Morice and Antrobus in the Exchequer ; 'tis in Hardres 325, and was reported at large by my Brother Cheshire at the Bar, and was the Case of Morice and Atwood. The

petty Canons of St. Paul's made a Lease, the 13 Car. 2 [1661-62], for twenty one Years, of the Rectory of St. Gregory's, to the Plaintiff and his Wife, rendring £40 per Annum and a Couple of Capons, the antient Rent had been first £25, then £37, then £38, and last of all £40, and the Capons : and there my Lord Chief Justice Hale (to whose Authority I lean) held the Lease to be void, though it was a greater yearly Rent than any of the antient Rents, except the last : And consequently, as he also declared in that Case, the usual and accustomed Rent was that reserved upon the last Lease ; and so must the Statute of Eliz. be expounded on the Word accustomed ; so that the Antient Rent in this Case is not to be taken in respect of Time past, but of the Time to come. I doubt whether I express myself so well to be understood, but I would say the Lease that was then, or last before in Being at the Time of such Settlement, the Rent thereon reserv'd is the antient Rent, in respect of any Lease to be made pursuant thereunto : as if a Lease was made four Years ago at £4, [123] and another be made now reserving the antient and accustomed Rent ; that Lease at £4 in respect of this Lease, which was then a future Act to be done, is antient, and the Rent thereof is old Rent, in respect of the new Lease. I will suppose a Variety of Reservations at several Times of Rent, as 10s. forty Years ago, and 20s. twenty Years ago ; yet the last Reservation of the 20s. must be the antient Rent, otherwise this Power cannot be executed : And therefore *ex necessitate* you must bring it to some Certainty, as I have done, to know what must be intended by these Words antient, usual, and accustomed Rent : And for that I depend on the Case of Morice and Antrobus in Hard. as a Case in Point ; and the Reason of the Law is with me, and 'twill be no Answer to say, That *ex necessitate* such a Construction was made there, because it was an Ecclesiastical Case ; and a Dean and Chapter, once reserving a greater Rent than formerly, can never diminish again ; but Tenant in Fee-simple may make Leases at 50s. and afterwards at 10s. and then makes a Settlement as in this Case : What then, shall the 10s. or the 50s. be the antient Rent ? And I hold that the 10s. shall be, for *major* and *minus* will [124] not be any Alteration of the Case, nor do vary it one Way or other ; as in the Case of Dean and Chapter, who can increase but not diminish, which is not the Case of Tenant in Fee, and what he might have done at the Time of the Settlement made, and which he then thought was a Rent sufficient, should, upon a Power reserved to him of his antient Estate, be the Measure of his Intention ; and without a Certainty the Power can't be executed, even by reserving a Sum in Particular. And so having dispatched this second Point, which is not a Thing which comes now directly in Question, I give this my Opinion for a future Good, and to be remembred, That upon any Settlement, where a Power is reserved to the Tenant for Life to make Leases of the Lands in that Settlement, which were antiently and accustomedly demised, and whereof Fines have been taken at the antient, usual and accustomed Rent, for three Lives or one and twenty Years, or any other Number of Years determinable on three Lives, that Rent must be the Sum (and no other) that was then or last before reserved upon a Lease of the same Lands in Being, or expired last before the Time of the Settlement made.

The third Point is, That all the Lands in the Settlement are demised by one Deed, [125] whereas the Intent of the Settlement was, That several Leases should be made of the several Manors and Farms, and so several Deeds and Counterparts to be sealed by the several Tenants : But now as they are huddled up altogether in one, they make but one Lease. To this I answer, That if the Reservation be several, notwithstanding they being compiled in one Deed, that can be in no Sort a Diminution of the Power : for suppose four several Farms at four several Rents ; as for Example, one antiently let at 40s., another at 20s., another at so much, and the other at another Rent, and all compiled in one Deed, reserving the several Rents antiently reserved for them : Can any one say it is but one Lease and one Reservation, or that it is not pursuant to the Power ? Surely it is a good Executing of that Power, and one Counterpart is as good and effectual as twenty Counterparts. The Intent of the Settlement was, That the Reservation should be so certain, that he to whom the Rent was to come, might know how and for what he should declare, *habendum* the four farms at four Rents severally and respectively, &c., for ninety-nine Years, if A, B, or C shall so long live : That is a good Reservation within the Intent of the Settlement : so is the Authority of Knight's Case in the 5 Rep. 54. Winter's Case in Dyer, 308-9. [126] and the Case of Tanfield and Rogers, Bro. 340. express, That several Reservations may be in one and the same Deed ; and that the Reservation here is such a several Reservation, and consequently the Lease good ; for that which was not antiently demised will not hurt the other,

but must fall to the ground : Lands antiently demised, and Lands not so demised, are letten in one Lease, reserving the antient Rent for those that were antiently demised, is a good Lease and Reservation, and for the other Lands is void ; and the contrary Opinion is contrary to all the Rules of Law ; the putting of them in one Lease will not be material to object, for by one Counterpart he may see what are the several Rents reserved out of each farm or Manor : But you'll say 'tis reserving therefore in joint Words, Demise all in one Word ; the Words are Demise, Lease and to Farm let, &c., Reserving therefore, with Submission, notwithstanding the Words are never so joint, yet they shall be taken severally where they have a distinct Subject Matter to work upon : The Power is for several Sorts of Lands or Estates, some demisable antiently, the others not. 5 Rep. 7. Justice Wyndham's Case, there was a Demise to A for ten Years of Blackacre, and a Demise to B for twenty Years of Whiteacre, and afterwards [127] a Demise by Indenture to a third Person, to commence after the Determination of the said several Demises ; which last Demise being of both Lands, and that to A expiring ten Years before the other to B, it was held, That the joint Words in the last Lease should have a several and respective Construction, and *reddendo singula singulis*, by the last Lease, the Term of ten Years in Blackacre should commence immediately after the Lease to A expired, and in Whiteacre, after the Lease to B expired, should commence ; that is, in one ten Years before the other ; and so it must of Consequence and to all Intents be a several Demise by joint Words in one and the same Deed of several Lands : In the like Manner, in this Case the Lands are several, and the Demise must be several by this Deed, because we must, to make a right Construction, look back to his several Power, and it will be very hard to construe this to be a void Deed of Demise, where it may be construed to be a good one : And the Words here are as express as can be to make it several ; he says, severally and distinctly, and so he demises them, and means to do it according to his Power, and no otherwise. These Words have been slighted at the Bar, but they ought not to be rejected ; for they are very material : This Lease he [128] makes in Pursuance of his Power, it would be a strange and hard Construction to say, That according to his Power he did demise these Lands jointly, when in express Terms he says, That according to his Power he demised them severally, as he ought to have done. 5 Rep. 18, Slingby's Case is express, That several Words are void, where they would work on a joint Interest, and joint Words are void where they would work on a several Interest ; but severally in a Covenant that be joint and several and work severally ; and plainer Words cannot be spoken than in this Case, for he says, several Claims for Years. It has been said, That a Power of this Nature ought not to be taken favourably, it being in Prejudice of the Remainder-Man : I confess I know not why ; for if he, that would have otherwise been Tenant in Fee, became Tenant for Life by such a Settlement, whereby that Power is reserved to him, that would have descended with the Fee, it ought to be taken beneficially for him, and that Power has a Relish of the antient Fee. 6 Rep. 17 b, Sir Edward Cleer's Case, that very improper Words might serve to execute such Powers. Clement Harwood seised of three Acres of Land of equal Value *in Capite*, made a Feoffment in Fee of two of them, to the Use of his Wife for Life, for her Jointure, and afterwards made a Feoffment by Deed of the third [129] Acre to the Use of such Person, &c., and for such Estate, &c., as he should limit and appoint by his last Will in Writing, and accordingly devised it to a third Person in Fee ; and though it could not be good as a Devise, but utterly void, inasmuch as he had conveyed two Parts before by Act executed, yet it was held a good Execution of his Power, because it ought to have a favourable Construction ; and therefore *ex necessitate* the Judges there had Recourse to his Power, that it should pass by Way of Limitation of the Use, even though he took no manner of Notice thereof by his Will, but devised the third Part generally in Fee : so here this Lease cannot be good by a joint Demise of all the Lands in the Settlement, and may be good by a several Demise of the several Sorts of Lands or Estates therein : It should be construed to be a several Demise, though it had been demised joint, as it is not, and so make it a good Execution of the Power, and consequently a good Lease, *ut res magis valeat quam pereat*. In the like manner in the Case in Hob. 312, the Devise which was void, as an absolute Disposition of the Estate, was construed a good Revocation in Execution of the Power, though no Notice taken of the Settlement therein, because such Power must always be construed favourably, and with a beneficial [130] Intent of the Party to whom it is reserved, in Consideration of the Estate he has parted withal : and so is Scrope's Case, 10 Rep. 143 b. A Covenant to stand

seised to other Uses than were in the Settlement, adjudged a good Revocation of the Uses in that Settlement, though not express'd ; and the true Reason is, because such a Power must at all Times have a beneficial Construction for him who is to have it ; indeed he must pursue Circumstances and the Form prescribed as such a Reservation, Counterpart, &c., but need not take Notice even of his Power ; and if he should make a Lease without mentioning of it, and seemingly as Proprietor, that shall be construed, as if it had been done by Virtue and in Pursuance of his Power, if it could by no Means be done by Virtue thereof, and so are all the Authorities : So that I conceive that there is nothing omitted that is requisite to make a good and effectual Lease according to the Settlement, and I think it to be such, and ought to be construed several.

Lord Chancellor Cowper. The Case has been stated clearly and distinctly by my Lord Chief Justice Trevor : And as to the first Point, I concur readily with both the Opinions that their Lordships have delivered ; because the Creation of [131] the Term, from the Death of the old Earl Charles, is in the Nature of a Mortgage, and so there must be consequently Interest for the Mortgage Money from the Time it was payable and due, which was at the Death of the old Earl Charles, and young Earl Charles was in the Nature of a Mortgagor ; and the Estate being charged when it came to him with the Money, he was bound only as Tenant for Life to keep down the Interest, as is the Common Rule of Equity ; if he redeems, he is to pay but one third of the Principal, and he in Remainder the other two thirds, that is the course of Equity : Then when Earl Fitton came into Possession he was not to pay Interest to himself, and so no Interest after that till the Time of his Death, at which Time the Interest will again revive.

Second Point. The second Lease, reserving for the new Lands the most improved Rents, is under an absolute uncontrovertible Uncertainty, and of no Value to the Parties. The great Point is upon the other Lease, which is made as well of the Lands antiently and not antiently demisable, both which are demised in one Lease : And I must own, with Submission to better Judgment, That in this Point I differ in Opinion with my Lord Chief Justice Holt, and am of the same [132] Opinion with my Lord Chief Justice Trevor. I took Time formerly to consider of it, when I was Counsel and attended at the Bar, and because it was a Case *prima impressionis*, I made a particular Observation on the Arguments at Bar on both Sides ; and I am now of the same Opinion I was then, and shall deliver it accordingly, making Use of my old Notes : But I must premise a few Things in Order to come at the Point in Question : And first, It is agreed by both my Lords Chief Justices, to be a Question merely at Common Law, and not to have a different Determination in this Court from what it would receive at the Courts below ; and it is here now in the same Manner, as if there had been a special Verdict here before me, where Equity can't aid ; nor will it help this Lease, it not being compleatly executed in all Respects : I speak this, because the Counsel for the Plaintiff seemed to direct some thing this Way, as if in Case any Thing were wanting it might be relieved ; and I am clearly of Opinion, That it being a voluntary Execution of a Power, not done upon a valuable Consideration, 'tis not a Matter by any Means proper to go before a Master upon, but must stand or fall as it can ; for if it be good, it must be decreed good, if bad, it must be decreed bad, [133] though never so inconvenient to the Remainder-Man, or the Lessee ; and so it is in the same Condition as if a Recovery had been suffered.

2dly, As to the Reservation, the Question is not, if it be void between the Lessor and Lessee ; and it was argued very fallaciously at the Bar for Want of Making this Distinction or Difference, where made between Party and Party may be good, but to bind the Interest of a third Person or not is the Question, and whether within the Execution of the Power : Now by the Limitations to the Power, it is plain, they were for the Benefit of the Remainder-Man : I will easily grant, That when he in Remainder for Life came into Possession, he might lease as he pleased ; and as to him the Reservation is not void, because it may happen to be recovered, but as to the Remainder-Man it is void, because it may not happen to be recovered ; so you see by this Distinction it is not void, for Uncertainty absolutely, but yet it is not absolutely and perfectly certain : Some things are in their Nature uncertain, some accidental ; and to argue, That if a Thing, as this Rent is, be not uncertain, then 'tis certain ; and if certain, it is then good to bind the Remainder-Man ; this is not fair Arguing ; the first won't follow, for there is a wide Medium between not absolutely uncertain and [134] certain, for future events may alter the Case here ; so it is not absolutely uncertain or certain : as if he can be able or so lucky as to pitch upon the Sum that was the antient Rent

if he can also prove it to be so : And if it shall happen, that the other shall not be able to prove that any other Sum was the antient Rent, then these three [If's] being so luckily with him, it may be a good Lease, and he may recover his Rent ; but if the contrary to any one of these [If's] happen, he can't be certain ; on the contrary he must fail, and the Lease is bad, so as to be absolutely void for Uncertainty, yet not so as absolutely uncertain, and the Remainder-Man, for whose Sake the Limitations are intended, is no Party. Now it is not only capable and possible never to be reduced to a Certainty, for the Remainder Man may meet with Difficulties insuperable, and if any Uncertainty in it, the Lease will be void as to him : And to prevent any such Uncertainty, there may be reserved the antient Rent or more, and that's alternative, and then the Lease will be good according to the Settlement. 'Tis said, the antient Rent is certain by referring to the last Rent, at or next before the Time of the Settlement, where no Lease was in Being : I do not agree to that, with Submission to the greater Judgment : [135] Suppose it leased once at a greater and twice at a lesser Rent, I take the Rent of the former Leases to be the antient Rents, for the last might be made by him that had the Fee, who is not bound to reserve the antient Rent, but may let it for nothing if he pleases ; here are Lands antiently demised, whereof Fines have been taken, so that here is a flat impossibility to make the Distinction, because the Lands have been let in all Probability for more or less, as the Fines have been higher or lower.

The third Thing I premise is this, That the Reservation and Deed, being to be made upon a Restraint of the Power, must be taken strictly against Tenant for Life ; because of the limited Acts he is to pursue, and liberally for the Remainder-Man, because that Restraint was intended for his Benefit ; and there are Multitudes of Authorities in the Books, That such a limited Power must be taken strictly against the Tenant for Life ; because tho' the Power be for the Benefit of Tenant for Life, yet the Restraints are put upon him for the Benefit of the Remainder-Man ; and if we should go on both the reasons together, it must still be taken for the Benefit of him in Remainder : And for this I insist on the reverse of the Reason in Mountjoy's Case, 5 Rep. 3 b. That was an Estate-tail created by [136] Parliament, and he had a narrower Power by the Act than the Law would have given him as Tenant in Tail ; therefore that must have a reasonable Construction according to the Meaning of the Act : *Vice versa*, here the Power of Tenant for Life is by Way of enlarging the Estate, and being in Augmentation of it must be taken strictly, and so must it be taken according to natural Reason : Now according to that, this can't be a good Lease to bind the Freehold and Inheritance of the Remainder-Man ; for in Construction of Deeds, the true genuine sense and Meaning of the Parties must be attended, so we must consider each Part of the Power in the Deed : And in respect of Rent, the Rent reserved must be in as good Condition, as the antient persons, that held the Estate, enjoyed the same ; it was not intended that general Words, especially that those mentioned in the Settlement, should be *verbatim* turned into a Reservation in the Leases, but provided for a Certainty to be had in every Reservation of what Rent should be reserved, and that to be particular, that he in Remainder might have a Remedy upon his Action, for a Rent reserved certain, and in Terms as formerly had been used to be reserved for the Land ; or at least so as it might be reduced to a certain Rent, by [137] referring to a Certainty : And this is the plain and honest Meaning of the Parties, and not to involve the Remainder-Man in perpetual Controversy and Uncertainty, as in this Case he is obnoxious to : 'Tis that the antient and accustomable Rents be reserved ; there Will be a certain Sum reserved, and here it is disputable what is the antient Rents, and 'tis said (or more) so that it may be ascertained without Dispute ; and it was intended, that a certain Sum be reserved where the Rents were even indisputable, for a certain Sum in all Cases must be reserved, and the contrary would produce Inconvenience ; for always a certain Rent was antiently reserved, and so it was intended by having the Counterparts : and I rely upon it in this Case, that he is under greater Disadvantages than any Freeholder formerly had been ; for let us consider what it is, that by allowing this Lease to be good, the Reversioner must prove : he must prove the Lands he avows for to be within the describing Words of the Lease, and that the Lessor was in possession, which he can't do here, because it is promiscuous and can't be known what Lands for what Rent ; but if there had been a Counterpart, the Lessee would be forced to say the Lessor was in Possession, and so the Lease would be a Conclusion, [138] at least an Evidence of the Rent : But here he must prove such a Sum as he declares for, and neither more or less was the antient Rent, or the Tenant will baffle him as often as he

pleases ; the Rent reserved here is neither like, nor the same Reservations and Rents, as used antiently to be reserved ; and to argue, That though an express particular Sum had been reserved, the Tenant might put it upon him to prove that it was the Rent antiently reserved, or more ; and so he in Remainder must prove what was the antient Rent, although a certain Sum had been reserved : That is not to be argued, it is a harsh supposition, That a Man should go about to destroy his own Lease, that he holds under, for so it would be, otherwise he can never avoid Payment in an Action of Debt for the Rent ; and if in such Action he should deny it to be the antient Rent, the Lessor or he in Remainder might bring his Ejectment, and upon shewing the Denial upon Record would recover the Land and put him out. Now this Case here varies, for the Tenant may baffle the Lessor twenty Times over, and yet keep the Lands in Despight of his Teeth : But if the antient Rent had been reserved, there would have been no such Danger, and the Remainder as well as the Lease had been good ; but now he may [139] shift here, as often as he can shew there was any other Rent antiently reserved ; so that I must be of Opinion, That this Reservation in the Manner here reserved, is reserving a worse Rent than used antiently to be reserved, and that the Restrain in the Settlement means, That he in the Remainder shall have the same in all material Qualities as well as the Quantity of the Rent, and a Remedy to attain to the Certainty and recover the Rent as well as the former Freeholders could. There are many Cases to this Point put in Mountjoy's Case in the 5 Rep., and I take them all to be very good Authorities, because being put by the Counsel at Bar, they were denied to be Law, as a Reservation of Rent to be paid at two Days, where antiently it had been payable at four, not good ; if Silver, where antiently it had been in gold, and many others there put were denied by the whole Court.

4thly, That this Lease as against the Lessor is not void, but against the Remainder-Man it is void, because not so beneficial as usual, and a very minute difference will serve to avoid it, which might have been prevented in Pursuance to the Settlement by reserving more than the antient Rent ; but here is none ; and if there be, it must have all the beneficial [140] Qualities of the Rent antiently reserv'd ; and those ought to be reserv'd and observed, as Mountjoy's Case in the 5 Rep. says. And there several Cases for Want of that denied to be Law, as Silver for Gold, or two Rents or two Manors conjoined, a Part of the Manor for an apportionable Share or Part of the Rent ; as if twenty Acres had been set for £20 each Acre of equal value, it is not a good Lease, if ten of those that were even be let at the Rent of £15, such a Lease would be void ; in the Case before us it is much stronger, because the original Parties to the original Power have laid a Stress on this very Thing, as if they foresaw and would prevent it ; for the Lessee by that shall execute and sign a Counterpart of this Lease : But the Deed here signifies nothing, it is a Shadow, and being particular of the Manors, as they were antiently set distinct, the Tenant may deny he held any particular Parcels, he may say, These and these Lands are not contained in any Box as I may call it, of several Leases, and insist upon any Rent he pleases, in twenty several Actions brought by the Remainder-Man, and may nonsuit him on the Evidence in every one of them ; and he is estopped to say nothing ; but Signing and Sealing it was intended, that several Leases should be made, and several Counterparts, and [141] several Rents certain, and that to Uncertainty, for which the Settlement provided : And all which the Parties foresaw.

Another Reason, or rather Observation, which may serve to answer what my Lord Chief Justice Holt said, That if the Settlement were certain, the Deed was as certain, and that the general Words in the Power are good for a Reservation : But a true Way to execute a Power like this, is not to do it in the general Words of the Power : In all Cases they must reduce the Rent to a Certainty by particular express Words : Suppose (as I have seen in some Deeds) that there was a Proviso, That in every Lease there should be inserted such Covenants, as are usual to be inserted in Leases in that County where the Lands lie, &c., and a Lease should be made with a Proviso in the very Words of the Deeds : That would not be good, nor could it be aided by any Special Verdict, finding the Covenants usually, &c. And the Words (or more) alter it extremely, and the Lessor must lay hold on both the antient Rent or more ; Whereby it is denoted, That in Obedience to it, he must do it one Way or other ; but still it must be certain.

A third Observation or Argument which I make is, Admitting the Sum reserved not necessary to be a certain Sum, sure it [142] must refer to an absolute Certainty : as in the Case of Levison, there was an absolute mathematical Certainty, than which nothing can be more certain : And in the Case of Levison and Pigot, the

very Power provides it should be so, at least 12d. for every Cheshire Acre; so that it must refer at least to something certain; But this refers to nothing that is so; on the contrary, to a Thing that is fluctuating, Custom and Usage; the which nothing is more uncertain than Antiquity and Custom: It is certain at the Time of an old Lease there was a Rent existing, and it was then known certainly what it was: But to make this good, it must now also be known what it is, but may be it is unattainable by human knowledge: As to the Thing in Question, there is Certainty absolute and natural; but we mean useful Certainty for the Benefit of Property, and in that Respect referring to Custom and Usage is uncertain: And therefore *certum est quod certum reddi potest* is fitted to maintain, that whatever in it self is once certain, must be ever certain, will not be granted; for it may or may not be certain according to future events, and much less to bind a third Person: And it is contradicted by Owen and Apree's Case, 1 Cro. 94. Supposing it had been referring to a Lease or Leases, between such a [143] one and such a one, that also had been void between the Lessee and Remainder-Man, because the Reversioner might lose the Lease; and so there is not any Equivalent, to which he may at all Times resort to be ascertained as in Pigot's Case; therefore it is not a good Reservation where it is not certain in it self, but refers to ancient Custom and Usage. There is as to Nature an Uncertainty, and an Uncertainty as to the Understanding; as for saying, That a Verdict would have ascertained it, that would be aiding the Defect, and to go before a Master or Jury to find; and what were the ancient Rents, is supplying a Defect, which has been made in executing a Power against Common Right; this is truly not an absolute but a conditional Reservation, good between the Lessor and Lessee, but not to bind the Remainder-Man. The Condition is, I let these Lands absolutely, and if an ancient Rent can be found, and you the Remainder-Man can prove it, then I reserve it to you: But if there be none, and if there be, and you cannot prove it, you are to have none.

There is another Uncertainty, which I don't need to help on, and this is in the Thing demised, and that runs to Apree's Case: Where Lands are demised by sufficient Description, the Lessee can't go [144] back, unless he forfeit the Lease: But here they are so demised, That tho' the ancient Rent had been reserved, yet the Tenant may say, the Lands are more or less; but if they had been distinctly demised, and he should say so in Pleading, he would forfeit his Lease; but here is no Light at all for the Lessor to go by, tho' he finds the certain Rent; so that it is only a bare Possibility, that by the Help of great Charges, good Fortune, and the Industry of himself, he may come at his Rent, if he can ascertain the very Lands anciently demised and their respective Rents; or if either the Lands be mistaken or the Rent, he is still to seek for it. Lands leased for the Rent reserv'd anciently on these Lands, and there be less Lands in the Lease than anciently were let, that is not a good Lease; but if less or fewer Lands than anciently were let, be demised for the same Rent in certain, that had been well.

In the third place, if there had been a Recovery, and a Lease of the divers Land in the Recovery, it would be bad, and the same Exception would hold; but the ancient Rent being a Sum of Money, you might reserve more than the ancient Rent: And so it appears, That altho' I had reserv'd by the Words ancient and accustomable Rent, that would be good: So [145] that *Certum est quod Certum reddi potest* will not do in this Case; if you can maintain the Reservation on the Lease, yet the Lease is not in Severalty as formerly the Lands were demised; and therefore it will be that Case in Point; or if you would make it a several Lease, yet here are more Lands, and then it will be stronger against you than if there had been less. O, but say you, it is the ancient Rent is reserved only for the Lands anciently demised, and not for the other Lands; that won't follow, for the same Lands are not demised in the same several Lease; the Words are severally, and not jointly of all the Lands in the Settlement, reciting the Messuages, Tenements and Hereditaments in several Manors in the County of Chester, and all and singular the Lands comprised in the recited Power, *habendum* for ninety-nine Years, if Sir Charles Orby, &c., shall so long live, and yielding and paying therefore yearly the ancient and accustomable Rents usually reserved and payable; (not said heretofore) in the leasing Part, only there is a Severalty, for the Lease is several, and not joint of all the Lands in the County of Chester, &c., and also of all the other Estate: It is a Severance, but it is the minutest that can be several; suppose of four Fields and four Messuages severally, where usually [146] two Fields and two Messuages were let; that would not be good, for it must be a Severance of all the Things demised: And I take the Words to be such, yet the Lands are not usually perhaps let by Manors,

&c., and the Reservation, &c., yet has Relation to Usage or Custom in the demising Part : Nor is it said as anciently demised ; and the Construction, that is endeavour'd to be put upon it would carry the Reservation to be several, further than any Case has as yet done ; The Lands pass by this Deed all during the Life of the Lessor, and therefore is one Reservation singly of all the Rents for all the Lands : These Manors reserving therefore several Rents, will not be good for a Demise of them where they were usually let single or together ; and the Calling them respective, ancient and accustomed Rents, is denoting what they were, not what they were reserved and used. Dyer, 309 ; Hob. 303 ; and Moor, 201. It is true, the several ancient Rents are reserv'd, but not for the several ancient Tenants ; and (respective) only denotes, but does not reserve : Therefore I am of opinion the Demise, tho' several and not joint, yet cannot be made any other Severalty than the Demise ; and that won't do the Plaintiff's Turn, for that will be for all the Lands ; and that will be Owen [147] and Apree's Case, and so let in a Manor never let before ; here are more Lands than anciently let : You won't say, that the Rent was not reserv'd as well for the Lands not anciently demised, for the Lands did pass as much as by their *redditus*, it is for all that is leased ; and that Part that was not anciently demised, being it must be apportioned, for there is no Covenant for the Lessee to pay the ancient Rent for the old Lands, in Case the other should be evicted ; therefore agreeable to Common Right, against which the Power is made, and to what was then intended by the Settlement, the Lease not being severally, much less singly : The general Course has been in executing of these Powers to make the Deeds or Leases in particular Terms, and not according to the general Words thereof : And now since that when these powers have been perhaps, and I believe, much ancienter than the Statutes for enabling Ecclesiastical Persons ; this was the first Attempt that ever was made to delegate the Power generally, as I may say, that was particularly to be executed in the same Manner as they were done before ; and for that it would be fatal to all Remainder-Men, because the Tenant for Life might upon a sudden at any Time make a Disposition of the whole Estate in this [148] uncertain Manner ; and being a new Invention in Derogation of the Common Law, and tending to introduce Perjury, Forgery and Fraud, the Courts of Equity won't aid it by any Means ; it is to be utterly exploded like the Attempt of Justice Richill mention'd in Littleton. I am of Opinion, it is not a good Lease, so as to bind the Remainder Man. And accordingly decreed, Sir John Hobart should be Trustee for the Uses in the Settlement, permit his Name to be used, and decreed an Account for the Mortgaged Estate ; and if the Party sets up a Title to the Inheritance and Mortgage, he must account for the whole Profit as the Counsel for the Defendant insisted on : But the Lord Keeper decreed only an Account, and if the Account were delay'd, that a Receiver be appointed ; refus'd to speed the Report upon the face of the Decree, because it is presum'd all Persons will obey. Then it was mov'd, that for the sum of £8000, devis'd by old Earl Charles to Lady Gerrard, and by her devis'd to young Earl Charles, who devis'd the same to the Defendants, Interest might be discounted for the same by the Plaintiff, as Administrator to Earl Fitton, for the Time Earl Fitton enjoyed the Estate. But to this the Keeper answered, that Earl Charles the younger [149] having the Feesimple in Reversion, and the Fee being fallen now into the Party who was to have that Money, shall he not have it out of the Estate ? For it is not personally due on Earl Fitton ; it is too hard to give Interest for it to you that have the Fee, the same being a personal Demand of Atwood. Thomas's Case in the House of Lords was the same ; she recovered her Portion after the Fee had fallen in to her : The Keeper said, That was because of Fraud in the Trustees, it may be, and so would not decree any Interest for it, but that all writings, except such as concern'd the mortgag'd Estate, to be deliver'd up, and those when the Possession comes to the Defendant by Brent Administrator of Charlotte : And decreed costs for the £4000 only, as Mortgagees usually have.

[150] Mich. 6 Annæ Reginae [1707] in Canc'.

ATTORNEY GENERAL at the Relation of the Master and Fellows of Sidney College in Cambridge, *contra* — — BAINES and MARY his Wife, Heir of Doctor Johnson.

A Will written by the Testator himself had no Witnesses, though a Codicil referring thereto had four Witnesses, yet held no good Will, for Freehold Lands, &c.

Doctor Johnson seized of several Freehold and Copyhold Lands, and possessed likewise of divers Leasehold Lands, surrenders the Copyhold to the Use of his last Will,

and after makes his Will in Writing, whereby he devises all his Estate both Freehold, Copyhold and Leasehold to Trustees, their Executors, &c. in Trust for the Maintaining and Providing for several poor Scholars of that College, and for divers other Charities in his Will particularly expressed and directed: This Will was written with his own Hand, but had no Witnesses to it; he afterwards makes a Codicil, wherein he recites and [151] takes Notice of the Will; and this Codicil was subscribed by four Witnesses, and duly executed, and soon after dies; and now this Bill was brought to have the Trustees take upon them the Trusts, and to have a specifick Performance thereof; and it was urged in support of the Charities, that for the Copyhold there was no Question but the Will was sufficient, because they did not pass by the Will, but by the Surrender; for as Copyhold they could not pass by the Will; and for the Leasehold Lands they being but Chattels are Part of the Personal Estate, and not within the Statute of Frauds and Perjuries, but remain at the Common Law; and for them the Will is effectual likewise; and for the Freehold, tho' the Will be not effectual, as a Will, to pass them within the Statute of Frauds and Perjuries, for want of conforming to the Circumstances required by the Statute, yet it is good as an Appointment to charitable Uses within the Statute of 13 El. And it was compared to 11 Co. Magdalen College Case, where Want of Livery or Attornment shall be supplied, being but Circumstances concurring to perfect the Grant and Intent of the Disposer of Lands; but where there is a Defect of Power, there the Statute for Confirmation of Grants will not [152] supply that, as by a Feme Covert, or Infant; so if Tenant by Knight's Service devise the Whole, there is a Defect of Power for a third Part, tho' Collison's Case in Hob. and Moore before 32 and 34 H. 8 [1541-43], seems contrary. Mr. How likewise said, that 43 Eliz. co-operating with the Will makes it good as an Appointment, and cited 2 Roll. Rep. 318, and that that Statute controls the Statute of Westm. 2, *de donis conditionalibus*, and cited a Case *inter Dey and Thwaites* at the Rolls about twenty Years ago.

Sir Thomas Powis for the Defendant urged, that the Will, not being executed as the Statute of Frauds and Perjuries directs, would not be good to pass the Freehold Lands, and the Taking Notice of the Will in the Codicil can't mend it, for that, for ought appears, it might be executed in another Room, and the Witnesses to that see or know nothing of the Will; and Collison's Case of the Infant comes full up to this Case, tho' the principal Case there does not, and so does the Case of Socage Lands (as I think it was put of Socage Lands), and tho' 43 El. makes void the Statute *de donis*, so that if Tenant in Tail devises his Lands to a Charity, this shall be good as an Appointment, though not [153] as a Devise within that Statute of Frauds and Perjuries, which being a subsequent Statute to that of 43 Eliz. over-rules it, and says, that no Devise or Bequest of Lands shall be good without such Publication and Circumstances as the Act requires; and this Statute was made to prevent Mens Disinheriting their Heirs, though it were for a Charity, unless the Solemnity and Circumstances required thereby were pursued, and that it ought not to operate as a Disposition or Appointment against the Statute.

Vernon on the same Side agreed, that 43 Eliz. repealed the Statute *de donis*, being subsequent to it, and as that did, so must 29 Car. 2, repeal 43 Eliz. being subsequent to it; for that disables Persons from giving away their Lands without such and such Circumstances, or to cancel or revoke a Will without such solemn Ceremonies, and says, any Law, Custom, or Usage to the contrary, which binds more strongly.

Pauncefort on the same Side and to the same Effect, that 43 Eliz. should give place to 29 Car. this being subsequent, and made to prevent Perjuries and other Mischiefs by disinheriting Heirs.

Dobbins in Reply for the Plaintiff, that the Will is not to be void by 29 Car. 2, but only the Devise, that shall be void as [154] a Devise, but yet it may be good as an Appointment: Neither is the whole Will to be void, but only the Devise of Lands, where the Statute is not pursued: And he insisted farther, that the Codicil taking Notice of the Will, and being duly executed, that makes the Will good also, if it was affixed to the Will; and the Laying it in another Place signifies nothing, nor is to be regarded, for it should relate to the Will, tho' he had it personally in his Custody.

The Attorney General cited Collison's Case, which he said they had not answered: that it was good as an Appointment; and he said the Statute of 29 Car. 2 might operate upon former Statutes for Wills, but could not when they were no Wills, but Appointments only.

The Lord Chancellor held this a very good Distinction, and said it was found out

to support Charity before 29 Car. 2, but now upon that Statute can this, not being good as a Will, operate and be good as an Appointment ? He agreed the Court would favour Charities, but he could not give a Loose to break in upon the Statute, and make Wills, which are often made *in extremis*, to be good against the Heir, when there was a Statute to prevent them ; and the Statute never intended to disinherit the Heir upon [155] such a Distinction ; and as upon the Statute *de donis*, a Will by Tenant in Tail can't be good as a Will, but yet by 13 Eliz. shall be good as an Appointment : So now this Statute of 29 Car. 2, says, it shall be void to all Intents and Purposes, if the Circumstances required by that Statute are not pursued ; *ergo* it cannot be good as an Appointment ; but it being a favourable Case on the one Side, and a Charity on the other, he would consider farther of it, and would confer with the Judges in it.

Hill. 6 Annæ Reginae [1708] in Cane'.

HYDE *contra* HYDE.

A Will in nine Sheets sealed, &c., by the Testator, who intending a new Will signed a Draught thereof, and then tears off eight Seals from the former, yet held good for the Real Estate, and the other for the Personal.

A Man makes his Will in Writing, and thereby gives all his Real and Personal Estate to his Wife, her Heirs, Executors, &c., in Trust to pay his Debts and Legacies, and he devises several Legacies to his Children and other Persons, and concludes, in Witness whereof I have to this my last Will and Testament, containing nine Sheets of Paper, and to a Duplicate thereof, to be left in the Hands of such a one, set my Seal in the [156] Presence of three Witnesses, who all subscribed their Names in due Form of Law. Afterwards the Testator being minded to add other Trustees to his Wife, and make some little Alterations in his Will, sends for a Scrivener, and gives him Directions to prepare a Draught of Instructions for another Will, which the Scrivener did accordingly, and brings the Paper of Instructions to the Testator, which he read over and approved very well, and sets his Hand to it, and being at a Tavern, thinking he now had made a new Will, he pulls out of his Pocket the first Will, and tears off the Seals from the first eight Sheets, which the Scrivener seeing ask'd him, What he was doing ? Why (says he) I am cancelling my first Will : Pray (says the Scrivener) hold your Hand, the other Will is not perfected, it will not pass your Real Estate for Want of being subscribed and executed pursuant to the Statute of Frauds and Perjuries : Say you so (says the Testator) I am sorry for that : and immediately desisted from tearing off any more of the Seals, and in some short Time after dies, without having done any further Act to perfect the second Will, or cancel the first. After his Death, on Application to the Spiritual Court by the Wife, who was made Executrix of this [157] last Will, they sentenced it a good Will as to the Personal Estate, and admitted her to prove it : And now this Bill was brought by the Legatees against the Wife and other Trustees to have a specifick Performance of the Trust in the first Will, and that the Estate might be sold pursuant to the Directions of that Will, and their Legacies be paid them : It was insisted, that that Will was revoked by making the other, and that the other, tho' there were the same Legacies given out of the Lands thereby devised to be sold, was not sufficient to pass the Real Estate, or make any Charge upon it, for Want of the Circumstances required by the Statute of Frauds and Perjuries.

Sir Joseph Jekyll urged, that the last Sheet of the first Will was avoided by the Tearing off the Seals from the eight first Sheets ; for when in the last Sheets he refers the Execution of it, as his Will, to his Sealing of every Sheet, as the Signal or Testimonial of its being his last Will ; if any of these Signals fail or are destroy'd, the whole Will becomes void : and here he has torn off eight of the Seals : besides the Statute of Frauds and Perjuries having four Words, viz. Burning, Cancelling, Tearing or Obliterating, and that by any of these the first Will is to be avoided, here are two of [158] those Acts, for here is Tearing and Cancelling, and so the first Will is defeated and avoided.

Mr. Cowper on the other Side insisted that tho' the original Will shall by this Act be supposed to be cancelled, yet here being no *Animus Cancellandi* or *Revocandi*, and that as soon as he was told of it, he desisted and went no farther, that the Duplicate thereof, which he took Notice of in his Will, remaining intire and undefac'd in the Hands of the Party, to whom it was deliver'd, shall be sufficient to pass the Real Estate.

Mr. Williams on the same Side insisted, that it should be only a Revocation *pro tanto*, for so much as the Seals were tore off from, and no more, and that for the last

Sheet it should remain a good Will : for a Man may revoke Part of his Will if he pleases, and yet the Rest stand good : And Mr. Gilbert said, that Sealing of all the Sheets was not essentially necessary to the Perfection of the Will, but only to the last Sheet, and that it remains intire and absolutely perfect and executed, and that he had not any Intention of cancelling the Will ; for that when he was told of the Consequence he desisted, and the last Sheet was only essential for the Making the Will remain intire, and therefore can't be said to be cancell'd, but [159] shall be good and essential to all Intents and Purposes, the essential Part which makes a Will still remaining.

Serjeant Hooper cited a Case in C. B. since the Revolution, where a Man made his Will in due Form, and after made another Will, whereby he revok'd the first Will, but the last Will had but two Witnesses, and it was adjudged no Revocation ; for that Statute was made on Purpose to take away all Constructions of a Man's Intentions, where the Form of the Statute was not exactly pursued : But my Lord Chancellor wonder'd how that could come to be the Question, and thought he was mistaken, since the Statute is express, that no Will shall be revoked by a subsequent Will, unless such subsequent Will be signed and attested by three or more Witnesses ; and in the principal Case he decreed this Tearing off the eight Sheets the Seals to be no Cancelling of his first Will, not being done *Animo cancellandi* ; as soon as he was told of it that the other would not be sufficient to pass his Real Estate, he immediately desisted, and left the last Sheet intire and uncanceled ; and took this Difference, that for the whole Personal Estate this Making of the second Will was a sufficient Revocation of the first *in toto*, and that it should not be taken [160] to be a good Will as to Part of the Personal Estate, and no Will or Revocation as to the other Part of the Personal Estate, for his Intention should not be taken by Halves : and since the Spiritual Court has sentenced it a good Will of the Personal Estate, it must be good for the Whole, and such Legatees of the Personalities in the first Will as are left out in the second must lose their Legacies, but for those that had Legacies by the first Will chargeable upon the Real Estate, if the same Legacies were devised to them by the second Will, that they should still continue chargeable on the Real Estate, and should be raised out of it : And so he said it would be, whether their Legacies were increased or diminished, they being by the second Will made chargeable upon, and to be raised out of the Real Estate likewise, which tho' it was not sufficient to charge the Real Estate in it self, yet since the Real Estate remained well devised by the first Will, they should be still secured by that Real Estate, for they were not out of Lands like a Rent, but only secured by Land, which he said was well devised, but for other new absolute personal Legacies devised by the last Will, they should be chargeable only upon the Personal Estate, and should have the Preference to be first paid [161] out of the Personal Estate before the other Legacies in the first Will upon the Real Estate, because they had their several Funds out of which they were to be paid, the personal Legacies in the last Will out of the Personal Estate, which was well devised by that Will : and the Legacies charged upon, or secured upon the Real Estate, which was well devised by the first Will, out of the Real Estate : and all agreed, That the second Will, tho' not sealed and subscribed, as the Statute of Frauds and Perjuries directs : yet it is good for the Personal Estate, it being *casus omissus* out of the Statute, and then it was good at Common Law.

[Mews' Dig. Will, IV, A, 1. S. C. 1 Eq. Ca. Abr. 409. See *Dancer v. Crabb*, 1873, L. R. 3 P. & D. 104.]

Pasch. 7 Annæ Reginæ [1708] in Canc'.

WALLIS *contra* EVERARD.

Bill upon three Demands dismissed as to two, and reliev'd for the other, where Bond and other Debts had been paid by an Administratrix for the Honour of the Family, and other Allowances made to her.

Plaintiff, as Administratrix to her Husband, brought a Bill upon three Demands ; the first for £500, which she paid upon Bond-Debts of her Husband's over and above his Assets ; the second for £120, due by the Defendant upon a Note : the Third for her Dower or Thirds out of the Real Estate. The Case was shortly thus : [162] The Plaintiff's Intestate upon Purchasing an Estate in Fee, wanting Money to compleat the Purchase, borrowed of several Persons £500, and gave Bonds for Re-payment with Interest : But before these Bonds were satisfied, died intestate, leaving the Plaintiff, his Widow, and one John Everard his Son, a Minor of about two or three Years old :

The Plaintiff took out Letters of Administration to her Husband, and exhibited an Inventory in the Spiritual Court of his Personal Estate, which falling much short to pay his Debts, the Plaintiff for the Honour of the Family, and to prevent the Creditors suing the Infant, paid those Bond Debts, intending to have them allowed out of the Real Estate when the Infant came of Age. The Plaintiff likewise, as Guardian to her Son, enter'd upon the Real Estate, and received the Rents and Profits thereof for about sixteen Years, when he died, still under Age; and the Estate thereupon descended to the Defendant as Cousin and Heir at Law, against whom she now brought this Bill, to have a Satisfaction out of the Real Estate, for what she paid over and above her Husband's Assets; and for the £120 which she had brought to the Account of her Husband's Personal Assets, and for her Dowry: As to the Dower, the Bill was dismissed without much Difficulty, because [163] she had her Remedy at Law; and as to the £120, it was denied to be due; and if so, then since she ought to be discharg'd of so much of her Husband's Assets, tho' brought to Account in the Inventory, the Bill was dismissed as to that likewise; but as to the first Point, it was insisted for the Plaintiff, That she stood in the Place of the Creditors; and as they for want of Personal Assets might have fallen upon the Real Estate for Satisfaction of their Bonds: so now she having paid them stood in their Place, and had the same Equity as they would have had. For the Defendants it was insisted, That the Plaintiff's Bill ought to be dismissed likewise as to this Part, being very extraordinary; for upon Payment she might have taken an Assignment of the Bonds: as is usual in such Cases, and have sued them in the Creditors Names at Law.

2dly, It was said, That she received the Rents and Profits as Guardian to her Son for sixteen Years, and now would sink all that and burden the Real Estate with the whole Debts.

3dly, That the Creditors themselves could have no Effect of their Bonds till the Infant had come of Age, by Reason, if they sued him, the Parol would have demurred till his full Age; and therefore she was not at all obliged to pay those [164] Bonds; and so it was paid in her own Wrong.

Thereupon the Plaintiff's Counsel urged, that the Estate was not worth above £33 per Annum, and that her Dower of it came to £11 per Annum, and that she ought to be allowed £14 per Annum at least for the Maintenance of her Son, and then the Residue which she received would not near amount to satisfy what she had paid; and though the Parol would have demurred till the Infant's full Age in Strictness of Law, yet it was for the Honour of the Family to have those Debts satisfied sooner, and therefore she ought to be allowed them.

My Lord Chancellor said the parol Demurrer was no Discharge of the Debt, it was only a Composition of the Infant, that he should not be harrassed with Suits before he was of Age to know how to defend them, and that the Debt was nevertheless subsisting; and decreed an Account to be taken of the Personal Assets of the Husband, and to see how it had been applied, and how far it fell short, and likewise an Account of what the Plaintiff had received of the Rents and Profits of the Real Estate, allowing her upon the Account what was reasonable for the Maintenance of the Infant, and what she had paid on the Bonds for the Honour [165] of the Family, and then to resort back to the Court, and for Costs, &c., to stand revived 'till an Account taken, tho' the Defendant urged this Account might be at the Peril of Costs on the Plaintiff's Side.

Pasch. 7 Annæ Reginæ [1708] in Cane'.

STRICKLAND *contra* HUDSON, MASON & UX'.

Legacies devis'd to three Children decreed to be paid to the Father on his Entering into Recognizance with one S. One of the Children dies: the Father dies insolvent: the Recognizance is sued against S, who as A's Representative, brings his Bill against the other two Children to have Allowance for their Maintenance, &c.

The Case was, that one John Lodge having one Son and the two Defendants his Daughters, their Uncle by Will gave them £50 a piece, and if any of them died, their Share to go to the Survivors and Survivor equally, and limited no Time either for Payment of these Legacies, or within what Time the Death of any should intitle the Survivors, and died: the Children being all under Age, their Father, as next Friend and Guardian, brought his Bill in this Court against the Uncle's Executors to have

the Portions paid him upon giving Security, which was decreed accordingly ; and thereupon he and the now Plaintiff Strickland enter'd into a Recognizance before a Master of this Court of £300 Penalty, [166] the Condition whereof (after reciting the Decree, and that the Children, by Reason of their being under Age, were not capable of giving Discharges for their Legacies) was, that if the Conusors or either of them should pay the said £50 a-piece to the Children at their respective Ages of twenty-one Years, then the said Recognizance to be void : The Father after puts out the Son Apprentice, but, as was prov'd, gave no Money with him ; the Son lived nine or Ten Years after he came out of his Time, and then died intestate ; the Defendants intermarried, and some Time after the Father died insolvent, without ever having paid the Portions or the Interests thereof, and the Recognizance being now put in Suit against the Plaintiff, the other Conusor, he brought this Bill to be relieved, and insisted, that the Father being dead he now stood in his Place, and ought to have the same Equity against the Defendant as the Father would have had ; that the Father had maintain'd the Defendants for several Years in their Minority ; that neither they before, nor their Husbands after Marriage had ever demanded of the Father their Legacies, and therefore no Interest ought to be paid for them ; and for the Principal, that it ought to go towards Satisfaction of their Board [167] and Maintenance, and in Particular for a Year's Board after Marriage, and when their Husbands were obliged by Law to maintain them ; and for the Son's Legacy, it did not belong to them, but to his Representatives ; for tho' no Time was limited when these Legacies were to be paid, yet the Law would supply a Time, and give it them when they were capable of having any Benefit by it, or were in such Circumstances as to require it ; and the Son being put out Apprentice, and his living so long after he came out of his Time, his Legacy was vested in him, and ought not to survive, but to go to his Representatives.

For the Defendants it was answered and proved, That they did all the Work of the House as their Father's Servants, and that he kept no other, and their Service was more worth than the Interest of their Legacies ; and therefore no Deduction ought to be upon that Account ; that the Father was bound by the Laws of Nature and of the Land to maintain his Children in their Minority, and their Portions given them by a Stranger ought not to be lessen'd upon that Account ; that for the Year's Board after Marriage, it was by express Agreement, and was all they were to have from their Father ; and for their Brother's Legacy, admitting it [168] did vest in him, and so belonged to his Representatives, yet it being by the Will to the Survivors generally without any Times limited, whenever he died, his Representatives would be but Trustees in Equity for them.

Cur'. You need not urge this last Point ; for it was expressly limited by the Condition of the Recognizance to be paid at twenty-one Years of Age, which he attain'd to, and so it belongs to his Representatives, and it is not now upon the Foot of the Will, but of the Recognizance ; as to the other Legacies they must be paid with Interest and Costs, for their not demanding them was no Discharge of them, for they were Tender of troubling their Father, but ought not therefore to be Losers ; and he said, that for this Reason the Master of the Rolls, who had longer Experience than himself, would never allow a Child's Legacy to be paid to the Father or Mother upon any Security whatever, by Reason of the Strife and Dispute it might occasion in a Family ; and for the Maintenance of them in their Minority, the Father was bound to do it, and their Portions given by a Stranger are nothing to him more than if they had not any ; and for the Interest of them, their Service was more worth, and therefore they are to have the Interest ; [169] but for the Year's Board after Marriage the Plaintiff must be allowed, the Proof not being full as to the Agreement.

Term. Trin. 7 Annæ Reg' [1708] in Canc'.

LITTON STRODE *alias* LITTON *con.* LADY FALKLAND & AL'.

Divers Settlements on Marriage, &c., by the Ancestor. *Quære* how far controllable by a subsequent Will made by the Heir, and such Wills expounded.

The Case was this : Sir Rowland Litton had Issue by Judith, his first Wife, William, afterwards Sir William Litton, Rowland, and Anne who was married to Sir George Strode, and Mary who was married to Sir Francis Russel ; and had Issue by Rebecca, his second Wife, the present Countess of Falkland ; and on the 20th of February,

1665, by Indenture and Fine on the Marriage of William, his eldest Son, with Mary Harrison, settles his Estate in Hertfordshire, in this Manner, viz. As to Part, to the Use of William for Life, Remainder to Mary his Wife for Life for her Jointure, Remainder to William in Special and General Tail, Remainder to Sir Rowland in Fee; and as to the other Part, to Sir Rowland for Life, Remainder to William for Life, then to Trustees during [170] his Life, to support the Remainders to his first and others Sons in Tail Male by any other Woman, Remainder to Sir Rowland in Tail Male, Remainder to the right Heirs of Sir Rowland; and as to the Residue, to the Use of Sir Rowland during his Life, Remainder to William in Special Tail Male, Remainder to Sir Rowland in Tail Male, Remainder to the right Heirs of Sir Rowland: And afterwards by Indenture and Fine for barring the several Estates Tail, limited in Remainder to Sir Rowland by the preceding Deed, he settles and conveys all those Lands to the Use of himself for Life, and after his Death, and after the respective Uses and Estates precedent to the Estates Tail therein limited to Sir Rowland should determine, to the Use of Sir Francis Russell and Sir Nicholas Strode and their Heirs, in Trust to permit Rowland Litton, his younger Son, to take the Profits during his Life, and after in Trust for his first and other Sons in Tail Male successively; then in Trust for such Persons and Estates as Sir Rowland should by Deed or Will appoint, and in Default thereof in Trust for the right Heirs of Sir Rowland: And afterwards by Lease and Release Sir Rowland conveys Lands in Hertfordshire and Bedfordshire to Sir Francis Russel and Sir Nicholas Strode and [171] their Heirs, to the Uses and Trusts following, viz. as to those in Hertfordshire, to the Use of Sir Rowland for Life, then in Trust to and for the Use of Rowland the Son for ninety-nine Years, if he should so long live, then to Trustees during his Life, then in Trust, and for the Use of Rowland's first and other Sons in Tail Male, Remainder to the right Heir of Sir Rowland; and as to those in Bedfordshire, to the Use of Sir Rowland for Life, Remainder to Rowland, &c. (as the other), then in Trust to and for the Use of the right Heirs of Sir Rowland. Rowland the Son dies without Issue in the Life of Sir Rowland, who after, in 1674, died likewise: Then William, now Sir William Litton, by Will in Writing, devises Part of the Lands comprised in the Settlement of 65 to Dame Philippa, his Wife, for her Life; and then comes this Clause, And all other my Lands, Tenements and Hereditaments (out of Settlement) I give and devise to Litton Strode (the now Plaintiff), Son of Sir George Strode, and his Heirs, upon Condition, that if I leave any Daughters by my Wife, or that she be *enfeint* at my Death, and after deliver'd of any Daughter or Daughters, that he shall pay four thousand Pounds to such Daughter or Daughters; and also upon this express Condition that he shall change [172] his Name from Strode to Litton, and write his Surname Litton to all Deeds, &c., and if he does not, &c., then to go over to the Lady Russell and her Heirs; and makes him and Dame Philippa his Executors and residuary Legatees: After making this Will Sir William forecloses the Equity of Redemption of several Mortgages, and purchases several other Lands of Inheritance, and was also at the Time of making his Will seiz'd of divers Copyhold Lands not surrender'd to the Use of his Will; afterwards Sir William adds two Codicils, which he wills should be annexed to his Will, and thereby gives some particular Legacies to other Persons, and both Codicils had three Witnesses a-piece, but were not annexed to his Will, that being in the Country, and the next Day Sir William dies without Issue; and now the Plaintiff Litton, *alias* Strode, brought this Bill to have a Discovery of the Deed and Writings, and to have the Lands, whereof the Uses were determin'd, as given to him by Sir William Litton's Will, and an Account of the Profits, and that the Will might be established and proved by Witnesses *in perpetuum rei memoriam*; and what Lands passed by this Will was the principal Point in Question.

The Court agreed in this Case, that [173] there was no Part of the Estate so settled, but that it would take Effect in Possession after Sir William's Death, if he died without a Son, as in Fact he did.

It was argued for the Defendant by Sir Thomas Powis, that the Condition being only, that the Plaintiff should change his Name, and not that he and his Heirs should do it, the Personal Estate, which was more than £20,000, was a sufficient Consideration; and as to the Words themselves, And all other my Lands, Tenements, and Hereditaments (out of Settlement), it is very plain they are Words of Description what Lands he intended should pass, and to take in any that were in Settlement would be totally to extinguish and reject those Words, which are repeated three Times in the Will to shew his great Care not to break in upon any Settlement, and therefore are not to

he looked upon as unwary accidental Expressions ; and said he believed it was a superstitious Notion, that a great many People had entertained, that a Man could not dispose of an Estate which came from his Ancestors, but ought to let it go to his Heirs as it came to him, tho' Lands of his own Acquiring he might do what he would with them ; and this seems to be the Intention of this Will, that he would not meddle with any of the Lands [174] which were settled by his Father, and came to him by Conveyance from his Father ; for the Words are to be taken to distinguish the Lands, and not the Estate in the Lands, and the Words operate upon both, viz. Those he had out of Settlement were to pass, and those in Settlement not to pass ; as to the £4000, which is made Part of the Condition of the Plaintiff's Taking, 'twas very fit that when Sir William gave away so great an Estate, that he should charge it with a fortune for his Daughters, if he had any ; and this was more proper for her than the Land it self ; for if she died before she came of Age to settle it, it would have gone away from her Husband (so he would have nothing with her) to Sir William's three Sisters, as Heirs of Sir Rowland, tho' the Lady Falkland were but of the half Blood, because there was no *possessio fratris* in Sir William, he having Possession of the Estates-Tail only ; and the Words out of Settlement are very material, for if they had not been in Settlement at all, or as the other Side would have them to be useless Words and of no Force at all, because of the old Remainder in Fee, they would have gone to the Heirs of Sir William only, but the Settlement being still in Force, which he would not disturb, they will go as they [175] ought to have done : As to the Case of Cooke and Gerard, 1 Saund., he said, there he had no other Lands but what were settled or devised.

Sir Joseph Jekyll on the same Side said, the Words were to be taken, all his Lands not comprised in any Settlement of that Family, and not all that he had a Power to dispose of, which would be very impertinent ; for, if he devises all, he devises all that he has a Power to devise, and then to say all that he had a Power to dispose of is impertinent ; besides these Lands, which were about £2000 per Annum, were actually in Settlement at the Time of making the Will ; for he was then Tenant for Life, Remainder to himself in Tail Male by Mary, Remainder to himself in Tail Male general ; and therefore the Reversion which he had would not make it good, for that took Effect only at his Death, and the Words are to be taken as they were meant at the Time of Speaking them, and not to wait and expect till his Death for a Construction : As to the Mortgages, he said they passed as Part of his personal Estate to the Residuary Legatees, and not to the Devisee ; and as to the Case cited by Brother Prat of Tenants in Common, no doubt but Tenants in Common may devise, though Jointenants cannot, and the only [176] Question there was, whether the Partition after was not a Revocation ? Then they would have Evidence read to prove what was the Testator's Intention by these Words, which was opposed by the other Side ; viz. Sir Edward Northey, who cited 5 Co. Lord Cheyney's Case, 4 Co. Vernon's Case, and Cro. Jac. 144, Molineux's Case ; and said there could be no Averment out of the Will since the Statute of Frauds and Perjuries. Sergeant Prat, that no parol Declaration out of the Will should be admitted, and said he never knew it in any Case, unless sometimes in this Court, to prevent a resulting Trust, but not where there was a plain express written Will, as here. Sergeant How cited Bertie and Lord Falkland's Case, in Lord Keeper Wright's Time, to that Purpose ; and Dobins said, then a Nurse, an Apothecary, Children, and every Body that attended a sick Body, and would catch at every Thing that drops from him at every broken saying or Expression, would be the Witnesses. But the Court, with the Assistance of the Master of the Rolls, Lord Chief Justice Trevor and Justice Tracy agreed, that where the Words stand in *æquilibrio*, and are so doubtful, that they may be taken one Way or other, there 'tis proper to have Evidence read to explain them, and we will consider [177] how far it shall be allowed, and how far not, after 'tis read : And this is not like the Case of Evidence to a Jury, who are easily biass'd by it, which this Court is not : And the Distinction in Cheney's Case well warrants the Reading of Evidence, where the Intent of the Testator is doubtful ; as there, where a Man had two Sons named John, &c., which, my Lord Chancellor said, differed not from this Case, where the Words hang in equal Balance, what Settlement he intended : Then Proof being made, it appeared by several Expressions of the Testator, That he never would infringe his Father's Settlement, and that his Father was a wise Man, and settled his Estate as he would have it go, and therefore he would not break into any of those Settlements.

After which the Counsel for the Defendant went on, and Serjeant Parker said,

It must be intended such Lands as were not comprised in any Settlement, or such as were ; and yet the Effect of them was quite at an end by Determination of the particular Estates : and it was intended not to hurt those ; for where the Uses were continuing he could not devise away. 1 Saund. 170. And he observed, that in other Places of his Will, where he devised Rent charges the Words were general [out of all his Manors, Lands, &c.], [178] without saying [out of Settlement] : And here 'tis not limited to him and the Heirs Male of his Body, but to Him and his Heirs ; so that if he should have only Daughters, it would go immediately out of his Name again : Besides if Sir William Litton had a Son after making his Will, as there was the same Probability for a Son as a Daughter, that Son would have all the Estate so settled in Tail ; and yet the now Plaintiff must have changed his Name, though he could have only had what was not settled : And Cro. Car. *Rose v. Berkley*, was cited to shew, That admitting the Words to be *in equilibrio*, yet there were two Things to turn the Balance on their Side : First, That they were Heir at Law, and therefore to be favoured. Secondly, Nothing of what the Witnesses deposed tends to the Application of the Words, but only that he would not alter the Settlement, because my Lady Falkland was as much his Father's Child as the others.

Jennings on the same Side. As to the Preamble of his Will, viz. And as for my Temporal Estate, &c., they are words of Course, and the Drawer of the Will no very skilful Person. As to the Codicils, he said, they not being annexed to the Will could not amount to a new Publication of the Will ; and therefore the [179] Freehold Land purchased after making the Will, could not pass by it ; neither did the Mortgages pass to the Devisees, but being only a Security for Money are to be reckoned Part of the Personal Estate, and so to belong to the residuary Legatees.

Lechmore on the same Side said, The words out of Settlement were introduced for the Sake of the Heir at Law, as well as the Words of the Devise were for the Devisee.

Sir Simon Harcourt on the same Side. Suppose the Words had been, All my Lands under Settlement, then no Doubt they have contended, That all he had Power to give should have passed. As to the Copyhold, this Court won't supply the Defect of a Surrender, for a Devisee to disinherit the Heir at Law. As to the Mortgages, That they should pass as real Estate, he said, was a strange Doctrine in this Court, when they were not foreclosed nor released at the Time of making the Will ; and though they were so after, yet then 'twas in Nature of a new Purchase, and a new Right, and will not pass without a new Publication.

Cowper on the same Side. He spoke only of the Evidence that proved, That Sir William would not break in upon his Father's Settlement, tho' he was told, my [180] Lady Falkland would come in an equal Sharer with her Sisters ; and that he had so declared before the Will, at the time of the Will made, and after to the very Time of his Death.

Williams.—Suppose he had leased some Lands, and had others in Possession, and then devises all his Lands out of Lease ; surely those in Lease would not have passed, no more will the Lands here which are in Settlement : tho' it had been a Grant with such Words, which is a much stronger Case : As to the Codicils, they cannot amount to a Republication, because not affixed to the Will. 1 Rol. Abr. 617. As to the Mortgages, he said, If they released the Equity of Redemption after the Will, that would have been so far from passing them by it, that it would have been a Revocation of the Will, the Release being to him and his Heirs ; and when he begins [all the Messuages, Lands, &c.], which are Things of an inferior Nature to Manors, &c., no Manors can pass. 2 Co. Archbishop of Canterbury's Case.

Mr. How.—Whether there is any Use that is still executory and not executed, they are said to be in Settlement, and the antient way of executing Remainders upon Fines *sur Grant & Render* was by *Seire facias*. 24 Ed. 30, Co. Lit. 184 a. And here a great Part of the Estate was by [181] Indenture of £72, limited to the Trustees and their Heirs, and therefore 'twas in Settlement and executory.

The other Side, who had argued first (tho' by Mistake I have inserted them last, viz. Sir James Selby, Serjeant Prat, Sir Edward Northey, Serjeant Hooper, Serjeant How, Dobins and Brydges, who all insisted chiefly, That the Remainder of all being limited to Sir Rowland and his Heirs, 'twas the old Use and the old Reversion, and no new Estate ; and therefore it was never in Settlement, but out of Settlement at making the Will, and cited Pybus and Mitford's Case, and Fenwick and Mitford's Case, 2 Vent. 286, 1 Lev. 212. That he had given his Wife Part of the Lands comprised in the Settlement ; and then says, All other my Lands, &c., out of Settlement ; which must

he intended all that he had Power to give ; that otherwise the Estate, that would be coming to the Plaintiff, would not be a sufficient Consideration for changing his Name, and taking that of Litton upon him, which was intended should be continued in the same Grandeur and Dignity, as it had been formerly in Sir William's Family ; and being charged with £4000 to Daughters, if any should be, would have reduced it to little or nothing, if the other Lands should not pass:

[182] 2dly, That the making of Codicils, and directing they should be annexed to his Will, would amount to a new Publication of his Will, though it was not in Fact annexed ; because he therein took Notice of his Will ; and then the new purchased Lands would pass.

3dly, That the legal Estate of the Mortgages passed by the Will, and when the Equity of Redemption was afterwards released, foreclosed or extinguished, that made the Devise absolute, and goes in Favour of the Devisee ; and the rather, because when he had it in his Power to have them Land or make them Money, he chose to continue them as Land, and had the legal Estate in him to devise.

4thly, That this Court would supply the Defect of a Surrender of the Copyhold, being for the Advantage of a Grandchild, as they have frequently done for a Child.

The Court gave no Opinion, but said, They would take Time till next Term, and then they would give their Opinions : But they took Notice, that by the Deed of £72, all the Estates are limited to Sir Francis Russel and Sir Nicholas Strode, and their Heirs in Trust, to permit Rowland the Son to take the Profits during his Life, &c., and after in Trust for Sir Rowland and his Heirs ; and therefore it could not be the old Use in Sir Rowland, but a new Use or [183] Trust : and if the Trust to the right Heirs of Sir Rowland be kept in the Trustees, then 'tis not out of Settlement : But if this Court should look upon the *Cestui que* Trust as executed, then 'twill be in Sir William, and by Consequence out of Settlement : But what construction these Words shall have, is the Question, &c. And the Court took time to consider of this Case till Trinity Term ; when on Wednesday the 17th of June, they all unanimously, viz. Tracy, Trevor, Master of the Rolls, and my Lord Chancellor, gave their Opinions for the Plaintiff. First, Mr. Justice Tracy put the Case at large, before he entered upon the main and general Question ; he argued, That the Depositions read in this Case ought not to be received, or to have any Weight or Influence in this Case ; and said, This differed not from the principal Point of my Lord Cheney's Case, 5 Co., and took a Difference between a void Devise and a doubtful and uncertain one ; as if J. S. has several Sons, and a Devise is made to one of the Sons of J. S. this is entirely void, and can never be made good ; but if it be only doubtful and uncertain, it must receive its Construction from the Words of the Will it self, and no parol Proof or Declaration ought to be admitted out of the Will to ascertain it ; for then Marriage Settlements or Purchases may be defeated to [184] twenty Years after they are made by such Parol Proof started up : But where a Man has two Sons named John, and devises to his Son John, without saying which of them he means, 'tis very consistent with the Words of the Will to admit of Proof to explain which of them he intended, and the Words in the Will are not at all altered by it. And now, since the Statute of Frauds and Perjuries, this is stronger ; because by that Statute, all Wills are to be in Writing, &c. As to the main and general Question of the Case, he held, That not only those Lands of his own Purchase, but likewise all other Lands in any of the Settlements, the Uses whereof were to determine upon his Death, or his dying without Issue, would pass by this to the Plaintiff ; for they were comprised in the Settlement ; yet the Uses of them being determined upon his Death, they cannot be said to be in Settlement ; as if a Man makes a Settlement of all his Lands in such a County, except such and such particular Lands ; surely those Lands that are excepted are not in Settlement, tho' they are comprised or mentioned in the Deed of Settlement : And if he had intended to have given the Plaintiff only the Lands of his own Purchase, he would have expressed it so ; and the Defendants do admit these Lands, that [185] were limited to Rowland the Son, passed by the Will, he being dead without Issue.

2dly, Because the Inheritance, or Trust of the Inheritance of all those Lands, resulted by Law to Sir Rowland, as Part of his old Estate, and the Limitation of it to the right Heirs of Sir Rowland was only *clausula clericalis*, and signified nothing, and said, There was no more Reason why the Reversion of those which he had as Tenant in Tail, after Possibility of Issue extinct, should pass, than those which he had as Tenant in Tail, which determined likewise upon his Death without Issue : And his Intent here

seems clear, That he thought he should die without Issue; and cited Aley. 28. 1 Lev. 212, which, he said, was the Case almost *in terminis*, and 1 Leon. 251. Bennet v. French, and 2 Vent. 285. As to the Objection, That he could not devise those that were in Settlement; and therefore the Words [out of Settlement] if they did not exclude those that were in Settlement, would be void, he said, The Authorities cited were a sufficient Answer to it.

3dly, His Intent appears to pass all those Lands, by his devising Annuities to his Wife out of all his Estate, because he doubted whether some Part of his Estate might not be so settled, that it could not pass by the Will, and consequently the [186] Annuities not take place out of them, and therefore he charged his whole Estate with these Annuities.

4thly, The Circumstances of this Will prove his Intent to pass them, as by increasing his Wife's Jointure, continuing his Name and Blood, which could not be intended without supporting it to that Grandeur, Dignity and Honour he himself had lived in; and that it was not limited to the Heirs Male of the Plaintiff, was the Unadvisedness of the Attorney that drew it to omit, for no Doubt it was in the Intention of the Testator: Besides, his devising Part of the Lands settled to his Wife, and then saying afterwards, And all other my Lands, &c., shews that he intended all the other Lands which he had in his Power to devise: His Giving the £4000 to any after-born Daughter, and making no Provision for any after-born Son, who would only have the new purchased Lands, &c., and no loose Words shall overthrow a Will. Hob. 65. As to the Mortgages, he held, they did not pass to the Plaintiff by the Will, they being in Equity only Securities for Money, and were Part of his personal Estate; and when the Equity was afterwards purchased in, 'twas then as a new Acquisition, a new Purchase in Fee, and did not pass by the Will made before: As to the [187] new purchased Lands, he held, they did not pass by the Will, nor can the Codicils amount to a new Publication of the Will, not being annexed to it, and being made quite to another Purpose, 2 Rol. Abr. 617, 618. As to the Copyhold, he thought in this Case the Court would not supply the Want of a Surrender to the Use of his Will, and that therefore they should descend to the Heirs at Law.

Trevor agreed with him *in omnibus*; he said, As to the particular Estates, these Lands indeed were in Settlement, but as to the Inheritance, it could not be said to be in Settlement, that being the old Reversion and Inheritance which he had before; and tho' it was limited to him and his Heirs, yet it would have gone to them without any such Limitation; and he did not enjoy it by Virtue of the Settlement, but as the old Estate and Inheritance which he had in him before. As to the Mortgages, tho' the legal Estate passed by the Will, yet they being in Equity only Chattels, and looked upon as Part of his personal Estate, the Devisee would be but Trustee of them for the Girls. As to the Copyhold, he said, This Court had helped no further than for a Son, a Wife, or a Creditor, and therefore they should not pass. Master of the Rolls accord. Lord Chancellor [188] accord. First, As to the Copyhold, he said, As this Case was circumstanced, it would be more Equity for this Court not to supply the Want of a Surrender than to supply; for Equity consists in Equality, and it would be very unequal for the Plaintiff to run away with all, and the Heirs at Law to have nothing, when the Law it self has thrown a Part to them; and 'twould be then no Equity to take it from them, tho' rather than a Wife should want a Maintenance, a Child a Provision, or a Creditor go without his Debt, this Court will supply the Want in some Cases.

2dly, He held, That the new purchased Lands did not pass by the Will, the Codicils made after not being annexed to the Will, and therefore could not amount to a new Publication of it.

3dly, As to the Mortgages, they being but Chattels and Securities only for Money at making the Will, and so no Inchoation for passing them, tho' the Equity of Redemption be after bought in or foreclosed; yet they cannot pass, that being a Revocation *pro tanto*: As to the main Point he took several Distinctions.

First, As to the Lands which he had of his own Purchase, there was no Doubt but they passed.

Secondly, As to the Lands which were [189] settled upon the Son, there was no Doubt likewise but they passed, the Uses of them being all determined, and the Inheritance settled and vested in Sir William.

Thirdly, As to those whereof he was Tenant in Tail, &c., they likewise passed, and

so did also those whereof he was Tenant in Tail, and the Uses determined. As to Mr. Vernon's Objection, That suppose he had devised all his Lands in Settlement, then without Question all these Lands would have passed : And now tho' he devises all out of Settlement, yet they would have contended to have them pass likewise, and so the Words [out of Settlement] to signify nothing at all. As to this he said, It is true the Lands themselves could not be in Settlement and out of Settlement at the same Time, neither do the Lands themselves pass at all ; for ponderous Land or *terra firma* remains where it did : And it is an Impropriety of Speech, I give the Estate of all my Lands in Settlement, or I give the Estate of all my Land that are out of Settlement. And he allowed the Arguments on the other Side had their Weight in them, which made him for some Time doubt with himself of the Case ; but at last he thought the Argument on the other Side out weigh'd them, and so a Decree passed for the Plaintiff, as to the main Point, and for the Rest for the Defendants, [190] who had brought a Bill for that Purpose.

Note : The 18th Day of February, 1708-9, this Case was heard in the House of Lords, and the Decree was confirmed upon an Appeal thereon brought.

CORBET *con.* MAYDEWEL.

13 Jan. 1710, in Canc'.

Bill to charge Mortgage-Money on Personal Estate and discharge the Real Estate devised.

Thomas Maydewel, before his Marriage with Margaret his Wife, conveys his Estate to the Use of him and his Heirs till the Marriage ; and after, as to the Lands in Northamptonshire, to himself for Life, Remainder to the Trustees and their Heirs during his Life, to preserve Contingent Uses ; and after his Decease, to her for Jointure ; and after her Decease, to her first, second, third, fourth, fifth, and every other Son and Sons on her Body, severally in Tail Male ; Remainder to the Heirs of his Body, Remainder to his right Heirs : And as to his Lands in Leicestershire to himself for Life, Remainder to Trustees and their Heirs for his Life, to preserve Contingent Uses ; and after his Decease, to Trustees, their Executors, Administrators and Assigns for 500 Years from thence next ensuing, upon the Trusts and Provisoos after-named ; and after the [191] Expiration or other Determination of the Term, to him and to the Heirs Male of his Body on her, Reversion to his right Heirs ; and the Term declared to be upon Trust, that in Case he shall happen to die without Issue Male of his Body on her Body ; or that the Male Issue between them shall happen to die without Issue Male of their Bodies, before they or some of them respectively attain their several Ages of twenty-one Years, and there shall be Issue one or more Daughter or Daughters of his Body on her Body begotten, either in or after his Life-time, which shall be unmarried or not provided for, as herein is mention'd at the Time of his Decease, that then the said Daughter or Daughters respectively shall have the respective Portion and Portions herein after expressed, viz. If there shall be but one such Daughter, to have £2000, and if there be two or more such Daughters, then such Daughters shall have among them equally £2000, the said Portion or Portions of the said Daughter and Daughters to be respectively payable, and paid at their respective Ages of eighteen Years, or Days of Marriage, which shall first happen, or as soon after as the same can conveniently be raised : And in Case the said Portion or Portions of the said Daughter or Daughters shall not be paid, according [192] to the Purpose and Intent of these Presents, that then the Trustees, or the Survivors of them, their Executors, Administrators and Assigns, shall and may out of the Rents, Issues and Profits of the Premises so limited to them, or by Lease, Mortgage or Sale thereof, or of all or of any Part of the said Term of 500 Years, as to them in their Discretion shall seem meet, raise, make up, and pay the said Portion and Portions unto the said Daughter or Daughters ; and in the mean Time, until the said Portion or Portions shall respectively become payable as aforesaid, the Trustees, their Executors, Administrators and Assigns, shall out of the Rents, Issues and Profits of the Premises to them limited, raise convenient Maintenance for such Daughter or Daughters, not exceeding £30 per Annum a-piece ; and if there be more than three, not exceeding £20 per Annum a-piece, and shall permit such Person or Persons, to whom the Freehold and Inheritance of the Premises, immediately expectant on the said Term of 500 Years, shall for the Time being appertain, to receive and take the Overplus of the Rents and Profits of the Premises, until the

said Portion or Portions of the said Daughter or Daughters shall be paid according to the Intent of these Presents; and after [193] the said Portions and Maintenances shall be raised, then the Premises, or so much thereof as shall remain unsold, shall go with and attend the Reversion and Inheritance; and be for the Benefit of that Person or Persons, to whom the Reversion and Inheritance, immediately expectant on the said Term of 500 Years, shall for the Time being appertain, according to the Uses and Estates herein before limited: Provided always, that if he in his Life time, or if after his Decease the Person or Persons, to whom the Reversion and Inheritance expectant on the said Term of 500 Years, according to the Uses and Estates herein before limited, shall for the Time being appertain, do or shall well and truly pay, or cause to be paid, or to the good Liking of the Trustees, their Executors, Administrators or Assigns, sufficiently secure to pay to the said Daughter or Daughters of him on her Body, which shall be unmarried at the Time of his Decease, the said Portion and Portions and yearly Sums of Money for the Maintenances, here before limited to be charged, or intended to be charged or raised for the said Daughter or Daughters respectively, according to the true Intent and Meaning of these Presents; or if there shall be no Issue Female of his Body on her, or if the Issue Female shall all of [194] them happen to die before any of them attain the Age of eighteen Years; or if the Issue Male between him and her, or any of them, shall live to attain the Age of twenty-one Years, or leave Issue Male, lawfully begotten, behind them, that then in such and in every or any of these Cases, and at all Times from thenceforth, the said Estate and Term of 500 Years shall cease, determine and be void, any Thing herein contained to the contrary notwithstanding.

Margaret the Wife died fifteen Months after Marriage without Issue Male, leaving one Daughter, who is now twenty-eight Years old, and to whom the Father, the said Thomas Maydewell, for seven Years before her Intern marriage with Mr. Corbet, the Plaintiff, paid the Maintenance of £30 per Ann. Mr. Maydewell, some few Years after Margaret's Death, married another Wife, by whom he has several Children.

Upon this Case, Mr. Vernon, Mr. Dobins and Mr. Williams, being clearly of Opinion, That the Portion ought to be raised with Interest from eighteen: a Bill was brought for that Purpose.

Mr. Maydewell admits in his Answer, That he placed his Daughter with her Grandmother Elizabeth Collins; and that he paid her for about seven Years, the Maintenance of £30 per Annum, and took [195] Receipts for the same, for so much due at such a Time. Elizabeth Collins, the Grandmother, in her Depositions declares, That her Granddaughter married Mr. Corbet by her Consent, Advice and Direction; and her Reasons for her so doing were, That several advantageous Offers had been made from Time to Time to her Father in the Way of Marriage, but he never could be prevailed upon to consent to any Match whatever, notwithstanding his Daughter behaved her self very dutifully to him. Several Letters from Mr. Maydewell to one Mr. Orlebar were produced, and prov'd at the Hearing, wherein he says, That he constantly paid his Daughter the £30 per Annum, due to her by her Mother's Marriage Settlement.

December the 8th, 1709, the Case came to be heard before my Lord Chancellor, and the Plaintiff's Counsel insisting upon the Case of Staniforth and Staniforth, where the Words were, That if it should happen that the Father and Mother depart this Life leaving no Issue Male, then to Trustees for 200 Years from the Decease of the Survivor of them, to raise Portions for Daughters, without limiting any Time for Payment; his Lordship said, The Word [And] might be construed disjunctively in that Case, but in this here being a Condition precedent to the Vesting [196] of the Portion, it must be perform'd by the Father's dying before it could be raised; that being, as he thought, a substantial provident Part of the Settlement; and therefore would have dismiss'd the Bill, had not Mr. Vernon prevailed on his Lordship to be attended with Precedents.

And a Case in 2 Jones 201. Pasch. 34. Car. 2 [1683], reported there by the Name of Greaves and Mattison, was produc'd, it was in the King's Bench for the Resolution of the Court: Sir Edward Greaves the Plaintiff conveys his Estate to the Use of himself for Life, Remainder to the first and other Sons of his Body on his Wife in Tail Male, and for want of such Issue, to Trustees for forty Years, Reversion to his Heirs. The Term was declar'd to be in Trust, That in Case it should happen the said Sir Edward to decease without Issue Male of his Body begotten on his Wife, and in case there shall be but one Daughter, that then the Trustees, their Executors, Administrators and

Assigns, shall out of the Rents, Issues and Profits of the Land, by demising, letting or setting the same, raise £5000 to be paid to the said Daughter at the Day of her Marriage or her Age of twenty-one Years, which should first happen, together with the Yearly Sum of £150 for her Maintenance and Education, until her Marriage or Age [197] aforesaid; and in Case there shall be more Daughters, then £6000 to be equally divided among them, Part and Part alike, and to be paid them respectively, when they shall accomplish their respective Ages of twenty one Years or Days of Marriage, which shall first happen, together with the yearly Sum of £200 for the Maintenance and Education of such Daughters, until they shall respectively attain to their several Ages, or be married (first happening), a respective, equal and proportionable Part of the said £200 allowed for her Maintenance to cease: And in Case any of the said Daughters shall happen to decease before her or their respective Ages of twenty-one Years or Days of Marriage; then the Portion of the said Daughter or Daughters, so deceasing, to be equally paid and divided to and amongst the other Daughters, and to be paid unto them at their respective Ages of twenty-one Years or Days of Marriage, which shall first happen. Sir Edward's Wife died, leaving two Daughters but no Issue Male; one of them died about seven Years old; the other, without his Privity, married the Defendant, a Journeyman Mercer; whereupon the Father brought an Action of Trespass for marrying his Daughter, and had a Verdict; but in Order to settle the Portion, it was referred to Justice Raymond (the [198] Father dying in the Mean Time) to hear Counsel on both sides upon the Case; And it depending Four Terms, each Side being strongly of their own Opinion, after Debate at Bar and Bench, it was resolved by the Lord Chief Justice Pemberton, Mr. Justice Dolben, and Mr. Justice Raymond, that she should have £6000, and that because, first the Interest and Right of the Portion was vested in the Daughters by the Death of their Mother without Issue Male, and should not attend the Death of the Father. Secondly, That then the Trustees might sell their Interest in the Term to raise the Maintenance or pay the Portion, if any Daughter attained her Age or was married in his Life-time; for perhaps he might marry (as Sir Edward had done) another Wife, and not take due Care of them, or live so long, that they would not have their Portions in convenient Time. And 3dly, The Interest having thus vested in the two Daughters by Express Words, they were to have £6000 between them, and by the Death of one the Survivor was entitled to the whole.

Jones Justice, tho' he agreed the Term might be sold in his Life-time, differed; for first, it vests not absolutely but contingently during his Life; the Words being in case he decease without Issue Male. [199] Secondly, As it is to be raised out of the Rents, Issues, and Profits, which cannot be during his Life, for the Words Demising, Letting and Setting are intended when they can take the Rents, Issues and Profits, which cannot be during his Life: And it shall be presumed the Father will take Care of them, unless that Care be expressly transferred to Trustees; otherwise it will encourage Disobedience, and be a means to ruin them by Matches.

The Case of Heyter and Jones decreed by the Lords Commissioners, 14 Nov. 10 W. 3, and afterwards affirmed by their Lordships upon a Re-hearing; and afterwards affirmed upon an Appeal to the House of Lords. Lands were settled upon the Marriage of the Plaintiff's Mother and Father for their Lives; and afterwards in Trust, that the Trustees, after the Decease of the Plaintiff's Father and Mother, should, out of the Rents and Profits of the Premises, or by Fines, raise £4000 for the Portions of all the Children of that Marriage (except the Eldest Son) to be paid at their ages of twenty-one Years, unless the next Heir should, within one Year after the said Portion become payable, pay or secure the same: The Father dies, leaving Issue a Son and several other Children. Decreed, that Dorothy Heyter, one of the younger Children, was [200] intitled to her Portion of £4000, with Interest for the same from her Age of twenty-one Years, though she attained that Age ten Years before the Mother's Death. 'Tis true, in this Case the Defendant obtained a Deed from the Plaintiff by Surprise, to pay Interest for the Portion: But the Bill being to have Relief against that Deed, the Cause was decreed upon the Merits, with respect to the Settlement only.

Also the Case of Gerrard and Gerrard, decreed by my Lord Keeper Wright, 2 Annæ, upon the Marriage of Sir Charles Gerrard with Honora his Wife, Daughter of my Lord Seymour: Lands were settled to the Use of himself for Life; Remainder to his Wife for Life; Remainder to Trustees for 200 Years, upon Trust, That if Sir Charles Gerrard should die, leaving only one Daughter by this Marriage, then for the raising £5000 for her Portion, to be paid at her Age of twenty-one Years or Day of Marriage, which should

first happen, after the Decease of the said Sir Charles and Honora, or within six Months after the said Days or Times respectively, provided that if Sir Charles, or any other Person to whom the Inheritance of the Premises should come, should pay the said Portion to such Daughter at the Time aforesaid, or give good Security to be approved of by the Trustees, they should [201] surrender the Term. Sir Charles dies, leaving the Plaintiff Elizabeth his only Child; and tho' in this Case, by express Words of the Deed of Settlement, the Portion is not appointed to be paid till her Day of Marriage or Age of twenty-one Years, which should first happen after the decease of her Father and Mother; which was provident, because the same Estate with the Mother's Jointure; yet the Court decreed the Portion and Interest from the Time in the Bill in the Mother's Life-time.

Staniforth and Staniforth, decreed at Powis House by the Master of the Rolls, 13 March, *tertio* of the Queen. Lands were settled upon his Marriage with Christian, to the Use of the said Jonathan Staniforth for Life; Remainder to Christopher for Life; Remainder to the Heirs Male of Jonathan and Christian: And if it should happen that the said Jonathan and Christian depart this Life, leaving no Issue Male, then to Trustees for 200 Years, from the Decease of the Survivor of the said Jonathan and Christian, for raising Portions for Daughters. Jonathan dies without Issue Male leaving one Daughter; and by the express Words of the Settlement, the Term securing the Plaintiff Christian's Portion is not to arise till after the Death of the Survivor of Jonathan and Christian: Yet the Court decreed the Portion to be [202] raised and paid in the Life-time of Christian, whose Jointure covered the Estate, with Interest from filing the Bill, though there was no express Time limited for the payment thereof, and therefore should the rather be intended at the Death of the Survivor.

December the 8th 1709. The Cause came to be heard before my Lord Chancellor, and the Plaintiff's Counsel insisting upon the Case of Staniforth and Staniforth, where the Words were, That if it should happen that the Father and Mother depart this Life, leaving no Issue Male, then the Trustees for 200 Years, from the Decease of the Survivor of them, to raise Portions for Daughters, without limiting any Time for Payment: his Lordship said, The Word [And] might be construed disjunctively in that Case, but in this, here being a Condition precedent to the vesting of the Portion, it must be performed by the Father's dying before it can be raised, that being, as he thought, a substantial provident Part of the Settlement.

13 June 1710. His Lordship, without further Argument, pronounced his Decree to this Effect, viz. This is one of those ill penned Settlements, where the Conveyancer, not for Want of Skill, but by an ill made Use of a Multiplicity of Words, [203] runs into those Blunders which occasion Trouble to this Court: My Opinion therefore in this Case will be cleared up, by leaving out those Words which are immaterial: But first, to distinguish from the precedents, Heyter and Jones is impertinent, and Counsel ought to advise their Clients better than to trouble the Court with Cases which signify nothing at all to the Purpose; for there a Man came to be relieved against his own deliberate Agreement, after an Abatement for Interest, which was payable by the Deed. In Gerrard and Gerrard, the Words, after the Death of the Father and Mother, were justly rejected, in order to raise the Portion at a Time, when for Conveniency and to promote a proper Match for the Daughter in Marriage, which is the natural and true Use of it, the same ought to be raised. As to the other two, if it had been *res integra*, I should not have gone so great a Length; but since this Court and the Judges at Common Law have thought fit to allow it, I will consider the Reasons and distinguish them from the Case before me. To begin *a notioribus*, which is the clearest Method of Reasoning. First, Where a Term is vested, as in this Case, and the Portion is payable at a Day certain, there, tho' the Term be to arise after the Father's Death, the Portion shall arise in his [204] Life-time. Secondly, Where the Term and the Portion are both to arise upon a Contingency, as in the case of Staniforth and Staniforth, there, because a total Failure of Issue Male between the Parties is all that was Contingent in the Case (for it is certain all Flesh must die), the Portion shall be raised in the Life-time of the Father or Mother, at the Day of Payment, which in that Case was the Age of eighteen, or Day of Marriage, in regard the Term must certainly vest, and can never be defeated by leaving of Issue Male. Thirdly, Which is much the stronger and comes nearest this Case, where the Term is vested and the Portion contingent, as in Greaves and Mattison's Case, there the Failure of Issue Male between the Parties shall tantamount the Decease of the Father without Issue Male of the Body of his Wife, and the Portion be raised even in his Life-time, because payable at a Day certain, and especially since

it is directed by the Deed in that Case, to be raised by Sale thereof : These Concessions I have made, because I find it to have been the current Motions of late, but I think it of a hard Digestion : and tho' in this Case I agree the Plaintiffs have a very colourable Demand, yet I cannot make any Decree for them, because leaving out the superfluous Words, and putting in those which the Conveyancer [205] ought to have inserted, it will appear to be much stronger than any of the former Cases, and stands thus, viz. In Case the Father shall happen to die without Issue Male of the Body of his Wife, and there shall be a Daughter begotten between them, which shall be unmarried or unprovided for at the Time of his Decease, she is to take by this Description, or else she cannot have this Portion : Now tho' the Plaintiff's Wife cannot be then unmarried, yet she may be provided for in his Life-time ; which remains still contingent, because no Body can yet say she will be unprovided for at the time of his Decease : But the Deed goes further and says [Then] (that is, at the time of his Decease) the said Daughter shall have £2000 paid for her Portion ; and in the mean Time (that is, from Failure of Issue Male till payable) the Trustees shall, out of the Rents, Issues, and Profits raise £30 per Annum for her Maintenance, which must be after the Father's Death : for though these Words [Profits, &c.] may be construed by Sale or Mortgage where they stand alone in a Deed, yet being here put in Contradistinction to Mortgage or Sale, they must be understood of annual Profits only ; and that cannot be unless, you will let the Maintenances run in upon his Estate for Life ; so that it is plain in the Proviso, [206] if he in his Life-time pay, or sufficiently secure to be paid to such Daughter as shall be unmarried ; there is *vitium Clerici* by leaving out these Words (or not provided for) at the Time of his Decease, and if they be inserted, all Parts of the Deed will consist, and this plain and natural Construction will arise thereupon, that the Father at any Time during his Life, by paying her £2000, shall defeat the Term. And therefore he dismiss'd the Bill without Costs.

HAWES *con.* WARNER & AL'.

In Michaelmas Term 1703, Thomas and Anne, two of the Children of Thomas Hawes, who was the only Son of Nathaniel Hawes, late Treasurer of Christ-Church Hospital, and Citizen of London, brought their Bill in this Court against Anne Warner, Widow, only Daughter of the said Nathaniel, and her four Children, Anne, Elizabeth, Mary and Edmund Warner, and against Nathaniel Hawes, Son of the said Thomas, as Heir, and others as Executors of the Will of the said Nathaniel the Grandfather, setting forth, That the said Thomas, the Father of the Plaintiffs, died in the Life-time of their late Grandfather, leaving Issue Nathaniel Hawes and the said Plaintiffs Thomas and Anne : [207] and that the said Defendant Anne, Daughter of the said Nathaniel, having inter-married with one Edmund Warner, had Issue by him the said four Infants Defendants.

That the said Nathaniel the Grandfather became indebted to his said Son Thomas, on Account of Profits received out of an Estate of the said Son at Walmire in Yorkshire, and otherwise, to the amount of £2200 and upwards ; and that he gave with his said Daughter a very considerable Marriage-Portion, and was bound for his Son-in-law Edmund Warner to the amount of £3000, besides which, the said Edmund was indebted to him in £500 by Note under his Hand, and also in £905, 19s. 6d. paid upon his Account ; and that the said Edmund died in the Life-time of the said Nathaniel, and the said Debt remains unpaid.

That the said Nathaniel being seized in Fee of Divers Messuages in Thames-street, mortgag'd the same for £1600, and by the Mortgage Deeds covenanted to pay the said Sum : And afterwards, viz. 21 July 1699, made his Will, and thereby devised one of the said Messuages to his Grandson Nathaniel Hawes and his Heirs, and another to his Grandson Thomas Hawes and his Heirs, and another to Anne Warner his Granddaughter for Life, [208] Remainder to the said Thomas and his Heirs, and gave several pecuniary Legacies to his Daughter Anne Warner, Widow, and to his Grandchildren by her ; and also to his Daughter-in-law Elizabeth Hawes, the Widow of his Son Thomas, and to his Granddaughters by her, with some other small Legacies, amounting in the Whole to £5800, which Sum he by his said Will calculated to be the *Residuum* of his Personal Estate (his debts and Funeral Expences being first thereout paid) ; and by his said Will did also declare, That in Case his said Estate should by Losses or otherwise fall short of his Estimate, a proportionable Abatement should be made to the several

Legatees of the several Legacies thereby given : And in Case his said Estate, at the Time of his Death, should exceed the said Estimate of £5800, he did give the Surplus (what ever it should prove) to and amongst all his Grandchildren, Share and Share alike : And in the said Will is a Proviso, That the several Devises of his Real Estate, and the several Legacies and Sums of Money to his Daughter-in-law, Mrs. Hawes, and his Grandchildren by her, were upon Condition, That she within three Months after his Decease, and her Children, when of Age, should release to his Executors all Monies, Parts, Shares, Claims and [209] Demands whatsoever, which they or any of them could claim out of his personal Estate, or be intitled to by Virtue of the Custom of London or otherwise, or which they could claim or demand in Right of his Son Thomas deceased, or in Reference to his the said Thomas the Son's, or the said Nathaniel the Testator's Estate ; and in Case they did make such Claim, &c., then he devised over the same Messuages and other their Legacies to the Children of his Daughter Warner, Share and Share alike. And the End of the Bill was to have the said £1600 remaining due upon the said Mortgage, paid out of the Personal Estate, and that the mortgaged Premises so devised to the Plaintiffs, as aforesaid, might be discharged thereof.

The Defendants by their Answer confessed the substance of what was alledg'd by the Plaintiffs in their Bill, but urged, that the Testator's Intent was, That the Legatees of the mortgaged Messuages should abate in Proportion with the pecuniary Legatees, and that the Will did so devise.

And 7 Februarii, 1704, the Cause was heard by the Lord Keeper Wright, at which Time it was insisted on Behalf of the Plaintiffs,

1. That the Money due on the mortgaged Premises being a Debt of the [210] Testator's (there being a Covenant in the mortgaged Deed for him to pay it), this, as well as other Debts of the Testator, ought to be paid out of the Personal Estate ; and this was more plain from the Words of the Will, which directs, That the Testator's Debts and Funerals should be paid in the first place out of the Personal Estate : And that the Testator's being uncertain in the Calculation of his Estate was not strange, considering, that at the Time of making his Will he was engaged in a Partnership Trade, depending upon long, confused and intricate Accounts, which had not been made up in sixteen Years Time.

2. That altho' the Will directs the Legatees should abate in Proportion, yet it does not direct, That the Devises of the Real Estate should make any Abatement. And that there is a known Difference between a Devisee and a Legatee, the former being of a Real Estate, but the latter only of Personal Things ; and that the Difference seems to be accordingly well known to the Testator, and to be taken Notice of in the Words of the Will : for the Real Estate is thereby specifically devised, and so ought not to be contributory to any Deficiency of the Personal Estate, which is expressly charged with the Payment of his Debts. And as this Case is, it is much the stronger, because here [211] is a good and valuable Consideration for the Devises to have the Real Estate : for that the Testator was indebted to his Son (their Father) in £2200, for Rents received of his said Son's own proper Estate (left him by a Relation) during his Minority, besides £1015, 5s. 2d. as appears by Accounts under his own Hand, received for Dividends of East India Stock, the Trust whereof is declared under the Testator's own Hand and Seal, and this in Time after the Making of the said Will, and that these Demands are very near equivalent to the Real Estate.

To which it was answer'd on Behalf of the Defendants,

1. That it seems apparently the Intent of the Testator throughout his said Will, That in Case his Personal Estate should prove so deficient, as not to make good the particular Legacies thereby devised, every Legatee should abate in Proportion ; and that the mortgaged Premises should bear their own Burden : And if he had intended that they should have been exonerated, he would have provided so by his Will when he devised those Premises.

2. That it is not likely he could mean, That the Mortgage should be paid out of the Personal Estate, because he calculates that to be £5800, which is very near what his said Estate amounts unto ; and [212] it would have been more, if the Interest of the £1600 from the Testator's Death had not been paid out of it ; and that it appears, the Testator made his Will from a Calculation of his Estate.

3. That the Houses devised are £300 per Ann. and tho' the Devises thereof pay the £1600 charged thereon out of the same, yet they will have near twice as much as any of the other Legatees : And therefore, that the Testator's Will would be best

fulfilled by letting the Houses bear the Mortgage, which is their own Burden, and the Personal Estate be applied to pay the Legacies ; by which means they will be all paid unto a very small Matter.

But the Court decreed, That the £1600, and all the Interest thereof, due on the said Mortgage, should be paid out of the Testator's Personal Estate.

And that the Plaintiffs, if they will have the benefit of their Legacies, must severally release their claim of the East India Stock and the Produce thereof, and the Account for the Walmire Estate, according to the Intention of the Will.

And that the Legatees should abate in Proportion, in Case the Personal Estate should fall short, and that the Executors should account before a Master touching the said Personal Estate, the East-India [213] Stock and Produce to be taken as Part thereof ; and that the Plaintiffs and Defendants should both have their Costs of Suit out of the Personal Estate.

Hereupon the Master reported, That the Personal Estate fell short to pay the Legacies £1732, 12s. 2d. and charged the Devises of the Real Estate to contribute by a Pound-Rate, together with the pecuniary Legatees, to make good the Deficiency of the Personal Estate.

To which Report the Plaintiffs excepted, for that the Real Estate was not to contribute or bear any Part of the Deficiency of the Personal Estate : Which Exception being argued before the Lord Chancellor Cowper was allowed ; and the Court declared, That that Part of the Decree, which says the £1600 should be paid out of the Personal Estate, could not be alter'd but by a Re-hearing or an Appeal.

After which the Defendants got an Order for a Re-hearing ; but on the Plaintiff's Motion, shewing the long Acquiescence under the Decree, viz. three Years, and apparent Delays in the Cause, the Order for re-hearing was discharged.

And afterwards on an Appeal, the Decree of this Court was affirmed in the House of Lords, March 7, 1707-8.

[214] De Term. Paschæ, 1688, in Canc'.

SAUNDERS *contra* CHARLES BALLARD.

Of Jointenants or Tenants in Common by Devise.

A devised £200 to be laid out in a Purchase of Lands, and settled upon M and the Heirs of her Body ; and if M die without Issue, that then the Children of J. S. shall have it (or Words to that Effect) so that it did not appear by the Will, whether the Testator intended that the Children should have the Land as Joint-tenants or Tenants in Common. M died without Issue ; the Trustees afterwards purchase Land with the £200, and settle it on C and D, the two then living Children of J. S. and their Heirs : C hath Issue and dies. The Court would not help the Issue of C against D, who had claim'd all by Survivorship : for my Lord said, he would not make it a Breach of Trust in the Trustees, that they did make this a joint Purchase, there being nothing in the Will to direct them otherwise : But if the Money had remained in their Hands, he seem'd to be of Opinion, That the Children of C should have had a Moiety ; for where Money is given to two (being Personal Estate) it shall be several to them.

[215] THOMPSON *contra* BASKERVILL.

Parties in Suits on Mortgages.

The Plaintiff's Cause was heard before the Master of the Rolls ; and the Master of the Rolls ordered, That (for Want of proper Parties (viz.), for that the Mortgagor was not made a Party, the Plaintiff being a second Mortgagee, and contesting the Validity of the first Mortgage, pretended to be made unto the Defendant, and to have an Account if a true one, &c.) the Plaintiff should pay five Marks Costs, and make the Mortgagor a Party. The Plaintiff sets down his Cause as an Original Cause, and not by Way of Appeal, having indeed amended his Bill, but never served the Mortgagor with Process, which he pretended he could not do, because the Mortgagor was beyond Sea, but that they left a Subpœna at the last Place of his abode (viz.), the King's Bench (where he had been a prisoner, but escaped). But the Court would not hear the Cause ; for the Plaintiff ought to have the Mortgagor's Answer, or run out all the Process of Contempt to a Sequestration, before he can hear his Cause against the Defendant. For no Contempt can be without Service of the Subpœna. *Vide ante*, 23.

[216] GWEVERS *con.* THE EARL OF DANBY & AL.

Bill by other Creditors after a Decree, &c.

Lands were settled by the Parliament for the Payment of Mr. Cooke's Debts of Norfolk. The Trustees brought one Bill against the Administrators of Cooke, to discover the Personal Estate, &c. And the Administrators, who were Administrators as Creditors to Cooke, with three or four of the Creditors, bring a Bill against the Trustees: And it was decreed, that they shall sell, &c., and that all Creditors may come in by a Time, contributing to the Charges, &c., and now the Plaintiffs, as other Creditors, exhibit their Bill against the Administrators and against the Trustees, to discover the Personal Estate, and to have the Lands sold, &c. The Defendants objected, That the Plaintiffs ought not to have exhibited a new Bill, but by Motion to the Court come in as Creditors upon the former Bill exhibited by the Administrators. But the Court over-ruled it, and said, this Bill was well brought, because it calleth the Administrators themselves to an Account, which could not be upon the former Bills.

[217] EARL OF PEMBROKE *con.* BOWDEN & AL'. Creditors of the late Earl of P. & *contra.*

Q. If Money agreed to be laid out in a Purchase be Assets?

The late Earl of Pembroke seiz'd in Fee of Lands, demised them for 100 Years at a Pepper-Corn Rent, and takes back a Lease, with a Proviso to be void if he paid not such an annual Sum to J. S. and £1000 to J. D. (or to that Effect): And the Creditors of the said Earl contended to make the Surplusage of this Term (it being worth more than the £1000), and the Annuity payable out of it, Assets to pay his Debts; and the Earl as Heir pretends, that it ought to go to him, and that it is but as if the deceased Earl had mortgaged it, and the same had been forfeited: For then the Court agreed, That the Heir paying the Money should have had it: And it was urged for him, That the Intent of this Conveyance was the same as a Mortgage, tho' it was so contrived by Counsel, that there is indeed a Term in the Testator: And the Lord Chancellor cited a Case between Whitticke and — in my Lord Hale his Time in B. R. where J. S. before and in Consideration of his Marriage with J. D. enter'd into Articles of Agreement under Hand and Seal, to lodge £100 in the Hands [218] of J. N. to be laid out upon Lands for the Life of the Wife, for her Jointure, with other Remainders: which said £100 was so lodged in his Hands; and before any Lands bought, J. S. dies, and a Creditor of J. S. sues his Wife, who had taken out Administration to him; and upon a special Verdict finding as aforesaid, the £100 was adjudged not to be Assets in Law: And my Lord said, That in Honeywood's Case, here in Chancery, he had decreed either the same or the like Point, and then brought the Record of that Case into the Court. For the Intent being, that the £100 should be vested in Land, it was to be no longer looked upon to be the Personal Estate of J. S., and therefore he seemed to doubt here, whether this Term, were so much as Assets in Law, for that it was the plain Intent, That the Inheritance should not be charg'd for any Intent, but to secure such Monies; and it might have been done by Way of Mortgage, so that then the Creditors could have had no Pretence to charge it with Debts: and it would be very hard, and might prove of dangerous Consequence upon this Way of Settlements, by Demise and Re-demise to make any other Construction, and which was surely never thought of in the Contrivance of the Counsel, at his Advising such a Manner of Conveyance.

[219] But the Court advised (being assisted by Lutwich and Powell) till next Term.

Nota: It seems to me, that in the Case of Marriage-Money, by Force of the Agreement, and lodging the Money in a third Person's Hand (*viz.* J. N.'s), the Property of the £100 was in J. N. not in J. S. upon such Trusts as agreed, and so could not be Assets in Law nor yet in Equity, because it was for Special Trusts to be directed by the express Agreement.

It was also said and agreed in the Debate of the Principal Case, That where a Man purchases an Estate, upon which there are Mortgages for Years, and he takes the Terms to himself, and the Inheritance to others in Trust for himself, and dies indebted: the Terms shall be Assets, albeit that it be expressly declared, that the Terms shall wait upon the Inheritance; for this Court will not take away that which is Assets in

Law, tho' it will many Times enlarge and make that Assets in Equity which is not Assets in Law, in Favour of Creditors : But where the Inheritance is in the Purchaser, and the Terms purchased in Trustees Names to attend on the Inheritance, those Terms shall never be made Assets in Equity.

Quære, Whether in the first Case where the Term is in the Purchaser, &c., whether the Lands shall go to the Heir or [220] Executor, there being no Debts ? And it seems to me the Heir shall have it, being to attend on the Inheritance : But Equity will favour Creditors more than Executors.

And if a Copyhold of Inheritance not surrendered to the Use of his Will, be devised to be sold for Payment of his Debts, the Creditors shall enforce the Heir in Chancery to sell it ; and as I understood, Mr. Serj. Philips said, it had been adjudg'd so : And so 'tis in the Case of Charitable Uses.

Nota : It was also said and agreed, That where a Man articles for the Sale of Land under Hand and Seal, and without any farther Execution thereof, they by mutual Consent go off of the Bargain (by Releasing each other or cancelling the Articles, &c.), and then the Bargainor dies indebted ; this shall not be Assets : So if Part of the Money was paid, and the Bargainor repays it, and they agree to go off as aforesaid, and then the Bargainor dies : But if the Bargainor dies, Part of the Money having been paid him, and no Conveyance made to the Bargainee ; as the Bargainee hath a Remedy in Equity to compel the Heir of the Bargainor to make the Conveyance upon paying the Residue of the Money ; so the Creditors can force the Heir to convey, and the Bargainee to pay the Money as the Testator's Personal [221] Estate ; and it shall be Assets to them in Law and in Equity, when paid. But *Quære*, Whether, when there be no Debts, and Part of the Money paid as aforesaid, the Executors shall force the Heir to sell, and shall have the Money ? Or, Whether he and the Bargainee may not agree to go off the Bargain ? For tho' the Ancestor (having both his Executors as well as Heirs in him) might undo the Bargain, though executed in Part, which may perhaps, as it were, amount to a Re-purchasing of it ; yet there is a distinct Interest betwixt the Heir and Executors after the Testator's Decease : So that the Testator having done an Act, whereby he intends to deprive the Heir and make it a Personal Estate, the Heir can't prevent it after.

But note also in this Principal Case, the Earl having agreed to sell Lands for £5000 by Articles seal'd, &c., and a Mortgage being given up to the Earl by the Bargainee for £3000 in Part of Payment, the Court seemed pretty clear, that the other £2000 should be Assets, albeit that the Bargainee did offer in his Answer to take the said £3000, and release the Bargain, if the Court pleased ; or to that Effect.

[222] EXECUTORS OF PAMPLYN *con.* J. S.

Leases, &c., mortgaged.

The Plaintiffs exhibited an Inventory amounting to £900, whereof £600 was in Leases. The Defendant recover'd against the Plaintiff £200 owing to the Defendant by the Plaintiffs upon the Plea of *Plene administravit* ; and then the Plaintiffs exhibited this Bill, pretending that the Leases were mortgaged for more than they were worth : But their Bill was dismissed, for it did not appear by any Proofs (if by the Bill) that the other £300 was administred, or that the Verdict was given upon the Account of the Value of the Leases : Neither (as far as I could observe) did it appear, that the Plaintiff had Notice of the Leases being in Mortgage when the Verdict was given ; which seems necessary to me to be done ; for it was said at the Bar, and not (that I observ'd) denied, that the Plaintiffs, notwithstanding their Inventory, were not estopp'd to shew those Mortgages, and then only the Surplusage could be Assets in Law. And besides, Pamplyn had given the Executors other Freehold Lands of £800 Value, to be sold for the Payment of his Debts, which was Assets in Equity at least : But the Lord Chancellor seem'd to rely only on the first Matters.

[223] SANDERS *contra* PAGE.

The Husband and Wife, seized in Fee in the Right of the Wife, levied a Fine to A and B, &c., to the Use of A and B for 1000 Years ; and after to the Use of the Wife and her Heirs, and declared the Trust of the Term to be for the Husband during his Life, and after for the Wife and the Heirs of her Body, with Remainders over ; and

after the Husband and the Wife join in a Fine *sur concessit* to J. S. for twenty-one Years, rendring £110 Rent per Annum to the Baron for his Life, and after to the Wife and her Heirs, and after the Wife dies, and after her Husband dies intestate. Sanders takes out Administration to the Husband, and Page to the Wife (being also Heir to her), and the Plaintiff sues to have this Term for 1000 Years, upon Pretence, that if it had been a Term in the Wife, in Law, her Husband should have had it by Survivor, or at least the Rent during the Residue of the twenty-one Years, but the Bill was dismissed: For tho' it be true, that if a Woman be *Cestuy que Trust* of a Term (as the Case of Sir Edward Turner against his Mother was), and then marries without any Agreement by the Husband before Marriage, that the Trust shall be to her separate Use, and that [224] the Husband shall not intermeddle therewith; yet if the Husband, after Marriage, dispose of the Term for a valuable Consideration, it shall be good in Equity, as well as if she had the Term in her self, and married, &c. And the Judgment, that was given by the Lord Nottingham to the contrary, was said by himself to have been upon a Mistake; for that the Wife having married a former Husband, that Husband and she, before the Marriage, did make such Agreement; but when she married with Sir Edw. Turner, no such Provision was made. But the Lord Nottingham thinking that such Provision had been in his Case, decreed the Sale void: And it was reversed, as it seems, by his own Approbation in the House of Lords: But here is no such Thing, but the Husband is agreeing to the Trust for the Term, and therefore shall not have it by Survivor; nor could he have disposed of it without her being examined in Chancery, or by joining with her in a Fine; and if he could not dispose of the Term itself, or any Part thereof by himself, the Rent here reserved shall not go to his Executors upon the mere Reservation: But if the Covenant had been to pay him and his Executors and Administrators the Rent, perhaps he might have it upon the Contract, tho' not as a Rent.

REPORTS and CASES Argued and Decreed
in the COURT OF CHANCERY, in the
Reigns of King Charles I., King Charles II.,
and King William III. [1625–1693].

Easter Term, 1 Car. 1 [1625].

OKHAM *versus* HALL.

Lord Coventry.

The Defendant stood in Contempt for not answering the Plaintiff's Bill, and thereupon a Sequestration was granted, and the Sequestrators were ordered to pay the Rents to the Plaintiff towards the Duty demanded by his Bill; and at the same time that the Sequestration was granted, it was likewise decreed, [2] that the Bill should be taken *pro Confesso*, unless the Defendant shewed Cause within a certain Time limited for that Purpose by the Court. But this must be understood (as the Practice then was) where the Defendant had appeared; for if he did not appear at all, but stood out all Contempts to a Serjeant at Arms, no Decree can be had against him, or the Bill taken *pro Confesso*, for that must be after an Appearance, and when he stands on Contempt for want of an Answer.

JACKSON *versus* BARROW.

Lord Coventry, Pasch. 2 Car. 1 [1626].

The Plaintiff being an Assignee of an Extent, exhibited his Bill against the Defendant who was Tenant of the Lands, to enforce him to attorn Tenant to him, and to pay the Arrears of Rent which were in his Hands, and to deliver unto him a true Note in Writing of the Date of the Deed, and for what Term of Years he had it in Lease, and under what Rent reserved, but not any of the Covenants or Conditions contained therein. As to the Arrears of Rent, the Court desired to see Precedents before the Decree was made, and thereupon a Precedent was [3] produced in point between Shute and Mallery, 5 Jac. 1 [1607–8], and in the principal Case a Decree was made accordingly.

PERRIMAN *versus* GORGES.

3 Car. 1, Lord Coventry [1627–28].

The Father, in Consideration of Money borrowed of the Plaintiff, did promise to surrender certain Copyhold Lands to him for and during the Term of two Lives in Reversion, to commence after an Estate for Life then in being, and he sent a Note under his Hand to the Steward of the Court for that purpose: But before the Plaintiff was admitted, the Father died: The Defendant being his Heir at Law, was desired to make the Surrender, that the Plaintiff might be admitted; which he promised to do, and took a farther Sum of Money of the Plaintiff for that purpose: but before the same was done, he sold the Reversion of the said Copyhold Estate for a valuable Consideration: And yet the Plaintiff was relieved, for the Defendant was decreed to surrender according to the Agreement of the Father in his Life-time.

[4] MARKALL *versus* HYDE MIL. & ALIOS.

Pasc. 3 Car. 1 [1627], Lord Coventry.

One Green being seized of a Manor to which the Advowson of the Rectory was appendant, did, in Consideration of £50 grant the next Avoidance of the Church to one Stockman, his Son-in-Law, and afterwards by Deed enroll'd he sold the said Advowson to one Pool and his Heirs for the Sum of £100 and covenanted that it was free from Incumbrances, except the Grant of the next Avoidance as aforesaid.

Afterwards Pool granted the Advowson to the Plaintiff Markall and his Heirs : but the Defendant Hyde had before that time purchased of Green the aforesaid Manor to which this Advowson was appendant : but the Advowson was not mentioned in the Purchase-Deed, only the Manor *cum Pertinentiis* : There was a Schedule annexed to the Deed to this Effect (Viz.). One Grant of the Advowson dated, &c. (naming a Date long before the Date of the Deed to Pool) excepted : And in the Fine levied by Green to Hyde, the Advowson was specially named.

The Defendant by his Answer set forth. That he had contracted with Green [5] both for the Manor and the Advowson, and it was proved that he did know both of the Grant of the next Avoidance to Stockman, and of the Grant of the Advowson to Pool. And now the Grant of the next Avoidance being by several mesne Assignments come to the Defendant Steward, and the Church being void by the Death of the Incumbent, and Steward intending to be presented, the Defendant Hyde affirmed, that the Right of Presentation was in him by the Purchase of the Manor and the Advowson : and Steward unwilling to contend the Right, was perswaded not to insist on his own Title, but to accept of a Presentation from the Defendant Hyde, which was done accordingly : and afterwards Steward was instituted and inducted, and so the Church became full of him.

Pool not knowing but that Steward the Incumbent was presented by Vertue of the Grant of the next Avoidance as aforesaid, did sell the Fee-Simple of the said Advowson to the Plaintiff Markhall and his Heirs, who exhibited his Bill against the Defendants, to be relieved against the Usurpation of Hyde, and to prevent any Title that might be made thereby when the Church should become void of Steward : and it was de [6]-creed, That no Benefit should be had by this Usurpation, so as to defeat the Plaintiff's Title, neither should it be given in Evidence against him at a Tryal at Law : but that the Plaintiff standing upon the Validity of his Grant of the Advowson, and the Defendant Hyde insisting upon the Strength of his Conveyance of the Manor, and also of the Advowson, the Right should be tried at Law as if no such Usurpation had been, without Prejudice to the Title on either Side : and a Tryal was ordered accordingly.

NORGATE *versus* PONDER.

Pasc. 3 Car. 1 [1627], Lord Coventry.

An Award was obtained by Fraud, by which the Arbitrators did award, That one of the Parties to the Submission should seal and deliver a Bond to the other after general Releases first given : All which was done pursuant to the Award, and upon a Bill to be relieved it was decreed, That the Bond to stand to the Award, and the Arbitration it self, and the Releases and the other Bond executed by the Parties, should be brought into Court and cancelled.

[7] NELSON *versus* NELSON.

4 Car. 1 [1628-29], Lord Coventry.

The Defendant being Tenant of the Manor of H. was employed by the Plaintiff to purchase the same for him, which he the said Defendant agreed to do : but, contrary to the said Agreement, he purchased the same in his own Name, but was afterwards perswaded to let the Plaintiff into the Purchase, which was done by Deed mutually executed between them : but in that Deed there were several Omissions of many Things comprised in the Purchase Deed, and thereupon the Plaintiff exhibited his Bill for Relief against the said Omissions, and accordingly it was decreed.

LUCAS *versus* JOSEPH PENNINGTON, WILLIAM PENNINGTON, WRIGHT
AND NOBLE.

Lord Coventry, 5 Car. 1 [1629–30].

The Father of Wright the Defendant being Tenant of a Copyhold Estate, held of Joseph Pennington as Lord of the Manor, mortgaged the same to Lucas the Plaintiff's Father, upon Condition to be void upon Payment of a Sum of Money, which not being paid [8] on the Day, Lucas the Father entered, and devised the same to the Plaintiff, and died seised: After whose Death the Plaintiff enjoyed it, and the Lord demanding a Fine, he consented that the Lord should have the Profits for a certain Time in Satisfaction of the Fine, who enjoyed the same accordingly. But he having received out of the Profits more than the Fine amounted unto, refused to deliver the Possession to the Plaintiff, pretending that the Estate was forfeited, in regard that Lucas the Plaintiff's Father was never admitted, and had not paid any Fine: and William Pennington, whilst his Father Joseph was in Possession under the aforesaid Agreement to take Profits in Satisfaction of the Fine, procured Wright the Defendant to execute a Release to him, but without any Consideration expressed, and then he conveyed the Premises to his Father, who conveyed the same to Noble, another of the Defendants, and all this without any Consideration.

Upon a Bill exhibited, the Defendant Wright answered, That the Mortgage was at first unduly obtained from his Father upon his Death bed, and a greater Sum was expressed than was really borrowed, and that notwithstanding the said Fraud, the whole Money was really [9] tender'd at the Day, and no body was there to receive it. But Wright the Father having made no Entry into his Estate again after the Tender, and Wright the Son having executed a Release to William Pennington: the Court held, That tho' such Release had extinguished his Entry, yet the same should enure to the Benefit of him who had the former Right, in Trust only and for the Use of the Plaintiff, and decreed the Possession to him accordingly against the Defendants, and all claiming under them; and likewise that Joseph Pennington, the Lord of the Manor, should accout for the Profits since his Entry, deducting only his Fine.

MOYLE *versus* DOM. ROBERTS.

Lord Coventry, 5 Car. 1 [1629–30].

About 18 Years before the Bill filed, Moyle the Father became bound with one Rosecarrock in a Bond of £200 conditioned for the Payment of £100 to the Lord Roberts the Defendant at a certain Day long since past. Afterwards the Defendant purchased Lands of the said Rosecarrock to the Value of £500 which Purchase was made about four Years before Rosecarrock's Death. After his Death, the Plaintiff took out [10] Administration to him, and being sued upon this Bond, exhibited his Bill for Relief; and in regard of the Antiquity of the Bond, and for that Rosecarrock himself was never sued in his Life-time, it was presumed that the Defendant did deduct the Debt out of the Purchase-Money, and notwithstanding there were no Proofs made of the Payment of the Money, the Court decreed that the Defendant should be restrained from proceeding at Law on the Bond.

[See *King v. Baldwin*, 1817, 2 Johns. Rep. (U.S.A.) 588.]

FLEETWOOD *versus* CHARNOCK.

Lord Coventry.

The Plaintiff and Defendant were jointly bound for a third Person, who died leaving no Estate: the Plaintiff was sued and paid the Debt, and brought his Bill against the Defendant for Contribution, who was decreed to pay his proportionable Part.

GAWLE *versus* LAKE MIL'.

Lord Coventry.

The Bill was to establish certain Customs of Tything within a particular Parish, the Plaintiff alledging that there were such Customs, and setting them forth at large in his Bill.

The Defendant by his Answer denied the Customs, and alledging that it was [11] not

proper for a Court of Equity to determine whether there were any such Customs or not, that the Bill was in nature of a Prohibition at Common Law, and in a Case where such Prohibition had never been granted, or the Custom tried, and therefore the Bill was dismissed.

GIFFORD versus GIFFORD.

Lord Coventry, 5 Car. 1 [1629-30].

Gifford the Father being possessed of a Lease for Years (taken in the Name of another Person in Trust for himself, but determinable upon his own Life, and the Life of his Wife), did afterwards purchase the Inheritance; and upon the Marriage of his Son with the now Complainant, he settled an Annuity of £50 per Annum upon her, to be issuing out of the Premises during the Lives of him the said Gifford and his Wife, in case the said Complainant should survive her Husband, and conveyed the Inheritance to the Defendant, and died: his Son died, the Widow of Gifford the Father still living: And now the Son's Widow exhibited her Bill against the Defendant to have the Annuity decreed to her, and the Arrears ever since the Husband's Death, and [12] likewise against the Person in whose Name the Lease was taken, who to avoid the Annuity had assigned his Interest to the said Defendant, who claim'd the Lands by Vertue of a Grant from Gifford his Father, and the same was produced not cancelled: but it was decreed, That neither the said Grant or Lease ought to prejudice the Plaintiff, but that she should have the Annuities and the Arrears, and that the Lands should be liable to a Distress for the same.

MOOR & ALII versus COM. HUNTINGTON.

Lord Coventry, 6 Car. 1 [1630-31].

The Defendant being Lord of several Manors, did refuse to hold Courts, and grant Admittances, &c. whereupon the Copyhold Tenants exhibited their Bill to be relieved, and it was decreed, That the Defendant and his Heirs should, from Time to Time as Occasion should require, procure Courts to be held for the said Manors, and suffer the Plaintiffs and their Heirs to make Surrenders to such Persons, and for such Uses, as the Copyholders should limit and direct, and that the Surrendrees should be admitted accordingly.

[13] *FLOYER versus STRACHLEY.*

Lord Coventry, assisted by all the Judges, 7 Car. 1 [1631-32].

The Plaintiff exhibited his Bill, to be quieted in the Possession of certain Lands which he had purchased of the Daughter of one Pyke, he being now about 20 Years after his said Purchase disturbed by one Stephen Pyke, who pretended a Title as Heir at Law to Pyke, and born of the same Father and Mother with the Daughter, which was proved by several Witnesses, and thereupon he had recovered some Verdicts at Law; but the Place where he was pretended to be born was a mean House, and but seven Miles distant from the Dwelling house of his Mother: And forasmuch as those Verdicts were grounded on Depositions formerly taken in this Court, where the Record of the Bill and Answer could not be found, and the Witnesses which were produced at the Tryal were of indifferent Credit; and because on the Death of the Father an Office was found, whereby the Daughter was returned Heir, and no Claim was made by the Son for several Years after, and for that several Persons, as the Lord Chief Justice Popham, and others, claimed under the Title of the [14] Daughter: And at the last Tryal of her Title, the Jury were substantial and credible Persons, and declared, that for 20 Years and upwards the Daughter was reputed the right Heir, therefore the Possession was decreed to the Plaintiff.

SPYER versus SPYER.

Lord Coventry, 7 Car. 1 [1631-32].

The Bill was to make Partition, and settle Boundaries, between Lands which were Freehold, and other Lands held in Borow-English. The Defendant appearing, it was ordered that a Commission should be directed to certain Persons, as well to take the Defendant's Answer, as also to set forth the Meets and Bounds, and to return Tenants and Boundaries, which was done accordingly, and by Consent of the Parties the Court decreed the Boundaries, and that the same should be ratified and confirmed to all Intents and Purposes, as if the same had been judicially pronounced, upon a full Hearing in Court.

[15] INTER THEOPHILUM DOM. SUFFOLK. & RICHARDUM GREENVILL MIL. & BAR.
& MARIAM UX. EJUS, Def.

Lord Keeper, Justice Hutton, Justice Whitlock, 26 Julii, 7 Car.1 [1631].

The Defendant the Lady Greenville, whilst sole, had a Decree against the Earl of Suffolk for £600 per Annum, against which Decree the Earl prayed to be relieved, in regard there was a verbal Agreement between Sir Richard Greenville and the said Lady before Marriage, that she should have the sole Disposal of the said £600 per Annum : That accordingly, before the said Marriage, she by Deed assigned the Benefit of that Decree to one Cutford, and that afterwards she and Cutford released the same to the said Earl ; but not having the said Deeds to produce, and alledging that Sir Richard Greenville had got and cancelled the same, which he denied, it was ordered that he and Cutford should be examined upon Interrogatories to discover the said Deeds, or Copies thereof ; and accordingly they were examined : But the Matter being not cleared by such Examination, or what were the Contents of such Deeds, the Court were all of Opinion, that [16] there was no sufficient Proof to bar Sir Richard Greenville from the Benefit of the said Decree, for that the Arrears of the said £600 per Annum being in its own Nature a Thing of Action, and so to be merely recover'd by the Process of this Court, cannot in Law be assigned over to another. So that if the Assignment to Cutford had been proved (as it was not), it would have been a void Assignment in Law, and ought not to be supported in a Court of Equity, especially where no Consideration appears to make it better in Equity than it is at Law.

They were all of Opinion, that the verbal Agreement of Sir Richard Greenville, in Consideration of the said Marriage, was to subvert both the Grounds of Law, and the Right which was vested in him by the Inter-marriage ; and therefore if such Agreement is not settled by some legal Assurance to make it binding in Law, it is not fit to be maintained in a Court of Equity, in order to give a Feme Covert such a Power as is now pretended.

'Tis true, Things in Action are sometimes turned over by a Letter of Attorney ; but if it had been so in this Case, yet presently by the Inter-marriage the Letter of Attorney had been revoked [17] and determined, and all Covenants, Promises and Agreements, made by the Husband to his Wife before Marriage, relating to the Disposal of his Estate, would be extinguished by the Marriage ; and therefore if Cutford had an effectual Letter of Attorney executed to him, and the same could be produced, yet he could not in his own Name seal such a Release to the Plaintiff as he had done ; the Contents whereof appearing only on his single Testimony, he ought not to be admitted as a Witness, for he was a Party interested, and might justly be suspected of Partiality, because of former and continued Differences between him and Sir Richard Greenville : And therefore the Court held it dangerous to admit the Sufficiency of a Deed to be proved by the single Oath of such a Witness, especially since the Construction of Deeds was the proper Office of the Court of Chancery, but the Fact relating to the executing such Deeds was proved by Witnesses : So the Bill was dismissed, and Sir Richard Greenville had Liberty to prosecute the said Decree against the Plaintiff.

[18] MAYNARD & AL. *versus* DOM. MIDDLETON.

Lord Coventry, 8 Car. 1 [1632-33].

There being several Differences arising between the Plaintiff and Defendant, and they having petitioned the King therein, His Majesty recommended it to the Lord Keeper to compose the same, who having heard what was alledged on both Sides, made a Writing in nature of an Award, and decreed the same without Bill or Answer : and in the decreeing Part it was mentioned, that upon Reference from His Majesty, and upon the Submission of the Parties, it was ordered and decreed, That all the said Parties, their Heirs, Executors and Administrators, should justly observe and perform all and singular the Articles, Clauses and Things therein mentioned, according to the true Intent and Meaning of the said Order and Decree. And in some Places before the decreeing Part 'tis only said, that it was ordered so and so ; in other Places, 'tis ordered and declared ; and in other Places, 'tis ordered, adjudged and declared : But not long afterwards the Parties agreeing, did petition the Court to decree it ; which was done accordingly.

[19] VENDALL & AL. *versus* HARVEY.

Lord Coventry, 8 Car. 1 [1632-33].

On the same Day in which the Plaintiff's Cause was to be heard, his Counsel, as they were going to the Bar, were served with an Injunction out of the Exchequer, and the Court being acquainted therewith, the Defendant was ordered to attend, who was so far from denying the Service of the Injunction, that he owned it was done by his Direction. Thereupon the Court appointed two Orders made by the Lord Chancellor Ellesmere to be read, by which it appeared, that an Officer of the Custom-house being served with a Subpœna to answer a Bill, he refused, and procured an Injunction out of the Exchequer to stay the Suit : but it was ordered, that the Plaintiff should and might proceed in the Suit, notwithstanding such Injunction, and the Party was committed for serving the same, the Court taking it to be a great Derogation to their Authority : And therefore the Court asked the Defendant, If he would waive his Injunction, and proceed in the Cause ? To which he answered, That he desired Counsel might be assigned to him : Which was done [20] accordingly, and another Day was appointed for Counsel to be heard on both Sides ; at which Day the Defendant insisted, that it was not in his Power to waive the Injunction, and thereupon the Court examined him on Interrogatories, how it was that he had not Power in his own Suit, he coming in on a Contempt, and ordered the Plaintiff's Counsel to open the Cause ; which was done : And the Defendant still insisting in the Injunction, the Court decreed, That they would not suffer it ; for if it was pretended that the Defendant being a Receiver, ought to be sued in his proper Court, and not elsewhere, that had been overruled by many Precedents upon great Deliberation in the time of Sir Nicholas Bacon, Sir Thomas Bromley, the Lord Ellesmere, and other Chancellors and Keepers of the Great Seal : And in the present Lord Keeper Coventry's time, one Clerke was ruled to answer after he had pleaded the Privilege of the Exchequer, and did answer accordingly ; and this Order was made upon Conference with Sir John Walter Chief Baron, and the rest of the Barons of the Exchequer : And the Court declared, That if the Privilege of the Exchequer was to be allowed where the Suit was against an Accomptant only, yet [21] there was no Colour of allowing it where the Suit was against another Person not privileged, as in this Case.

And whereas it was objected, That the Exchequer had the Priority of Suit in this Cause ; it was answered, That did not appear, and that the Plaintiffs here were Strangers to any Suit in the Exchequer ; and there were many Precedents, where the Defendant in one Court of Equity hath been admitted to a cross Suit in another Court of Equity, without expecting the Event of the first Suit : for if the Plaintiff in the first Suit should discontinue or be dismissed, the Defendant hath no Help there but by a cross Suit, and the Court of Exchequer hath allowed new Suits to be brought there concerning Matters which have been judicially determined here : And this Court hath done the like by the Exchequer. And as to the Objection of the Inconveniency, to have the same Matters, and between the same Parties or others, to depend in several Courts at the same time, because the Courts might differ in Opinion, and the Judgments clash : it was answered, That where any Matter of Difficulty ariseth in a Cause which hath been heard in the Exchequer, and afterwards came into this Court, that the Chancery [22] calleth some of the Barons to assist, and the Court declared that Privilege doth not hold, unless all the Defendants were privileged ; nor then neither ; for as this Court doth not hinder the Proceedings in the Exchequer, so that Court is not to obstruct the Proceedings here by any Injunction. Therefore the Plaintiff shall be at Liberty to proceed ; and the Defendant's Counsel were enjoined by this Court not to move in the Exchequer, or to do any thing to hinder the Proceedings here, for which Purpose the Plaintiff may take an Injunction. And as concerning the Contempt of the Defendant, and the Punishment thereof, the Court advised farther, and ordered him to attend *de Die in Diem*.

MEECHETT *versus* BRADSHAW.

Lord Coventry, 9 Car. 1 [1633-34].

The Plaintiff was bound for the Defendant in several Sums of Money, and in order to indemnify him, the Defendant by Letter of Attorney assigned to him several Debts, and covenanted not to release the same, or any Part thereof : Afterwards the Defendant being a Tradesman became a Bankrupt, and the rest of his Creditors came in [23] and

compounded, and were paid out of the Residue of his Estate, not assigned to the Plaintiff by the Letter of Attorney as aforesaid.

Afterwards the Defendant intending to receive some of the Money which he had assigned to the Plaintiff before he had committed any Act of Bankruptcy, and combining with some of the Creditors who had compounded to share the Money which he had assigned to the Plaintiff, he exhibited his Bill to be relieved, and to have the Letters of Attorney confirmed: and the Court being satisfied that the Assignment was made *bona fide*, and before any Act of Bankruptcy, did decree, That the Creditors who had compounded ought not to claim or have any Share of the Money or Debts assigned, and that the Letters of Attorney should be confirmed to the Plaintiff against the Defendant, and all claiming under him.

[24] *FORD versus STOBDRIDGE.*

Lord Coventry.

The Plaintiff was bound as Surety for the Defendant, and the Debt was recovered against him, and he having no Counter-bond, brought his Bill to recover the Debt and Damages against the Defendant, which was decreed accordingly. *Quod nota.*

MARSTON versus MARSTON.

Lord Coventry, 8 Car. 1 [1632-33].

The Father both of the Plaintiff and the Defendant being seized of a Copyhold Estate, surrender'd the same to the Use of his Will, and devised it to the Defendant, who was his eldest Son, paying his Debts, and so much Money to the Plaintiff his Sister for her Portion when of Age; but if he failed to pay the Portion, then she was to have as much of the Copyhold Estate as did amount to the Value of her Portion. She afterwards came of Age, and the Defendant refused to pay the Portion. Whereupon the Homage allotted to her as much of the said Copyhold Lands as they adjudged to be the Value of her Portion; but the Defendant being admitted, refused to surrender the [25] same. Thereupon the Plaintiff exhibited her Bill, to have her Portion, or the said Allotment, decreed to her, and the Court gave Day for Payment of the Portion: and if he failed, then he was decreed to surrender the Allotment to the Uses declared in the Will.

MAUTER & UX. versus FOTHERBY.

Lord Coventry, 10 Car. 1 [1634-35].

Legacies were devised to be paid to Children when they came to their several Ages of 21 Years: Some of them who were of Age applied to this Court for their Legacies; but the Court being not satisfied whether the Estate would be sufficient to discharge all the Legacies to all the Children, some of them having not then attained their Ages of 21 Years, did decree, That those Legatees who were of Age, should receive their respective Legacies, but that they should make Retribution respectively out of the same, if the Court should think fit. So that the younger Children who were not of Age, and who were to be paid last, might have a proportionable Part and Share, in case the Estate should not be sufficient to answer the full of every Legatee's Part.

[26] *HUTCHINGS versus STRODE.*

Lord Coventry, 10 Car. 1 [1634-35].

Sir Thomas Phillips being seized (*inter alia*) of several Parcels of Land, for which the Plaintiff seeks Relief, did Anno 19 Jac. [1621-22] lease the same to certain Persons for 500 Years, and afterwards, viz. Anno 22 Jac. [1624-25] grant the same by Copy of Court-Roll to the Plaintiff, who was admitted and paid a Fine, and held the same for Lives. Afterwards Strode the Defendant purchased the Manor-house and the Demesnes, and got the Lease assigned to Persons in Trust for himself, and then claimed these Lands as Parcel of the Demesnes, alledging that the Copyhold Estate was destroyed; and the Plaintiff claiming them as ancient Copyhold, the Court was of Opinion, That his Grant being before the Defendant Strode's Purchase, ought not to be prejudiced by the Lease, especially if the same were ancient Copyhold Lands, and not Parcel of the Demesnes: However directed a Tryal at Law, whether the Lands were Copyhold or not, and the Lease not to be given in Evidence at the said Tryal, and there was a Verdict

that the Lands were not Copyhold. But it appearing to the Court that the Lands [27] had been ancient Copyhold Lands; and for that Sir Tho. Phillips, in a Survey of the Manor, had mentioned the same as Parcel of the Copyhold of the said Manor; and for that the Plaintiff had for several Years enjoyed the Lands quietly as Copyhold, notwithstanding the said Lease; and it also appearing that the Plaintiff's Estate was known to the Defendant at the time he purchased the Demesnes, and that he bought it but as an Estate in Reversion: Therefore the Plaintiff was decreed to hold it according to his Grant, and the Defendant was ordered, notwithstanding the Verdict, to pay good Costs both here and at Law.

LAKE *versus* PRIGEON.

Lord Coventry, 9 Car. 1 [1633-34].

The Defendant being Register to the Bishop of Lincoln, did for a Sum of Money grant the Deputation thereof to the Plaintiff for a certain Term of Years, who enjoyed the same for some time, but was turned out before the Term expired; and the Defendant having got the Agreement in Writing, refused to deliver it to the Plaintiff, so that he could have no Remedy at Law, and therefore exhibited [28] his Bill for Relief here. To which the Defendant demurr'd. and for Cause set forth the Statute 5 & 6 Ed. 6, prohibiting the sale of any Office of Justice, or the Deputation thereof, and averred that the Office of Register concerned the Administration of Justice: And for that the Plaintiff by his Bill had confessed that he had given Money, or contracted for it, contrary to the Meaning of the Statute; therefore he was disabled to execute the same, and the Demurrer was held good.

GWYNN *versus* EDMONDS.

Lord Keeper Coventry.

Rowland Owen being seized in Fee of the Premises in Question, made a Lease thereof to the Defendant Edmonds for 21 Years, and afterwards granted the Reversion to the Plaintiff Gwynn. The Term expired, but Edmonds refused to deliver the Possession, alledging that before Rowland Owen had any Estate or Interest in the Premises, one Owen *ap* John was seized thereof in Fee, and made a Lease to the said Edmonds for 21 Years, and afterwards granted the Reversion to one Griffith Edmonds, Brother to the Defendant, who released his Right to the Defendant, and affirmed [29] that the first Lease made by Rowland Owen was only to prevent Suits at Law which might arise, for that after the said Release Griffith Edmonds had delivered the Deed, (*viz.*) the Grant of the Reversion, to the said Rowland Owen, who was Heir at Law to Owen *ap* John the Grantor, and that the Acceptance of the Lease from Rowland Owen ought only to be an Estoppel during the Term. But it appearing to the Court, that Griffith Edmonds the Grantee of the Reversion, and under whom the Defendant claimed by Vertue of the said Release, had made a Feoffment of the Premises to the Plaintiff Gwynn, Anno 7 Jac. [1609-10] which was executed by Livery and Seisin, and to which the Defendant Edmonds was a witness, and for that the Defendant's Title by the Release was never set on Foot until the Lease was expired: Therefore the Possession was decreed to Gwynn and his Heirs, according to the Grant of the Reversion to him by Rowland Owen as aforesaid.

[30] MORRIS, LAMBETH & MARGERY UX. *versus* DARSTON.

Lord Keeper Coventry, 11 Car. 1 [1635-36].

One Curtis, the Father of Margery now the Wife of the Plaintiff Lambeth, and who married one Price her first Husband, did (in Consideration of the said Marriage, and of a Sum of Money paid unto him by Price the Husband) settle certain Lands on the said Price and Margery his Wife for Life, Remainder upon the Heirs of their two Bodies lawfully to be begotten, Remainder to the right Heirs of the said Price for ever.

Price afterwards settles the said Lands upon the Defendant Darston and his Heirs, in Trust and for the Use of himself for Life, Remainder to the Heirs of his Body; and for want of such Issue, to Margery and the Heirs of her Body; and for want of such Issue, to the Plaintiff Morris and the Heirs Males of his Body, with several Remainders over to other Persons.

Price died without Issue, and Margery afterwards married with the other Plaintiff Lambeth, who exhibited his Bill to have the Premises reconveyed to him and his Wife according to the Uses [31] limited in the last Deed, and at the Hearing his Counsel insisted, that the Limitation in that Deed (viz.), to Darston the Trustee and his Heirs, with a Remainder to the Heirs of the Body of Price, was inserted only through the Ignorance of the Writer ; for if those Words had been omitted (as they ought), then the Plaintiff Margery would have an Estate Tail, as was intended by the said Price her first Husband, otherwise she had but an Estate for Life, which she had before by the Settlement of her Father.

But the Defendant's Counsel insisted, that the Clause was inserted by Price, on purpose to bar his Widow from doing any Act to prejudice those in Remainder ; and for that Price was likely to have no Issue by Margery, and did afterwards die without Issue, it was decreed that she should have the Lands for Life, Remainder to her Issue if she should have any ; and that if the Plaintiff Lambeth should have any Issue by her which should die, then he to be Tenant by the Curtesy, and hold the same during his Life : And a Conveyance was directed to be drawn for that Purpose, and to bar Margery to prejudice the Estates in Remainder.

[32] LIPPIAT *versus* NEVILLE.

Lord Keeper Coventry, and Justice Hutton.

The Father made a Settlement of a Manor, reserving only an Estate to himself for Life, Remainder in Tail, to his Son the Defendant ; and afterwards he married a second Wife, and settled part of the said Manor on her, and then died, his Wife surviving, who enjoyed it for the greatest part of her Life. During which Time she granted several Copyhold Estates to the Tenants, who enjoyed the same under such Grants ; and among the rest she granted a Copyhold Estate to one Smith for his Life, and after his Death she granted the Reversion to the Plaintiff Lippiat. But not long before her Death, the Defendant, who was Tenant in Tail, brought an Ejectment against her, but confirmed the Estates which she had granted to the Tenants by signing their Copies.

Upon the Death of the said Smith, who was one of the said Copyhold Tenants, the aforesaid Lippiat, who had the Reversion, desired to be admitted ; but the Defendant, being Lord of the Manor, refused it : Whereupon he exhibited his Bill to be re-[33]lieved. And in regard Smith had enjoyed it all his Life-time, and for that the Defendant had confirmed the Estates of the other Tenants, the Court decreed that the Plaintiff should be admitted, and hold his Estate likewise according to the Grant made by the Widow.

COSIN *versus* YOUNG, FULLER, & AL.

Lord Keeper Coventry.

The Plaintiff Cosin delivered several Sums of Money to one Young, to put out at Interest for his Use, who informed the Plaintiff, that he had put the Money out accordingly, and had got the Securities in his Possession, when in truth he had purchased Copyhold Lands in his own Name with the Money ; to which he was admitted, and afterwards surrender'd the same to the Use of himself for Life ; and after his Decease, to the Use of the Defendant Fuller, who was his Sister's Son, and to several other of his Nephews.

Afterwards when this Practice was discovered, Young enter'd into a Statute to Cosin the Plaintiff, conditioned to surrender all his Copyhold Estates to him, and accordingly did surrender the same ; but before the Plaintiff was admitted, Young the Surrenderor died. And in [34] regard Fuller was presented to be his next Heir, Cosin the Plaintiff was denied to be admitted : Whereupon he preferred his Bill to be relieved, and the Fraud plainly appearing, and that all Young's Estate would not satisfy the Plaintiff, and for that Young did declare a little before he died, that his Nephews the Fullers, being then Infants, should surrender when they came of Age, the Court decreed the Plaintiff to hold the Lands till that time, and that the Defendants should surrender to him when they came of Age.

GIRD versus TOGOOD.

Lord Keeper Coventry.

Anno 13 Jac. 1 [1615–16] Lands were mortgaged, and the Mortgage being long since forfeited, the Plaintiff, as Executor to the Mortgagor, did in the Year 1643 bring a Bill to redeem; but after so long a Time, and the Lands being settled on the Son of the Mortgagee upon his Marriage, the Court would give no Relief, but decreed the Defendant to hold the same: And for that there were some Lives expired since the Mortgage, so that the Estate was of better Value than when first mortgaged, the Court ordered the Defendant to pay [35] some Money for the same: And for that the Executor was directed by the Will of the Mortgagor to pay the Surplus-Money (after the principal Debt and Interest was satisfied) to such Uses as therein mentioned, he was decreed to pay the same accordingly, and that the Defendant should hold the Lands against him, but not against the Heir, because he was no Party to the Bill.

JONES versus BAUGH.

Lord Keeper Coventry.

The Plaintiff was possessed of a Lease for Years, and made a voluntary Conveyance thereof to the Defendant, in Trust for himself, his Wife and Children: the Wife died leaving Children, and the Plaintiff being much in Debt, and having no Estate to pay the same besides this Lease, exhibited his Bill to compel the Defendant to join in a Sale of the Interest thereof to raise Money for Payment of his Debts, and for his Maintenance; and withall consenting that a reasonable Part thereof should be deducted, and remain in the Hands of the Defendant for the Portions of the Children suitable to their Mother's Fortune; which was decreed accordingly, and the Master to [36] ascertain the Portions, and the Defendant was discharged of the Trust save only as to the Children.

WENTWORTH MIL. versus YOUNG MIL.

Lord Keeper Coventry, 14 Car. 1 [1638–39].

The Plaintiff married the Defendant's Daughter, with whom he had £1500 in Marriage; and his Wife afterwards dying, and leaving Issue two Daughters, he entred into Articles with the Defendant, That as well the £1500 which he had in Portion with his Wife, as £1500 more which he gave out of his own Estate, should be secured for them by a Purchase of Lands, or Leases of Lands, and paid unto them at their Ages of 21 Years, or Marriage. The Court was of Opinion, That if the Money had been laid out in Lands pursuant to the Articles, and the Children had died before the time of Payment, the Lands would have gone to their Heir: but since it was in Money, and if they both should die before it became payable, that it should go to the Father, and to his Executors or Administrators.

[37] *SHERBOURN versus HOUGHTON.*

14 Car. 1 [1638–39].

The Bill was to be relieved upon a Trust: The Defendant pleaded the Jurisdiction of the Dutchy, but was ordered to answer.

So where the Bill was for a personal Thing, and the Defendant pleaded the Jurisdiction of the County Palatine, it was referred to Mr. Page, to search Precedents, and certify the Court: who reported upon View of Precedents, That the Jurisdiction of the County Palatine had been allowed between Parties dwelling in the same, and for Lands there, and for Matters local: and in the Argument of the principal Case, the 4th Institutes was cited in a Case between Sir John Egerton and the Earl of Derby, concerning the Jurisdiction of the County Palatine of Chester, and upon a long Debate the Plea was over-ruled. *Inter Halfe & Daniell*, 14 Car. 1 [1638–39]. See Hob. Rep. 77.

[38] *WILLOUGHBY versus COM. RUTLAND.*

15 Car. 1 [1639–40].

The Earl of Rutland bequeathed £500 to the Plaintiff, to be paid unto her at the Age of 21 Years, or Day of Marriage: but before either, the Defendant paid the said £500 to her Father, upon condition he would make it £1000, which he covenanted to do:

And afterwards by his Will he devised unto his said Daughter £1000 to be paid unto her at the respective Times as aforesaid, and died without mentioning that he devised the said £1000 in pursuance of the aforesaid Covenant. And now after her Father's Death she exhibited her Bill against the Defendant for the £500 but it was dismissed.

NEWELL & UX. *versus* WARD & BRIGHTMORE.

12 Car. 1 [1636-37].

One Ward being seised of an Estate in Fee, devised £20 to the Plaintiff's Wife, to be paid unto her at her Age of 21 Years; and devised the said Lands unto William Ward and his Wife for Life, upon condition that the said William, his Executors, Administrators, or Assigns, should pay all his Debts and [39] Legacies: And after the Decease of the said William Ward and his Wife, and the Survivor of them, then he devised the Inheritance to their Son Edmond Ward, and the Heirs of his Body, with several Remainders over, and made the said William Ward his Executor, and died. Afterwards he and his Wife, and Son, join in a Conveyance of these Lands to the Defendant Brightmore; then William Ward died, leaving no personal Estate. And now the Plaintiff being of Age, and married to Newell, she and her Husband exhibited a Bill, against the Widow of William Ward, and against the Purchaser Brightmore for her Legacy, alledging that the said purchased Lands ought in Equity to be liable to the Payment thereof during the Life of the Widow, who confessed the Will and the Sale to the other Defendant Brightmore, but that her Husband left no Assets, and that she was neither Executrix or Administratrix.

The other Defendant Brightmore insisted, that the Lands were not liable to pay this Legacy, because by the Limitation over to Edmond Ward, and the Heirs of his Body, after the Death of his Father and Mother, the Condition in the Will was destroyed; and therefore that a Purchaser's Estate was neither [40] liable in Law or Equity to pay the Debts and Legacies, tho' he had Notice thereof.

But the Court was of Opinion, that the Lands were liable in Equity, and therefore the Purchaser was decreed to pay the same with Damages and Costs; and when paid, he was to take his Remedy against the other Defendant the Widow for the Profits received, which the Court declared were likewise liable to pay this Legacy, and she was decreed to pay the same to the Purchaser, for which purpose he was to have the Benefit of this Decree.

JOYCE *versus* OSBORNE.

The Father of the Defendant was seised of a Rectory impropriate, and, as he apprehended, of the Perpetual Donation of the Vicaridge; the Endowment whereof was very small, and the Vicaridge-House being very much in decay, he conveyed another House and Lands to Trustees and their Heirs, for the better Maintenance of the Vicars, &c., and conceiving the Vicaridge to be Donative, did in the said Conveyance appoint how the Vicars should be qualified, and directed the Trustees and their Heirs to make a Lease of the said House and [41] Lands for 80 Years to the Incumbent for the Time being, if he should so long live; which was accordingly done, and his Appointment observed for some time.

But the Donor being mistaken in his Title, for the Vicaridge was Presentative, and not Donative, and by this Means the Right of Presentation being fallen to the King by Lapse, the Plaintiff was presented under that Title: But the Defendant excepted against him in regard he was not qualified according to the Appointment in the Deed, and thereupon the Trustees refused to make a Lease unto him of the said House and Lands; whereupon he exhibited his Bill to be relieved.

The Court declared, That the Qualification required by the Deed was occasioned through the Ignorance of the Donor, who thought the Vicaridge to be Donative: but that the Benefit of the Gift, and the Arrears thereof ever since the Plaintiff had been incumbent, ought to redound to him: For in Cases of Charitable Uses, the Charity is not to be set aside for want of every Circumstance appointed by the Donor; if it should, a great many Charities would fail.

Now in this Case it was appointed, That none should enjoy this House and [42] Lands but such as came into the Vicaridge by the Donation of the Defendant's Father and his Heirs: In which he was mistaken, for the Vicaridge was Presentative, and if so, 'tis impossible that any one should enjoy this Charity, there being other Circumstances limited by this Grant (*viz.*), That the Vicar for the Time being was to have no other

Benefice, and they were obliged to Residence, otherwise they were not to enjoy this Charity. The Plaintiff was decreed to hold it under those Conditions, and the Trustees were to make a Lease to him accordingly.

And whereas the Defendant intended to proceed against the Plaintiff to remove him by a *Quare impedit*, the Court declared, That the Plaintiff should have the Benefit of the Decree no longer than he could maintain his Title to the Vicaridge.

MAGGERIDGE *versus* GREY.

Lord Keeper Littleton, 17 Car. 1 [1641-42].

The Plaintiff's Husband had left a considerable Sum of Money, which he directed to be paid to certain Persons, in order to buy Lands for the Endowment of an Hospital : But the Persons to whom it was to be paid refusing [43] to undertake the Trust, the Court ordered other Trustees to perform the same ; and that several Persons of Quality might elect poor People qualified according to the Will of the Donor, to be placed in the Hospital ; and that the Trustees should have Power to displace and remove such who did not conform themselves to the Rules of the Hospital, tho' there was no such Provision in the Donation.

MARTIN & UX. *versus* BROCKETT.

Lord Keeper Littleton, 17 Car. 1 [1641-42].

The Defendant was to pay the Plaintiff's Wife £300 after his Death ; he sold his Estate, and the Plaintiff and his Wife preferred a Bill to have the Money secured to them after the Defendant's Death ; and the Court decreed that the Money should be retained in the Purchaser's Hands, and to be paid as aforesaid, and that he should be protected against the Defendant for the same.

[44] NICHOLLS *versus* CHAMBERLAINE.

Chamberlaine being indebted to one Ascue in £1000, the said Ascue made his Will, by which he devised several Legacies to Persons therein named, and made Chamberlaine his Debtor sole Executor.

The Plaintiff Nicholls, who was one of the Legatees, demands his Legacy ; which Chamberlaine denied to pay, insisting that he had not Assets, for that the Debt he owed to Ascue was released by his being made Executor, and so not liable to pay the Legacies given by his Will.

But it was decreed to be Assets, and upon an Appeal to the Lords in Parliament, it was referred to Baron Trevor, Justice Plesant and Rolls, who certified that it was Assets in Equity ; and so the Decree was confirmed.

OFFLEY *versus* JENNEY & BAKER.

The Plaintiff Offley, and one Jenney the Defendant's Son, being an Infant of five Years old, were Executors of Sir John Offley, and the Plaintiff exhibited his Bill to be relieved for a Debt. To which the Defendant de-[45]-murr'd, because the Infant Executor was not made a Party ; and the Bill being amended, the Defendant demurr'd again, for that the Infant did not sue by his Guardian ; and the Father being not thought proper to be Guardian, he being Defendant, the eldest Six-Clerk was appointed for that Purpose.

MORTON *versus* KINMAN & POPELWELL.

Anno 1649.

Morton the Plaintiff's Father died intestate, leaving a very good personal Estate. The Widow being about to marry one Kinman they came to an Agreement by Articles, That he should take out Administration to the Goods and Chattels of the said Intestate Morton, and should enter into a Statute to pay the Plaintiff, who was the Son of Morton, so much yearly until he should come of Age ; and accordingly he did enter into a Statute, and did administer, and with the said personal Estate he purchased Lands in Fee, and many Years afterwards died, leaving the Defendant Kinman an Infant his Son and Heir : But he died without any personal Estate, and much indebted to the Plaintiff, having neglected to pay the yearly Payment according to the Agree [46] ment aforesaid, and for that the real Estate could not be extended during the Minority of the Defendant.

the Court decreed against him and Poplewell and Guardian, That the Plaintiff should hold it till he was satisfied of his Debt and Arrears.

HUNT *versus* CAREW AND HIS SON.

Lords Commissioners, Anno 1649.

The Father being seised of an Estate for Life, Remainder in Tail to his Son ; and the Plaintiff thinking the Father had the Inheritance, applied himself to the Son for his Assistance in procuring a Lease from the Father, determinable upon Lives, offering £400 Fine, and a small yearly Rent : Whereupon the Son informing the Plaintiff, that his Father had a Power to make such Lease, procur'd the same of him, and the Son received £300 of the Money.

Afterwards the Plaintiff being informed that the Father had only an Estate for Life, desired the Son to confirm the Lease, which he refused ; and thereupon a Bill was exhibited against the Father and Son to compel him.

The Father by his Answer sets forth, That his Son wrote to him that he had very urgent Occasion for Money to pay [47] his Parliament-Composition, and earnestly desired him to consent to the making the Lease ; and thereupon he granted the same, which was brought to him engrossed before he had seen the Draught, and thereupon he sealed the same, believing that he had Power so to do without his Son ; but saith that they were both circumvented in the Value, for that it was worth above £200 more than was given by the Plaintiff, and that he had ordered his Son £300 of the Money.

The Son, by his Answer, confessed that the Plaintiff came to him about the Lease, which he was willing to procure of his Father, because he wanted Money to pay his Composition, but that he treated in Behalf of his Father ; for the Plaintiff would not give the Sum which he demanded ; therefore as to that he left him wholly to his Father, and that he always told him he would not join in the Lease, and denied that he ever declared that his Father had Power alone to grant the Lease, or that it was made by his Consent, or that he ever saw it or a Counterpart ; neither did he know upon what Consideration, or for what Term it was granted, but confessed he sent to his Father, and acquainted him that less was offered than [48] what the Lease was really worth ; but desired him to use some Means to procure Money for his Composition ; and confessed that he had received £300 from him, not as part of the Purchase-Money for the Lease, but only as so much directed to be paid to him from his Father, and that the Bargain was worth £200 more than was given ; and the other Defendant said that he was offered £150 more.

But the Court ordered, That since the Plaintiff was not acquainted that the Father had exceeded his Power, and he relying on the Affirmation of the Son (who had most of the Money), that the Lease would be good without his joining, by which he was deceived ; that therefore both should join at their own Costs to make an Assurance, and confirm the Lease to the Plaintiff during the Estate thereby granted.

MERRICK & UX. *versus* HARVEY MIL.

Lords Commissioners, Anno 1649.

The Plaintiff married a Widow, and there being several Accompts depending between her former Husband and the Defendant, who was much indebted to him, the Account was stated, and on the 2d of November, 1639, the [49] Defendant gave Bond, with Sureties, for the Payment of the Money due on the Ballance.

Two Days afterwards (some Things being forgotten) a farther Account was adjusted between them, and then General Releases were given to each other, which was not intended to release the Bond : and it appearing so to the Court by several Circumstances, it was decreed that the said Release should be set aside, and no Advantage taken of it as to the Bond.

HUNGERFORD *versus* AUSTEN.

Lords Commissioners, Anno 1650.

The Defendant was Lord of a Manor, and the Plaintiff was a Copyhold Tenant thereof ; and it was agreed between them, that the Defendant should grant a Licence to the Plaintiff to let the said Copyhold Estate for as long a Time and in as large manner as had been formerly granted to his Father or Mother, and £300 was paid for the same

to the Defendant : But he denying the Agreement, and refusing to grant such Licence, the Plaintiff exhibited his Bill to compel him ; and having proved the Agreement, and the Defendant confessing that he granted a [50] Licence to the Plaintiff's Mother to let it for 60 Years, the Court did decree that he should grant the like Licence now.

THOMAS *versus* JONES.

Lords Commissioners, Anno 1653.

The Defendant being a Prisoner in the King's-Bench, refused to answer : where upon it was prayed, that the Bill might be taken *pro Confesso*, if he did not answer by a Day : But the Court was of Opinion, That the Bill could not be taken *pro Confesso*, unless the Defendant was in the Prison of the Court. Whereupon he was removed by *Habeas Corpus* into the Fleet, and having a Day given him to answer, and he still refusing, the Bill was taken *pro Confesso*, and he was ordered to be kept close Prisoner.

[51] MOOR & AL. *versus* LADY SOMERSET.

Lords Commissioners.

The Plaintiff having exhibited his Bill for Matters arising within the County of Chester, the Defendant pleaded to the Jurisdiction of this Court ; setting forth, That the County of Chester had been Time out of Mind a County Palatine ; That the Privileges thereof had been established by the Laws and Statutes of this Realm ; That there was a Chief Officer there called The Chamberlain of Chester, who was Judge of the Exchequer Court of Chester, being a Court of Equity, &c. That all Pleas of Lands and Tenements, and all Contracts, Causes and Matters arising within the said County Palatine, were pleadable, and ought to be pleaded and determined in the said County, and not elsewhere ; and that if any such Causes were pleaded and adjudged out of the said County, the said Judgments were void, and of no Effect, except in Cases of Error, &c. And that no Inhabitant of the said County ought to be compelled by any Process to appear and answer to any Matter or Thing, except as aforesaid. And the Defendant averred, That he and the Plaintiff, at the exhibiting of the [52] Bill, were Inhabitants of the County of Chester : And forasmuch as he prayed by his Bill to have Relief touching the Possession of a Moiety of a Manor and certain Lands therein mentioned, lying in the said County, wherein the Plaintiff claimed a Title with the Defendant as Coparceners, and that all the Matters in the Bill concerned the Title and Possession of the said Manor and Lands ; the Plea was allowed, and the Plaintiff's Bill dismissed.

EARL OF CARLISLE *versus* GOBER & UX.

Lords Commissioners Widdrington, Tyrrell, and Fountaine, Anno 1659.

The Plaintiff mortgaged his Lands in Fee to one Andrews, to be void upon Payment of £100 and Interest on a certain Day, and he covenanted to pay the Money, and gave Bond for Performance of Covenants.

The Money was not paid ; Andrews the Mortgagee died ; the Wife of Gober, the now Defendant, was his Heir at Law ; and she and her Husband having formerly exhibited a Bill against the now Plaintiff, to have the Money paid at a certain Day, or the Plaintiff to be foreclosed of the Equity of Redemption ; it was thereupon decreed accordingly.

[53] Afterwards the now Plaintiff discovering that Andrews the Mortgagee had made a Will, and an Executor ; which Will was proved, and the Mortgage Money given to the Executor ; he exhibited a Bill of Review against the now Defendants (and before the Time given by the former Bill, for the Payment of the Money was lapsed), setting forth all this Matter, and that the Executor was not party or privy to the former Decree, nor was it then known that there was either Will or Executor, and so prayed to be relieved against the Decree, and that the Court would direct to whom the Money should be paid, and that the Bond might be delivered up, &c.

The Defendants plead the former Decree, and on arguing the Plea, the Court held it to be an extraordinary Case ; and that if the Executor had the Right both by the Covenant in the Mortgage, and by the Bond and Will, the Court could not take it from him ; and that if the Heir of the Mortgagee should have the mortgaged Lands by Vertue of the Decree, the now Plaintiff would be likewise liable to the Executor for the Money upon the Bond and Covenant, and so to double Payment, which would be very

hard; and that a Bill of [54] Review would not lie in this Case, because that must always be between the same Parties to the Original Bill. Now the Executor was no Party to that Bill; and as to the mortgaged Lands, the same being forfeited since the Decree, the Plaintiff could not have them again; and if the Executor had any Right to the Money, he might obtain a Decree against the Heir of the Mortgagee for the Land, or for the Price of it, if it was sold; yet the Court would not put the Executor to take that Course, because he had a Remedy at Law upon the Bond and Covenant, which the Court could not hinder him to prosecute.

However, it was ordered, That the Heir of the Mortgagee should answer without Prejudice to his Plea of the Decree as aforesaid; and that he should bring the Mortgage-Deed and Bond into Court; and that he should sell the Land, and bring the Money likewise into Court, there to remain whilst he and the Executor interpleaded for the same.

[55] *HAMPSON versus LADY SYDENHAM.*

Lords Commissioners, Anno 1651.

The Plaintiff being Guardian to an Infant, lent Sir John Sydenham Money, who was likewise under Age; and Sir John and others enter'd into a Bond for the Repayment of the Money: And afterwards he died under Age, the Money not being paid, having before his Death made his Will, and the Defendant his Lady Executrix; and by his said Will he appointed that his Executrix should out of his personal Estate pay all his Debts, and particularly those to which he had set his Hand, and left sufficient Assets to pay the same.

The Executrix proved the Will, and possessed her self of the said personal Estate, and refusing to pay the Money due on this Bond, the Plaintiff exhibited his Bill to discover Assets, and to compel the Payment of the Money.

The Defendant by her Answer confessed Assets, but pleaded the Nonage of her Husband when he enter'd into the Bond, and insisted that she for that Reason was not liable to pay the said Debt. But it was decreed, That tho' her Husband was under Age, yet he had Power by Law to make a Will of his [56] personal Estate; and having by his said Will appointed that his Debts should be paid, therefore in Equity they ought to be paid pursuant to the Will, notwithstanding the Minority of the Obligor.

MATTHEWS versus THOMAS & AL.

Lords Commissioners, Anno 1649.

A Debt was owing to the Testator, who by Will made the Defendants his Executors, and devised the Debt to the Plaintiff. The said Executors proved the Will, and released the Debt; and thereupon the Plaintiff exhibited his Bill against the Executors, and against the Debtor, to be relieved against their Release, charging them with Practice, &c. The Defendants pleaded this Release, and upon arguing it, the Plea was allowed, and the Bill dismissed.

[57] Anno 13 Car. 2 [1661-62].

NEEDLER versus BARBARA & ROBERT WRIGHT.

Lord Clarendon, assisted by the Lord Chief Justice Hyde.

Charles Wright being seised in Fee of an Estate expectant upon the Determination of the Life of Dorothy Wright, did in 1636, for a valuable Consideration, demise the same to one Blemell for 51 Years, to commence after the Death of the said Dorothy, rendering Rent, &c.

Blemell surrendered the said Lease; and afterwards the said Charles Wright, in Consideration of £25 demised the Premises to one Lawrence for 61 Years, to commence as aforesaid, and covenanted that he was seised in Fee, that he had Power to make Leases, and that he would make any further Assurance; and confessed Judgment for the Performance of Covenants, and also made Oath that he was seised in Fee, &c.

The Interest of this Lease by several mesne Assignments came to the Plaintiff Needler, and Dorothy Wright being dead, the Plaintiff assigned the Lease to another [58] ther in Trust to attend the Inheritance, and by a Fine and Recovery, and also by Deed enrolled, he purchased the Reversion and Inheritance of the Premises, and being in Possession laid out £1000 and upwards in Building, and enjoyed the same till the Death of Charles Wright.

After whose Death, Barbara and Robert Wright claim the Lands by Vertue of an old dormant Entail precedent to any of the said Estates, Barbara claiming only an Estate for Life, and Robert the Inheritance, by Vertue of a Deed and Fine by which it was entailed on him.

The Plaintiff exhibited his Bill to have the Validity of this Deed examined, alledging it to be voluntary ; and thereupon a Tryal at Law was directed, Whether fraudulent or not ? And no Fraud being proved, a Verdict passed for the Defendant ; and thereupon the Court would give no Relief, nor the Defendant any Costs.

[59] HOLLOWELL, KIRK, & MERRY, *versus* ABNEY, ABNEY, & KENDALL.

Anno 13 Car. 2 [1661-62].

Kendall contracted with Merry to sell him certain Lands in Leicestershire ; afterwards Abney the Father, who lived near the Lands, purchased the same of Kendall, in Behalf of Abney his Son, a Merchant in London, and had a Conveyance from Kendall to Abney the Son and his Heirs.

The Plaintiff Merry exhibited his Bill to be relieved upon his Contract with Kendall, and against the Conveyance to Abney, and charged Notice of this Contract to both the Abneys.

Abney the Son pleaded, That he was a Purchaser *bona fide* for a valuable Consideration, without any Notice of Kendall's Contract with Merry, and without any Trust for his Father.

The Court declared, That in this Case Notice to the Father was Notice to the Son, and should affect him tho' a Purchaser ; for Notice of a dormant Incumbrance to a Party who purchaseth for another, shall affect the Purchaser himself ; and decreed that Abney should convey to Merry the Plaintiff, it appearing that his Father had Notice of the Contract before he purchased for his Son.

[60] VENABLES *versus* FOYLE.

Anno 13 Car. 2 [1661-62].

Mrs. Venables being Tenant to Winchester College of the Rectory of Andover, and indebted to the Defendant Foyle in £700, agreed with him that he should pay £400 more to the College, and that she would surrender her Lease, and take a new one in his Name. And it was also agreed, that she should for the first Year of the said Lease hold the Premises, and pay the College Rent ; and that if she in that Year did pay Mr. Foyle £1100 and Interest, then he should assign the new Lease to her.

The £400 was paid, and the new Lease taken in Mr. Foyle's Name. The first Year expired, and Mrs. Venables neither paid the Money to Mr. Foyle, or the Rent to the College ; but at the End of three Years she permitted him to enter upon part of the Rectory and Tythes, and to enjoy the same.

Afterwards he exhibited his Bill against her, either to pay the Money, or be foreclosed of the Equity of Redemption. She put in her Answer, by which it appeared that her Intent was, that the Plaintiff should satisfy himself by the Perception of the Profits, and not to pay him in Specie. Thereupon [61] Mr. Foyle the Plaintiff, upon an Accompt stated of what was really due to him, and in Consideration of the Payment thereof by her Son Nicholas Venables, did assign the said Lease to him. In which Deed of Assignment the Suit between him and Mrs. Venables was recited, and that his Interest in the Lease was only a forfeited Mortgage ; and the Assignee Nicholas Venables covenanted to indemnifie Mr. Foyle against his Mother, &c.

This being the Case, she now exhibited her Bill against her Son and Mr. Foyle to be relieved, setting forth, that the Estate to him was but a Mortgage, and therefore that upon Payment of the Money she ought to redeem against both.

Nicholas the Son pleaded several Outlawries, so she could not proceed against him. And Mr. Foyle answered, that he had assigned his Interest to the Son upon Payment of what was really due to him, and no more ; so that the Case was thus (viz.) : A Mortgage being forfeited, the Mortgagee assigns his Interest to another upon Payment of the Money ; tho' it was insisted for the Plaintiff, that this was a Breach of Trust in Mr. Foyle. And the Court was of Opinion, that Mr. Foyle should accompt [62] for all the Profits, both before and after his Assignment to Venables the Son, and pay himself in the first Place, and the Surplus to the Plaintiff ; and that he should

convey and procure all Persons claiming under him to convey the Lease to the Plaintiff, free from Incumbrances done or committed by him or them.

Afterwards Mr. Foyle, being not able to perform this Decree, exhibited another Bill against Mrs. Venables and her Son Nicholas, setting forth a Fraud and Practise between them, and that he was willing to accompt to the time of the Assignment, but not afterwards, and to comply with the Decree as far as he was able, and prayed that Nicholas might be compelled to accompt from the Time of the Assignment to him, and to convey, &c.

Then Nicholas exhibited another Bill against his Mother, claiming the Original Lease by a Title paramount to her; and it appearing that he had such a Title, Mr. Foyle was discharged against him.

[S. C. 1 Chan. Rep. 178 : 1 Chan. Cas. 2.]

[63] BRETTON *versus* BRETTON.

The Testator bequeathed Money to younger Children, and afterwards died and left several Daughters and one Son, who was Heir at Law, and who had a fair Inheritance from his Father, and was by Birth younger than the Daughters, who claimed a Share of the Money by Virtue of the Devise : But it was decreed, That he was not to be comprehended under the Name of a younger Child within the Intent and Meaning of the Will, and therefore should not take by it as such, he being Heir at Law as aforesaid.

MEYNELL *versus* GARRAWAY.

Lord Clarendon, assisted by Sir Orlando Bridgman. Anno 14 Car. 2 [1662-63].

One Wingate, in the Year 1652, mortgaged a Lease to one, and in the next Year, viz. 1653, he mortgaged the same Lease to Meynell the Plaintiff, and both the Mortgages being forfeited, the Defendant Mr. Garraway, Anno 1656, purchased the Inheritance, and having Notice of the first Mortgage, he discharged the same out of the Purchase-Money : But before he had discharged [64] that Mortgage, and had got it assigned in Trust to attend the Inheritance, he had Notice of the second Mortgage ; and the Money being demanded of him, and he refusing to pay it, Meynell exhibited his Bill, to discover whether Garraway was a Purchaser *bona fide* for a valuable Consideration, and that he might satisfy this second Mortgage upon assigning the Interest to him.

And it being referred to a Tryal at Law, Whether a valuable Consideration was really paid ? as also, Whether the Purchaser had Notice of the last Mortgage before he bought the Inheritance, and when he had such Notice ? And there being a Verdict, that he had Notice before the first Mortgagee had executed the Assignment, but that he had paid Wingate for the Inheritance before he had Notice of the second Mortgage, the Plaintiff's Bill was dismissed.

SIR WILLIAM DENNY BAR. *versus* FILMER.

Lord Chancellor Hyde, and Lord Ch. Just. Bridgman. Anno 14 Car. 2 [1662-63].

Bill of Review to reverse a Decree, and the Error assigned was, That the Decree was founded upon a Bill taken *pro Confesso*, when the Defendants to that Bill were not brought in upon any Contempt.

[65] There was a Demurrer to this Bill of Review, and in arguing the same it was insisted, That the Decree was regular ; for tho' the Defendants were not brought in upon any Process of Contempt, yet they appeared by their Clerk upon Service of a Subpœna, and afterwards moved the Court for a longer Time to put in their Answer than of Course they could have : Which Time was granted. And this was compared to a Judgment at Law by a Default, where after the Defendant hath once appeared, and afterwards makes Default, Judgment shall be enter'd against him.

But on the other Side it was insisted, That the Decree was erroneous, and not warranted by any Precedent, because the Defendants were not brought into Court upon any Process of Contempt ; neither was any Day assigned to answer before the Bill was taken *pro Confesso* : And this was alledged to be the constant Course and Rule of the Court.

Thereupon it was ordered, That the Defendants should answer by a certain Day, and the Benefit of this Demurrer should be saved to them till the hearing the Cause ;

which was afterwards heard by Sir Harbottle Grimstone, Master of the Rolls, who upon long Debate was of Opinion, that the Decree was erro [66]-neous : but appointed Precedents to be searched.

And afterwards the Cause coming to be heard by my Lord Chancellor, assisted by the Chief Justice Bridgman, they were of Opinion, That because the Defendants appeared to the Subpoena to answer, and craved a farther Day and had it, and still stood out all Contempts, and could not be taken, that the Decree was well grounded, and ordered the Bill of Review to be dismissed.

EDGORTH *versus* DAVIS.

Lord Chancellor Hyde, and Mr. Justice Brown, Anno 14 Car. 2 [1662-63].

The Bill was to have an Account of the Profits of Lands, which the Defendant had received upon a Trust for the Plaintiff during his Minority, and for Money received upon Bond, and for Writings.

The Defendant pleaded, That the Lands lay in Cheshire, within the County Palatine of Chester, and in Leicestershire and Lancashire, within the Duchy of Lancaster : and that he lived in the County Palatine of Chester, and not within the Jurisdiction of this Court.

This Plea having been formerly argued before the Judges in the Absence [67] of the Lord Chancellor, they ordered Precedents to be produced, which was done as followeth :

ff. Farne *ver.* Smith, 12 Eliz. [1669-70]. A Plea that Lands lay within the Duchy of Lancaster, and over-ruled.

ff. Smith *ver.* Delves, 7 Nov. Anno 2 Jac. 1 [1606]. The Bill being to produce Writings and Evidences, the Defendant pleaded, That the Lands which those Writings concerned lay in Cheshire, and that the Parties lived there : and concluded, that the Matter was not within the Jurisdiction of this Court : But the Suit being not for the Land it self, but for the Writings, the Plea was held idle, and over-ruled.

ff. Sherborn *ver.* Haughton, 3 Maii, 14 Car. 1 [1638]. The Bill was to be relieved upon a Trust. The Defendant pleaded the Jurisdiction of the Duchy : Ordered to answer.

ff. Hales *ver.* Daniel, 24 Oct. 5 Car. 1 [1629]. The Bill being to discover a personal Estate, and the Defendant pleading the Jurisdiction of the County Palatine, it was referred by my Lord Coventry to Mr. Page to search Precedents, and make [68] his Report to the Court, who certified, That the Jurisdiction of the Counties Palatine was allowed between Parties dwelling within the same, and for Lands there, and for all local Matters.

And in the Argument of the principal Case, the 4th Institutes was cited, Sir John Egerton *ver.* Earl of Derby ; and Hob. 77. Owen *ver.* Hall : and after a long Debate, the Plea was over-ruled, but without Costs.

BINION MIL. *versus* STONE.

Lord Chancellor, Lord Chief Baron Hale, and Mr. Justice Wyndham,
14 Car. 2 [1662-63].

Sir George Binion purchased a House for £2000 in the Name of his Son, an Infant of five Years old, and the same was conveyed to his Son by a Deed enrolled.

All the Estate of Sir George being exposed to Sale by the Parliament for his Delinquency, this House was sold as part of his Estate to one Stone, who, after Sir George's Son came of Age, gave him and his Mother £500 to make a farther Conveyance of the House to him ; which they did, having both made Oath, That they were not Trustees for Sir George.

[69] Sir George afterwards exhibits his Bill to be relieved against Stone, and suggests a Trust in his Wife and his Son for himself ; and it was insisted, That it should be presumed as such a Trust, in respect of the Infancy of the Son when the Purchase was made by the Father ; and that the Money was paid by him ; and that the Sale of the House was in his Right, and for his Delinquency ; and so the Lord Chancellor inclined to decree it. But an Offer being made to repay Stone the £500, Time was given to the Parties to consider of it ; and if they did not agree, the Court declared they would advise with some Judges about it ; for Hale and Wyndham held it to be a Trust upon

which Sir George might be relieved ; and thereupon Stone accepting the £500 he was decreed to reconvey.

THEW versus THIRCKNELL.

The Plaintiff was Lessee of several Lands, out of which an entire Rent was reserved.

Afterwards the Inhabitants of the Parish where Part of the Lands lay claimed a Right of Common in that Part, and upon a Tryal at Law it was found that they had such Right.

[70] Now this being only a Right of Common which was recovered, it was no Eviction in Law of the Land it self, and so no Apportionment of the Rent could be made at Law : Therefore a Bill was brought to have the Apportionment made in Equity. And Serjeant Maynard insisted, that such Apportionment had been frequently decreed here. But in this Case it appearing, that tho' the Right of Common was recovered, the Lands were still worth the Rent reserved, and more ; The Court would decree no Apportionment, but ordered the Bill to be dismissed.

SMITH versus HANBURY.

Anno 24 Car. 2 [1672-73].

The Plaintiff brought the Equity of Redemption of a Mortgage in and upon an Accompt directed to be taken of the Profits under the Mortgage, it was decreed, That the Master should examine whether the Wife of the Mortgagee recovered her Dower out of the Lands, it being a Mortgage in Fee, and her Husband died seised, and what Satisfaction was made for her Dower ? And the Master certified, That the Wife had recovered her Dower, and that it was set out by the Sheriff ; and the Question was, Whether it should [71] go towards Satisfaction of the Mortgage ? And it was ruled it should not.

SHERMAN versus COX.

Anno 24 Car. 2 [1672-73].

One Robins mortgaged his Estate in August 1650, to Smith for 99 Years ; and in November following to Partridge for 40 Years ; and four Years afterwards to the Plaintiff Sherman's Husband for a Term of Years, to secure the Payment of £1500, and last of all to one Browning, who bought in the two first Mortgages.

In the Year 1664, the Plaintiff Sherman exhibited his Bill against Robins the Mortgagor, and against Browning, to set forth and discover their Title, and that the Plaintiff might redeem. The Defendants put in their Answer, but there was no farther proceedings in that Cause.

Two Years afterwards Browning exhibited his Bill against Robins alone, that he would pay the Money, or that he might be foreclosed of the Equity of Redemption : Which was decreed accordingly, and an Accompt stated of what was due for Principal and Interest, and a Time set to pay the Money, or be foreclosed. The Money was not paid at the Time.

[72] After Robins was foreclosed, the Defendant Cox bought Browning's Title ; and two Years afterwards the Plaintiff Sherman brought a new Bill against Cox to redeem, who pleaded his Purchase, and the Equity of Redemption foreclosed.

And the Question was, Whether Browning should have made the now Plaintiff Sherman a Party to his Bill as well as Robins (which he had not done), and therefore should he now be let in to redeem ?

The Lord Keeper Finch declared, the Case was to be judged by Circumstances, and by comparing the Mischiefs on both Sides, and so to choose the least.

That it would be very mischievous to the Mortgagee to make every one who had any Interest Parties to his Bill ; for if so, then every Mortgagee would be in the Nature of a Bailiff, or a Steward, and his Business would never be done, for there might be several Mortgagees. 'Tis true, he would be helped at last, having his Principal, Interest, and Costs, tho' he might be at some Trouble and Pains in getting it ; but if the Plaintiff should not be relieved, his Loss would be irreparable : Therefore he thought Trouble and Pains [73] less than Ruin and total Loss, and so over-ruled the Plea ; but declared, that the Accompt stated by the Decree should bind, unless some Collusion was proved ; and declared, he would consider of some Method to make Men take care to redeem their Mortgages, by ordering that Interest upon Interest should be allow'd ; or by

taking away the Rule, That Mortgagees should answer for what they might receive without their wilful Default ; or by ordering, that the Accompt of a Mortgagee upon Oath should bind, unless disproved by two Witnesses.

[S. C. 3 Chan. Rep. 83.]

EDWARDS *versus* ALLEN.

24 Car. 2 [1672-73].

A Devise in Remainder to such of the Children of A. B. C. D. as are or shall be living at the Death of the Testator ; this is but an Estate for Life in the Children, and adjudged by the Lord Chancellor Finch, that in this Case the Word Children extends to Grand-Children.

There was a Case cited 4 Car. 1 [1628-29] between Taylor and Hodges, where a Devise to four Sons was adjudged, that the three youngest had but an Estate for Life, and that the Inheritance was in the eldest, being Heir at Law.

[74] SIR SAMUEL JONES, AND WILLIAM JONES, Executors of Sir William Jones,
versus BRADSHAW.

Anno 1661.

Mary Cotton bequeathed £500 to one Dormer, and made Sir William Jones her Executor, and died.

Sir William the Executor sold Lands to Sir Samuel Jones, and left £500 of the Purchase-Money in his Hands, who gave Bond for it to Sir William Jones in his own Name.

Afterwards Sir William Jones made the Plaintiffs his Executors, and died. They inventoried this £500 as part of Sir William's Estate, and Mr. Dormer the Legatee having exhibited a Bill against them, obtained a Decree for the £500, suggesting that it was left in the Purchaser's Hands, with an Intent, and upon Trust, that he should pay it to Dormer : And the Court declared it was not Assets of Sir William Jones's Estate.

Then Bradshaw the now Defendant brought an Action of Debt against the now Plaintiffs as Executors of Sir William Jones upon a Bond of their Testator : and they having not Assets after the Payment of the £500 to Dormer, and that Decree and Payment not being pleadable to the Action, or to be given [75] in Evidence at Law, they exhibited their Bill against Bradshaw, setting forth the Case as before mentioned : and the Question was, Whether the Plaintiffs should have Allowance for the Payment of the £500 against the now Defendant ? And it was decreed they should, and that the Matter should go to an Accompt. And it was the Opinion of Sir John Maynard, That if a Man should sell his Lands, and leave part of the Purchase-Money in the Hands of the Vendee, and then gives or appoints Money to be paid to a Stranger : he shall have it, and it shall not be Assets. *Vid.* Hob. Rep. 265.

HEATH *versus* HENLEY & WHITWICK.

21 Maii, 15 Car. 2 [1663].

The Plaintiff was Son and Heir, and also Executor of the late Chief Justice Heath, who was made Chief Justice at Oxford during the Time of the Civil Wars, but never sate as Chief Justice in Westminster-Hall ; and the Bill was to have an Accompt of Money received by the Defendants as Prothonotaries of the King's-Bench, and which, by Vertue of their Office, they ought to receive for the Use of the said Chief Justice.

[76] The Defendants pleaded the Statute of Limitations, 21 Jac. cap. 6, and upon arguing this Plea it was insisted by the Plaintiff's Counsel, That this being an implied Trust *Virtute Officii*, was not within the said Statute, tho' a Guardian is, and he is a Trustee ; and therefore it was ordered that the Defendants should answer.

DAIRE *versus* BENTESHAM.

Mich. 13 Car. 2. [1661].

Henry Daire agreed for the Purchase of Copyhold Lands, which were surrendered out of Court to his Use : but he died before Admittance, having other Copyhold Lands, and also having made his Will after the said Agreement, and thereby devised to the

Plaintiff and his Heirs all his Copyhold Lands, he being at that Time his Heir at Law : but his Wife being with Child, was afterwards delivered of a Daughter, now the Wife of the Defendant Beversham.

The Plaintiff taking it for Law, That the Copyhold Land for which Henry Daire had contracted, and to which he never was admitted, did not pass by his Will ; he suffered the Daughter to be admitted, and she held the same for 20 Years, and the Plaintiff paid Rent [77] for that Time, and agreed so to do as long as he should hold the Lands.

Afterwards Differences arising between him and her, the Plaintiff exhibited his Bill to have these Copyhold Lands decreed to him ; and upon hearing the Cause, it was declared by the Court, That it was clear the Copyhold Lands for which the Testator had agreed, and which were surrendered to him out of Court, did pass by his Will, tho' he died before Admittance, for that the Purchaser had an Equity by the Contract to recover the same ; and the Vendor stood entrusted for him till a legal Conveyance was executed ; and cited the Lady Foliamb's Case in 1651, wherein it was ruled, That if Articles are signed for a Purchase, and then the Purchaser deviseth the Lands, and dieth before any other Conveyance is executed, the Lands do pass in Equity.

But in the principal Case no Decree was made, because the Plaintiff had admitted the Title to be in the Defendant as Heir at Law, and paid his Rent for many Years : but declared, if he had come in time, it was proper for a Decree.

[78] CLERKE *versus* LORD ANGLESEY.

A Legacy was devised to a Feme then under coverture, and the Husband alone without his Wife exhibited a Bill to recover it ; and because she was not a Party, the Defendant demurred, and ruled good : For of Things merely in Action belonging to a Wife, as a Bond, she ought to be joined.

But 'tis otherwise in case of Rent accruing to the Husband in the Right of his Wife after Marriage.

[S. C. 1 Chan. Cas. 41, *sub nom.* *Clark v. Lord Angier.*]

ANONYMUS.

Trin. 14 Car. 2 [1662].

The Bill was only for the Discovery of a Deed ; to which the Defendant demurred, because the Plaintiff had not made Oath, according to the Course of the Court, that he had not the Deed.

But Serjeant Glynn insisted for the Plaintiff. That the Course of the Court did not require such Oath in this Case, because the Bill is barely for a Discovery, and not to be reliev'd as to the Deed. For where the Bill alledgeth the Want of a Deed, and seeketh Relief upon the Matter contained in the Deed, in such Case 'tis necessary that the Plaintiff should [79] make Oath that he hath it not. But where the Plaintiff by his Bill seeketh only for a Discovery of a Deed, and no Decree upon the Matter therein contained, but that he may produce it at a Tryal, or the like ; in such Case he ought not to be put to his Oath, for 'tis not to be presumed he would exhibit a Bill if he had the Deed to produce. And this Difference was now allowed, and the Demurrer over-ruled.

ANONYMUS.

Anno 16 Car. 2 [1664-65].

The Bill was to have a Decree for an Enclosure, upon an Agreement made by the Parties for that Purpose ; but there being eighteen Shares, and but fifteen Parties to the Suit, it was objected, That all the Parties to the Agreement were not made Parties to the Suit ; and also that other Persons claimed a Right of Common in the Soil now to be enclosed, who were neither Parties to the Suit or Agreement, and therefore to decree that Agreement would be to do manifest Wrong, and occasion many Suits and Quarrels.

To which it was answered, That tho' there were eighteen Shares, and but fifteen Parties, yet some of those Parties were to have two Shares, and that [80] there was one had Common, but it was by reason of Vicinage.

Whereupon it was decreed, That the Agreement for the Enclosure should be performed ; and a Commission was awarded to set out the Share of each Person. And the Court declared, That if there were any who were not Parties, and who had any

Interest, they could not be bound by this Decree and so be at no prejudice ; but that it should not be in the Power of two or three obstinate Persons to oppose and hinder a publick Good.

STUKELEY *versus* COOKE.

The Plaintiff sets forth, That the Defendant bought Cloth of him to the Value of £1100, and paid part of the Money, and gave Security for the rest ; and that the Defendant promised the Plaintiff's Wife, if she could procure a Release from her Husband, that he would give her £20. And that he did give a Release, but the Defendant denied to pay the £20, and the Plaintiff had no Witness to prove the Promise.

The Defendant demurred for want of Consideration to the Promise, because by Payment of part, and securing the [81] rest, the Debt was released by Law ; but the actual Release was no more than what by Law and Conscience ought to be, and therefore it was *Nudum Pactum*, and without any Consideration to make any such Promise.

[S. C. 3 Chan. Rep. 70.]

CUTTS *versus* PICKERING.

4 Maii, 23 Car. 2 [1671].

The Defendant claimed an Estate by a Will for 90 Years absolutely, but after the Word Years there was a Rasure supposed to be written [if he so long live]. The Question was, How to Find out this Fraud and Alteration of the Will ! And for that Purpose the Plaintiff had exhibited interrogatories, to examine Mr. Joshua Baker, the Defendant's Solicitor, on Oath ; and Mr. Baker demurred, for that he knew nothing but as he was Solicitor for the Defendant, and as trusted by him, and demanded Judgment whether he should be examined against his Client ; but the Demurrer was over-ruled, and upon an Appeal to the Lord Keeper the Order was confirmed.

[S. C. 3 Chan. Rep. 66.]

[82] LADY GRIFFIN *versus* BOYNTON.

Pasc. 13 Car. 2 [1661].

The Plaintiff having only a Copy of a Deed of Feoffment under which she claimed the Land, the Original being lost, and the Defendant having a Counter part, the Plaintiff desired by her Bill that the Copy might be compared with the Counter part, and if it agreed, that the same might be allowed in Pleading as a good Deed, sealed and delivered ; which was accordingly granted, and it was referred to a Master to settle the same.

So where a Plaintiff claimed Lands by a Will, which was proved ; but the original was taken out of the Prerogative-Office, so that the Plaintiff could have no Remedy at Law, and therefore he prayed the Aid of this Court ; and it was decreed, That the Copy of the Probate of the Will out of the Register's Book in the Prerogative Office should be admitted in Evidence at Law at any Tryal, which should be had concerning the Title of the said Lands, as the true Original Will. This was decreed in the same Year, (viz.) 13 Car. 2, *inter Dom. Gorges versus Foster*.

[83] HALFORD *versus* BRADSHAW.

The Bill was to be relieved against a Statute, and upon hearing the cause an Account was directed, and after several Proceedings and interlocutory Orders, the Matter was referred to Mr. Ambrose Phillips by Consent of all Parties, and his Award to be conclusive. Mr. Phillips made an Award, which was confirmed *nisi Causa*. At the Day appointed several Reasons were offered against confirming it, and amongst the rest for that Exceptions were taken to it : But the Court declared, That the Parties having bound themselves by Consent, they would not look back into the Award, and thereupon it was confirmed by the Lord Chancellor.

JACKSON *versus* DIGBY.

Upon a Motion, the Question was upon a Bill of Review, by which Money was decreed back from the Defendant to the Plaintiff, which he had gotten from him by a former Decree, Whether the Party should pay Damages or not ? Upon a former Motion in this Case, the Court directed to search Pre [84] cedents, and none were

found where any Damages or Costs were given on a Bill of Review. And this was compared to Cases where Judgments have been reversed upon a Writ of Error (*viz.*), That the Party shall be restored to all that he had lost *per Judicium pred'*, but no Damages or Costs, and so it was decreed.

GODSCALL *versus* WALKER & WALL.

The Bill was to be relieved against several Judgments in Debt, obtained from Sir John Godscall an Infant, by Practice between the Defendant Walker a Goldsmith, and Wall an Attorney, and the Guardian of the Infant, and it was referred to a Master to examine the real Consideration either in Money or Goods, for which the said Judgments were had, and to make his Report, that farther Order might be taken therein.

[85] VISCOUNTESS CRANBORNE *versus* DELMAHOY.

A Bill of Review to reverse a Decree made in May 1655, in which cause the Dutchess of Hamilton, the Defendant's late Wife, when Sole, was Plaintiff, and the now Plaintiff the Lord Cranborne and his Lady were Defendants.

The Errors assigned were, 1. That the Dutchess was a Feme Covert at the Time of the Decree made; for it appeared by Delmahoy's Answer in this Court to another Bill, That after the Bill exhibited by the Dutchess, and before the hearing that Cause, she and the Defendant intermarried, and so there was no Cause in Court for the Foundation of such a Decree, it being abated by the Marriage.

The 2d Error: That the Dutchess's Father being seised in Fee of a Trust Estate in the Priory of Guilford, and of other Lands in England, he conveyed the same to the Dutchess and her Heirs by Deed in nature of a Feoffment, which was not executed by Livery and Seisin, and therefore was void at Law, and not to be supported in a Court of Equity to disinherit the now Plaintiff, who [86] together with the Dutchess were Daughters and Coheirs of their said Father.

To this Bill the Defendant demurred, and for Cause shewed, That it did not appear by the Bill but that the Decree was well grounded; for the first Error assigned was not Matter appearing in the Body of the Decree, but quite out of it, and *Dehors*; neither was it proper for any other Person than the Defendant to take Advantage of it; besides it was only Matter in Abatement, and did not concern the Right; and after a Decree was made in Point of Right, any Matter that might be pleaded in Abatement, was not such an Error as to ground a Bill of Review: And the Court was of that Opinion.

As to the 2d Error assigned; Since the Father was seised of a Trust, the Deed, tho' it was in nature of a Feoffment, might pass that Trust, tho' not executed by Livery; and it was sufficient to declare the same, which, as the Law then stood, might be declared by Parole.

It was then insisted, that the Defendant might answer the Bill; and after a long Debate, the Court declared, That since the Cause was now as entirely before them as it could be upon an An-[87]-swer, there being no other Matter possible to be discovered or set forth, it was not fit for the Defendant to answer; and so the Demurrer was allowed.

PARRY *versus* BOWEN.

Resolved, that where a Person hath Power to lease for 10 Years only, and he maketh a Lease for 20 Years, that such Lease shall be good in Equity for 10 Years; and so it hath been settled several times in this Court.

BORRE *versus* VANDE.

A Factor had stolen the Customs of several Goods, and the Bill was, to have an Accompt, and to discover, whether he paid those Customs or not.

The Defendant by his Answer insisted, That he was not bound to answer that part of the Bill, because the Plaintiff who was the Merchant was not entitled to those Customs, nor had any Advantage thereby, whether the same were paid or not.

And it being referred to the Master, whether this was a sufficient Answer or not, he certified it was not: And Exceptions being taken to his Report, [88] the Cause was heard, and it was insisted, That it would be of very ill Consequence, and an Encouragement to unjust Factors, if the Court should give any Opinion for them in a Matter of Fraud as this was. But it was said for the Defendant, That by the Law

and Course of Merchants, the Factors were to have the Benefit of Customs stolen, because they were liable to the Penalties if discovered, and not the Merchants.

But the Court declared, That could not be a Law or Custom amongst Merchants which was grounded on a Fraud, and so ordered the Defendant to answer.

[S. C. *sub. nom.* *Bon v. Vandall*, 1 Chan. Cas. 30.]

RAYNES *versus* LEWES.

The Bill was brought by a Feme Covert against her Husband, to be relieved concerning a separate Maintenance agreed to be paid to her by her Husband. The Defendant demurred, for that she sued without her Husband; but for the Reason aforesaid the Demurrer was over-ruled.

[S. C. 1 Chan. Cas. 35.]

[89] CHURCHILL *versus* GROVER & AL.

Anno 15 Car. 2 [1663-64].

The Mortgagor confessed a Judgment to the Plaintiff, and had likewise acknowledged a Statute to the Defendant, which was precedent either to the Mortgage or Judgment.

Thereupon the Plaintiff, who was the Judgment Creditor, exhibited his Bill against the Mortgagor and the Cognizee of the Statute, to have a Discovery of what was due on the Statute, and that upon Payment of the Money it might be set aside.

The Cognizee pleaded, That he had extended the Land: and there being £3000 really due to him, the Cognizee, in Consideration of so much Money received, had made an absolute Conveyance of part of the extended Lands to him, and that his Debt being satisfied by that Conveyance, he had assigned the rest of the extended Lands to the Cognizor, and so he became a Purchaser of the Lands for a valuable Consideration, without any Notice of the Plaintiff's Title. He also pleaded, That the Cognizor was in Execution at the Plaintiff's Judgment, and therefore he could not extend his Lands, neither were they [90] liable to his Debt during the Life of the Cognizor.

And upon arguing this Plea, it was insisted on the Part of the Plaintiff as to the first Point, That it did not appear the Defendant was a Purchaser, there being no Money paid upon executing the Conveyance, the Consideration whereof was the Money due on the Statute, and that was no Purchase: and that it was common Equity for him who had any subsequent Judgment to be relieved against any precedent Statute upon Payment of what was justly due; and that therefore the Accompt made up between the Cognizor and Cognizee on the pretended Purchase ought not to affect the Plaintiff, so that the Defendant's Purchase being subsequent to the Plaintiff's Security, ought not to be aided by the Statute, and the Plaintiff's Judgment being on Record, the Defendant was bound to take Notice of it at his Peril, and therefore ought, upon Payment of the Statute, to yield the Possession to the Plaintiff.

But on the other Side it was insisted, That the Defendant was a Purchaser: and that tho' no Money was advanced on the Purchase, yet the Consideration of his assigning some part of the ex-[91] tended Lands to the Cognizor was as good and valuable as Money.

That it was the constant Justice of this Court, That if a Purchaser *bona fide* bought in an elder Statute or Judgment, and there were intermediate Judgments between that and the Purchase, of which he had no Notice, that in such Case the precedent Statute or Judgment should protect the Purchaser against all those intermediate Judgments.

That tho' the Plaintiff's Judgment was on Record, and a Purchaser bound to take Notice thereof, because it charges the Land at Law: yet in Equity, where the Cognizee of a Statute or Judgment comes for the Assistance of this Court to extend his Judgment against a Purchaser, he must prove that the Purchaser had express Notice of the Judgment, otherwise he shall not be relieved; and upon this Point the Plea was allowed to be good.

As to the other Point, That the Cognizor being in Execution on the Judgment at the Suit of the Plaintiff, and so the Lands not to be extended during his Life: it was argued, That was no good Exception in Equity, for that the Bill was to discover Incumbrances, and the Plaintiff could have no such Discovery after the Cognizor's Death, and there [92]-fore ought to have it now, And it hath been ruled here, That such a

Bill will lie, notwithstanding the Debtor is in Execution at the Suit of the Plaintiff ; but yet the Court inclined, that this Part of the Plea was likewise good.

[S. C. 1 Chan. Cas. 35.]

RANDALL *versus* RICHARDS.

A Witness having committed a Mistake in his Examination before Commissioners, applied himself to them to rectify it ; who told him, That the Commission was returned to London, and he coming there, made Oath of it, and that he was surprised by a hasty Examination : But the Commission not being opened it was returned back to the Commissioners, with a Special Commission to open it, and permit the Witness to rectify his Mistake. And afterwards the Special Commission being executed and returned, a Motion was made to suppress the Depositions, because unduly taken, and that no such Special Commission ought to have been. Whereupon it was referred to the Master of the Rolls to examine into it, who called to his Assistance the Six Clerks, and they were all of Opinion, That no such Commission had ever been, or ought to be now granted : [93] so the Depositions and the Special Commission were suppressed.

[S. C. 1 Ch. Cas. 25.]

SCOTT *versus* REYNER.

Anno 16 Car. 2 [1664–65].

An action was brought at Law by an Administratrix to her late Husband, upon a single Bill, for the Payment of Money due to him. The Defendant in that action exhibits his Bill, suggesting that in truth the Husband was not dead, but concealed himself, and pending this Suit, the Administratrix got Judgment at Law, But the Court granted an Injunction, and directed an Issue at Law, to try whether the Husband was dead or not.

[S. C. 1 Ch. Cas. 50.]

FREAK *versus* HORSEY.

Lord Chancellor, and Mr. Justice Brown.

The Heir of the Mortgagee exhibited a Bill to have the Mortgagor pay the Money, or to be decreed to make a farther Assurance, and also to be foreclosed of the Equity of Redemption.

The Defendant demurred to the Bill, because the Executor of the Mortgagee was not made a Party ; for probably he might have a Title to the Mortgage-Money, and the Demurrer was for that Reason allowed.

[S. C. 1 Ch. Cas. 51.]

KINGSTON & AL. *versus* MANWARING.

The Plaintiffs were the Children of the Defendant's Sister ; and the said Defendant being an Infant, his Mother took Care of his Estate during his Minority, and as Guardian to him ; and upon a Bill exhibited by the Plaintiffs to discover a Deed, the Question was, Whether the Defendant's Father had settled the Lands now in Demand on the Plaintiff's Mother ? The Proof was, That about two Years before her Marriage he had put her in the Possession of these Lands ; and had artided upon her said Marriage, That the same should be settled on her and her Heirs : To which Articles, the Defendant then an Infant was a Witness. But there was not any other Proof of such Deed of Settlement, yet the Court decreed for the Plaintiff ; but it was conceived a hard Case for the Court to decree an Equity upon a Deed, which had no other Proof.

[S. C. 1 Chan. Cas. 47.]

[95] BETTON *versus* ANN.

Anno 16 Car. 2 [1664–65].

A Lease was granted by the Crown to one who made an Under-Lease to another in the Time of the Usurpation, rendering Rent, &c. Afterwards the Interest which the Crown had in the Lands was exposed to Sale, and the Title by which the first Lessee held it was defeated, and by Consequence the Under-Lease was in Danger ; therefore he who had that Interest applies himself to his Lessor to be protected, which he refused.

The Estate was afterwards sold by the Usurpers, and the Under Lessee paid the Rent to the Purchaser, and afterwards purchased the Lands himself of that very Purchaser.

When the King was restored, the first Lessee who held under the Crown brought an Action of Debt against this Under Lessee, for all the Arrears of Rent ever since he had discontinued the Payment thereof to him, and had Judgment by Default.

And now the Plaintiff, who was the Under-Lessee, exhibited a Bill to be relieved against that Judgment, which (as he alledged) was obtained by Surprise: And tho' that did not appear, yet the Judgment was vacated, because the Rent [96] was discharged by the Act of Oblivion; of which the Chancellor said, A Court of Equity was as proper a Judge as the Courts at Law.

[S. C. 3 Chan. Rep. 16.]

GLOVER *versus* PARTINGTON.

Anno 16 Car. 2 [1664-65].

John Glover, the Plaintiff's Father, for securing £50 per Annum to Anne, his Mother-in-Law, during her Life, in lieu of so much which was charged on other Lands for her Life, and which he was now about to sell, did surrender certain Copyhold Lands of the Tenure of Gavelkind to Thomas Rolt, Brother of the said Anne, and his Heirs, in Trust for the said Anne, and upon Condition, That if the said Glover, his Heirs or Assigns, paid Anne £50 per Annum during her Life, then the Surrender to be void.

Thomas Rolt was admitted, and afterwards the said Glover failing to pay the £50 per Annum, Rolt surrender'd the Premises, to the Use of Anne for Life, Remainder to himself and his Heirs, but in Trust for her and her Heirs.

Rolt the Trustee died; the Lands descended to his Heirs (viz.), Children and Grandchildren, some of them Infants, and one of them a Lunatick.

[97] Afterwards Anne devised, That the Arrears of the £50 per Annum should be paid to her Executors; and having made the Defendant Partington her Executrix, and declared that the Children and Grandchildren of Rolt should permit her said Executrix to receive the Rents and Profits of the Lands towards the Payment of certain Legacies she had bequeathed; and that if the Plaintiff, who was the Heir of the said Glover, should within three Years after her Decease pay unto her said Executrix all the Arrears of the said £50 per Annum, then they should surrender to him and his Heirs; and remitted £100 of the principal Debt, and the Interest of the whole, in case he paid the rest within that Time; but if he failed, then the Premises should be surrender'd to her said Executrix, and the Arrears being paid, then she was to pay the Surplus to the Plaintiff, and to surrender to him; and soon afterwards died.

After whose Death, the Plaintiff exhibited a Bill against the Executrix, and against the Children and Grandchildren of Rolt, to have a Discovery of what was paid, and that upon Payment of the Arrears (excepting £100 and the Interest), the Lands might be surrender'd to him.

[98] But it was decreed, That if he would redeem, he should pay all the Arrears and Interest, and that upon Payment thereof the Lands should be surrender'd.

This Cause was afterwards reheard upon the Point of Interest; for as to the Payment of the £100, 'tis true the Bill came in six Months after the Death of Anne, and a long time within the three Years in which it was appointed to be paid: But by reason of the Infancy and Lunacy of the Defendants, and other Accidents, the Cause depended for many Years; and it was not safe to go to a Hearing to obtain a Surrender without their being made Parties, and for this Reason he suffered the three Years long since to lapse.

But all this was not held a sufficient Reason to retard the Payment of the £100, because the Remittance of it being a Voluntary and Conditional Gift to the Plaintiff, he ought to have performed the Condition by the Payment of the rest of the Money, if he would have any Benefit of the Gift; and if the Lands could not be surrender'd to him at the Time he paid the Money in Performance of the Condition, he should have sought for a Surrender afterwards, when it might have been lawfully made.

[99] Then as to the Matter of Interest, the Counsel insisted, That was strongest for the Plaintiff: for the Will appointed, That the Arrears being paid, the Lands should be surrender'd to him. Now certainly some Benefit was intended for him by this Appointment; but it would be none if he should pay all the Arrears and Interest:

for in such Case the Lands must be surrender'd, whether the Will had made any such Appointment or not.

But notwithstanding this Reason, the Decree was confirmed. Serjeant Fountaine, Mr. Churchill, Mr. Keck, and Mr. Solicitor Finch, for the Defendants.

Afterwards there was a Bill of Review brought by the Plaintiff to reverse this Decree; to which Partington the Executrix demurred, and insisted there was no Error in it.

And the Demurrer being argued before the Lord Chancellor, assisted by Baron Rainsford, it was insisted, That this was a Bill of Review of a very strange Nature, because the Plaintiff who had a Decree in his favour (*viz.*) that the Lands should be surrender'd to him, complained that he had not enough decreed, when in Truth a Bill of Review lay properly for him against whom the Decree or Dismission was pronounced; [100] and after long Debate, the Demurrer was allowed.

[S. C. 1 Chan. Cas. 51.]

PROWDE *versus* COMBES.

Anno 16 Car. 2 [1664-65].

There was an Accompt stated between the Mortgagor and the Heir of the Mortgagee, and it was under Hand and Seal; and a Bill was now brought to be relieved, suggesting, that upon the Sealing to the said Accompt, it was agreed between the said Parties, That if there was any Mistake, it should be rectified.

The Defendant denied the Agreement, and pleaded the Accompt stated, and set forth the several Meetings in order to it; and that it was perused by the Plaintiff and a Friend before it was sealed, and by him approved, and he consented to it: But it appearing to the Court upon the Hearing, that the Accompt was made up of Interest upon Interest, they set it aside, and ordered the Parties to go to a new Accompt *ab Origine*.

[S. C. *sub nom.* *Combs v. Proud*, 1 Chan. Cas. 54.]

[101] RAND *versus* CARTWRIGHT.

Anno 16 Car. 2 [1664-65].

A man made a voluntary Grant of his Lands, and afterwards he mortgaged the same Lands. Upon a Tryal at Law against the Mortgagee, the first Deed was found fraudulent; and afterwards he to whom that Deed was given exhibits his Bill, to redeem upon Payment of the Money to the Mortgagee, and it was decreed; That tho' the first Deed was fraudulent, because, *quoad* the Mortgage-Money, and *pro tanto*, it was voluntary, yet it was good as to the Equity of Redemption, and would pass it; for a voluntary Deed is good against the Party who made it, and against his Heir, tho' not against a Mortgagee.

[S. C. 1 Chan. Cas. 59.]

KINNERSLEY *versus* PARRETT.

Anno 16 Car. 2 [1664-65].

The Plaintiffs were Legatees, but their Legacies were not to be paid until they attain their respective Ages of 21 Years; and because they had no Maintenance in the mean time, they exhibit their Bill by their Guardian, setting forth this Matter, and praying that the Executor might allow them Maintenance.

[102] The said Executor demurred, for that the Plaintiffs were under Age, and their Legacies not yet due, and so had no Cause of Suit; but the Demurrer was overruled.

[S. C. *sub nom.* *Rennesy v. Parrot*, 1 Chan. Cas. 60.]

WOOLLETT *versus* ROBERTS.

Anno 16 Car. 2 [1664-65].

At the Hearing this Cause, the now Plaintiff offered to give in Evidence a Bill, formerly exhibited against him by the now Defendant. It was objected, That the Bill ought not to be given in Evidence, unless the Plaintiff could prove that it was exhibited by the Order, Direction, and Priyity of the Defendant; for any Man may

file a Bill in the Name of another : And the Court was of Opinion. That it should not be read, unless it was so proved.

[S. C. 1 Chan. Cas. 64.]

DRAKE *versus* THE MAYOR OF EXON.

Anno 16 Car. 2 [1664–65].

The Lessor made a Lease for Years, and covenanted with the Lessee and his Assigns, that he would renew the Lease. The Lessee became a Bankrupt, and afterwards the Commissioners of Bankrupts assigned this Covenant to the Plaintiff, who brought his Bill against the Lessor to have the Be [103]-nefit thereof, and that he might be compelled to renew the Lease. The Case was referred to Justice Wyndham and Baron Turner, and they certified that the Plaintiff ought not to be relieved : and so he was dismissed. But Serjeant Newdigate told Mr. Keck, who was of Counsel for the Defendant, That it had been ruled in this Court, That Commissioners of Bankrupts might assign an Equity of Redemption of a Mortgage : But this may be a Question, because the Statutes of Bankruptcy do enable them to assign the Benefit of Conditions which are to be performed, but not Conditions which are forfeited.

[S. C. 1 Chan. Cas. 71.]

LOVE *versus* BAKER & AL.

Anno 16 Car. 2 [1664–65].

Both the Defendants brought a joint Action at Leghorne against the Plaintiff, and had there arrested his Goods ; and the Defendant Baker being now here, and the other at Leghorne, and a Bill being filed against them, Baker put in his Answer, and it was ordered, That a Subpoena being left with him, should be good Service on the other Defendant who was at Leghorne, and thereupon an Attachment for want of Answer, and so an Injunction to stay Proceedings at Leghorne.

[104] Now the Defendants moved to dissolve that Injunction, and insisted that it was a new Case : And the Lord Chancellor being of Opinion that it might be a dangerous Case to stay Proceedings there : it was answered, That all Parties might have Justice, and be fully heard in this Court, but that the Plaintiff would be without Remedy if Distresses proceed at Leghorne, and the Defendants should get the Possession of all his Goods there.

Thereupon the Court declared, they would advise with the Judges ; and afterwards declared, that they were of Opinion, that the Injunction ought to be dissolved : But all the Barons were of another Opinion. And as to the Objection, That an Injunction did not lie to Foreign Jurisdictions, nor out of the King's Dominions : it was answered, That the Injunction was not to the Courts there, but to the Party who was the King's Subject.

[Mews' Dig. Shipping, A, XXVI, 1, d. S. C. 1 Chan. Cas. 67 ; 2 Freeman, 125.

Held over-ruled, *Portarlington v. Soulby*, 1834, 3 My. & K. 104.]

[105] HAYN *versus* HAYN & AL.

Anno 17 Car. 2 [1665–66].

Pending the Suit, and after Replication, and before Issue joined, the Defendant got a Release from the Plaintiff, and at the Hearing brought a Witness to prove it.

It was insisted for the Plaintiff, That this Release could not be produced in Evidence, because the Reality of it could not be tried, for it might be fraudulent, or obtained by Surprize.

The Court offering a Tryal at Law upon any such Issue, it was objected, That an Issue ought to be first joined in this Court upon a Point to be tried here, before the Court could direct a Tryal at Law.

After Consideration upon this Point, both at the Bar and Bench, it was ordered that the principal Cause should stay, and that a new Bill should be exhibited against the Release, so that the Truth of it might be examined, and both Causes to be heard together.

[3 Chan. Rep. 19.]

[106] STEPHENS *versus* BAILY.

Anno 17 Car. 2 [1665-66].

Lessee for another Man's Life contracts with the Plaintiff for a Sum of Money to convey an Estate to him, but dies before the Conveyance was perfected.

The Defendant, being the Heir of the Lessee *pur autre Vie*, enters, and holds the Land as Special Occupant; and a Bill being brought against him to perfect the Assurance, he demurred to it, and it was insisted for him, That he was in possession as an Occupant, and so was not privy to his Father who made the Contract.

Maynard on the other Side argued, That an Occupant is liable to an Action of Waste, and that was the Dean of Worcester's Case; and that an Occupant was bound by this Agreement in Equity: That the Plaintiff, who was out of his Money, ought to have Relief: That where a Man contracts for the Purchase of Lands, and dies before the Assurance is executed, the Heir of the Vendor stands trusted for the Purchaser, and is compellable in this Court to execute the Estate to him, and that Trusts here are of another Nature than Uses are at Common Law: That a Covenant doth [107] not bind an Occupant at Law, because the Estate which he possesseth by the Occupancy is not Assets in Law; but here it is a Trust: That if a Copyholder takes Money, and covenants to convey, his Heir is not bound at Law, yet this Court will compel him.

So in this Case, the Lands are bound by the Agreement in whose Hands soever they fall.

Mr. Finch for the Defendant insisted, That this was not like the Case of a Copyholder; for the Lord is bound to admit the Heir, and then he is in by Descent, and he may have an Ejectment before Admittance: 'Tis more like the Case of one seised in Fee, who contracts to sell, and dies before any Assurance, and without Heir, so that his Lands escheat to the Lord: This Court will not compel that Lord to convey to the Vendee. But Maynard said, The Reason was, because by such Conveyance the Lord would lose his ancient Services which were due before the Lands escheated.

To which it was replied, That this did not seem to be a tolerable Reason, because the Lord might make such a Conveyance reserving the ancient Services. But it being referred to Justice Tyrrell, he certified, That having advi-[108]-sed with the Judges, he was of Opinion that the Defendant ought to answer; and so it was ordered.

HAMDEN *versus* BREWER.

Anno 18 Car. 2 [1666-67].

Richard Hamden made the Plaintiff and his Widow Joint Executors of his Will, but upon this Condition, That if his Widow married, her Executorship should cease, and then the Plaintiff should be sole Executor.

A Bill was exhibited by the Executors, and an Answer put it, and several interlocutory Orders made, and amongst the rest, an Order by Consent, to refer the whole Matter in Difference to the Arbitration of another Person. Then the Widow died [? Married, see 1 Chan. Rep. 77], and now the Question was, Whether there could be any farther Proceedings on this Bill, or whether there must be a Bill of Revivor? And it being referred to the Chief Justice Bridgman upon this Point, he was of Opinion, That there must be a Bill of Revivor. Serjeant Fountaine opposed it; but notwithstanding a Bill of Revivor was brought, and it was to revive all the former Proceedings, and particularly that Order made by Consent.

[109] To this Bill the Defendant demurred, for that it sought to revive the Order made by Consent, to which the Woman was a Party, and she being married since her Executorship, her Consent was determined; and upon Debate, the Demurrer was allowed.

[S. C. 1 Chan. Cas. 77.]

CRISP & AL. *versus* SPRANGER & WESTWOOD.

Anno 19 Car. 2 [1667-68].

The Plaintiff's being Infants, exhibited their Bill against the Defendants as Executors in Trust for them, and it was to have an Account of the Profits of the Estate with which they were entrusted. The Case was thus:

The Defendant Westwood, both at the time of the Death of the Plaintiff's Testatrix, and long before, had employed a Farm, part of her Estate, for her Use and Benefit

in fattening Cattle. After her Death, he used the Farm as before, and fattened Cattle, and sent them to Spranger, the other Executor, to sell ; which he did, and laid out the Money in lean Cattle, which he sent back to Westwood, who received them, and fattened them on the said Farm, and afterwards sold them at several Markets. [110] Westwood became insolvent, and it was now endeavoured to charge Spranger with the Money which he had actually received for the fat Cattle, and for which he had given several Receipts, upon this Rule, That every Trustee ought to be charged with his own Receipts ; and thereupon it was decreed, That each Executor should be charged for what he had respectively received : This was by the Master of the Rolls.

Serjeant Maynard not satisfied with this Decree, said, It was no *Decastavit* for one Executor to pay or deliver over the Testator's Estate to another Executor, because each hath a Title to the whole ; and here was nothing done by Spranger but what was for the Benefit of the Estate. That he ought not to be charged with the Money for the fat Stock, when he had returned it to the Estate in lean, but that the other Executor ought to be answerable for the whole.

Afterwards this Cause was re-heard before the Lord Chancellor, the Master of the Rolls being present ; and Serjeant Maynard insisted, That Spranger being not liable at Law, ought not to be so in Equity : That if this Decree should stand, no Trustee could be safe : That the Farm was in Westwood's Management when the Testatrix died, and after her Death continued still in him who was a near Relation both to her and the Children. 'Tis true, Spranger acted as an Executor, but he is not to be charged, because there is no Breach of Trust ; and an Executor is a Trustee, as well to dispose as to receive ; and that he did not break his Trust in selling fat Cattle, since he laid out the Money upon the lean Stock to be fattened on the same Land, which were actually delivered to Westwood, and taken into his Possession.

Serjeant Fountaine on the other Side argued, That Spranger did suspect Westwood's Sufficiency, and therefore ought to have kept the Money, and not bought lean Cattle for him : That if two Trustees give Receipts, they shall be both charged, tho' they did not actually receive the Money. See *Towly ver. Chaloner*, Cro. 312, *contra*. As to the fat Cattle, the Value of them before they were sold, and the Money afterwards, was Assets in Spranger's Hands to charge him by any Creditors to whom he was liable, and this by receiving the Money for which they were sold ; and the Executors are not bound to manage the Farm as in the Life-time of the Testatrix, but upon the first Opportunity to turn the Stock into Money.

Lord Chancellor.—Since the Farm was in Westwood's Possession when the Testatrix died, if the Cattle had afterwards died, or had not been sold, Spranger had not been chargeable. It must certainly be good Husbandry for the Executors to sell the fat Cattle, and to buy lean ; and Spranger hath committed no Fault in what he did.

As to the Allegation, That where the Receipts can be distinguished, each Trustee is to be charged with so much as he received ; it is very true : But Spranger ought not to be charged with his Receipts, because he laid out the Money for Stock to be fattened on the same Farm, which was afterwards disposed of by Westwood ; and did so order, and declare and explain the former Decree made in this Cause accordingly.

[113] MILLER & UX. *versus* KENDRICK & VYLETT.

Anno 19 Car. 2 [1667–68].

William Kendrick, seised of Lands in Fee worth £90 per Annum, settled the same to the Use of Thomas, his eldest Son, for Life, Remainder to Trustees for 96 Years, if Thomas should so long live, to preserve contingent Remainders ; Remainder to Martha, the Wife of Thomas, for Life, for her Jointure ; Remainder of these and all other his Lands, of which Thomas was Tenant for Life, to the first Son of Thomas in Tail Male, with divers Remainders over : In which Settlement, there was a Power for Thomas at any Time during his Life, by any Writing, &c., to limit and appoint the said Lands of £90 per Annum to any other Wife, that Thomas should have, for Life, or to any of his younger Child or Children, or to any other Person for their Use, so as such Appointment be made to commence after the Death of Martha, and for the Life or Lives only of such Child or Children, and for their Maintenance.

Thomas had Issue Martha, now the Wife of the Plaintiff Miller, and another Daughter, and one Son, the Defendant Kendrick : and having no other [114] Way to make Provision for his Daughters, he in May 1657, for the natural Love and Affection

which he bore to them, and for their Education and Maintenance, grants, bargains and sells these Lands to Vylett, to Have and to hold to him and his Assigns for the Lives of his said Daughter Martha and her Sister, &c., to commence after the Death of Thomas, and Martha his Wife; whereas the Power given to him was, That he might limit it to them, to commence after the Life of Martha his Wife only.

And now the Plaintiff suggests, that she had no other Provision but what she had under this Deed, and that her Father apprehended he had well pursued the Power which he had to make Provision for her, but that the Defendant taking Advantage that it was not literally pursued: Whereas it was in Substance pursued, and the Estate granted to Vylett was not more, but less, than Thomas had Power to grant, for he had Power to grant it to commence after the Death of Martha his Wife, and he had granted it to commence after his own Life, and the Life of Martha: and this Mistake did happen, by reason that in the Settlement the Lands were limited to Thomas for Life, Remainder to Trustees for a Jointure for Martha; and it was charged [115] in the Bill, That in Equity that Mistake ought to be rectified, otherwise there would be no Provision for the younger Children.

The Defendant Kendrick demurred, for that the Deed of Settlement and Deed to Vylett were both voluntary; and it appearing by the Bill, that the Deed to Vylett was void in Law, being defective in the Execution of the Power, it ought not to be supplied in Equity; for if such Defects should be helped here, it would be in vain to employ Men of Skill to draw Conveyances and Settlements, for any Man might do it. 'Tis true, if the Deed had not been voluntary, but in Consideration of Money really paid, it might have been otherwise: Besides, this did not seem to be a Mistake, but designedly done; for if the Estate had been made to commence upon the Death of Martha, then Thomas himself would have lost his Estate for Life.

The Court was of Opinion, That the Law being against the Plaintiff, Equity would not help, but ordered to search Precedents; and thereupon a Precedent was produced for the Plaintiff, 6 Julii, 40 Eliz. [1698] Price and his Wife against Green (*viz.*) The Father being seised in Fee, settled the Lands by a Cove[nant] to stand seised to the Use of himself, Remainder to his eldest Son in Tail, reserving a Power to himself to make Leases of part of it for 40 Years; who accordingly made a Lease for the Benefit of a younger Child, which came by Assignment to the Plaintiff, and which the eldest Son would have avoided, because the Power was not well raised by a Covenant to stand seised. But it appearing to the Court, that the eldest Son was greatly advanced by the Father, and that the Conveyance which was by Covenant to stand seised, was intended to be by Livery; and being advised, that it would be as well by Covenant to stand seised, the Court did decree, That the Plaintiff should hold till the Defendant evicted him by Law; and did decree likewise, That the Defendant should admit the Power to make the Lease good in Law, if he did not prove an Entail paramount that Settlement.

[117] *BAKER versus HELLETT.*

Anno 19 Car. 2 [1667–68].

The Heir of the Mortgagor exhibited his Bill against the Assignee of the Mortgage, setting forth, That he had bought in several Incumbrances for a very small Consideration, and would now subject the Lands for the Payment of more than he had really advanced: Therefore he prayed, That the Defendant, who was an Attorney, might set forth what he had justly paid to buy in those Incumbrances, and that the Plaintiff might be relieved, &c.

The Defendant for Answer sets forth, That he did not desire more than what was really due: But as to that part of the Bill which sought a Discovery of what he had really paid, he demurred, and insisted, That he ought not to answer; for if he bought in the Incumbrances for less than was due, there was no Reason the Plaintiff should have any Benefit of the Bargain; and upon Debate, the Demurrer was allowed.

[118] *HARDING versus NELTHROPE.*

Anno 19 Car. 2 [1667–68].

The Defendant purchased several Lands charged with a Rent of £40 per Annum, and sold part thereof for a valuable Consideration to the Plaintiff; and covenanted, That the same were free from all Incumbrances done or committed by him.

Afterwards the Grantee of the Rent distrained on these Lands for the Arrearages of the Rent. Now tho' this was not an Incumbrance within his Covenant, yet the Plaintiff exhibited his Bill to be relieved, for that the Vendor knowing the Incumbrance, and concealing it, he by Fraud brought the Plaintiff to purchase, and therefore he ought to indemnify him against this Incumbrance. The Lord Keeper inclined to relieve him, because the Vendor did know the Lands were charged with the Rent, and it was a Fraud to sell them without discovering that Incumbrance : Like the Case in Croke, where a counterfeit Stone was sold for a Jewel, knowing it to be counterfeit : it was held that an Action of Debt would lie. And now in the principal Case, a Tryal at Law was directed to try, whe-[119]-ther the Vendor did know that the Lands were charged with the Rent when he sold them ; so that if it was found that he did know it, the Court seemed to incline that he ought to be relieved, because he was drawn in by a Fraud to make the Purchase.

HAWTRY *versus* TROLLOP.

Anno 19 Car. 2 [1667-68].

The Defendant pleaded to the Bill : which Plea, upon hearing the Cause, was over-ruled, and the Defendant was ordered to perfect her Answer upon Interrogatories : And afterwards upon a Motion it was ordered, That she should have a Copy of the Interrogatories, and answer by the Advice of Counsel. And tho' on the other Side it was insisted, That this was against the Course of the Court, for any Person who was to be examined on Interrogatories, to answer by Advice of Counsel : yet upon Debate the Matter was settled, That she should have a Copy of the Interrogatories, and answer by Advice of Counsel ; and so it hath been practised in like Cases since.

[120] DARCY *versus* DARCY.

Anno 20 Car. 2 [1668-69].

The Plaintiff was eldest Son by a second Venter, and had a Rent-charge of £200 well settled on him ; and the Defendant was the eldest Son by the first Venter. The Bill was to be relieved for this Rent-charge of £200 per Annum, for which there was half a Year then in Arrear ; suggesting, That the Defendant did not keep any Stock upon the Ground, but converted the same into Tillage, so that there was not sufficient for the Plaintiff to distrain, and that he was without Remedy, but in Equity, and therefore prayed a Decree against the Defendant for the Arrears and growing Payments. To which the Defendant demurred, for that the Lands being only charged with the Rent at Law, there was no Equity to charge the Person of the Defendant. But because it was further alledged in the Bill, That there was a legal Defect in the Assurance, which ought to be made good in Equity, it being made upon a good consideration : therefore the Demurrer was over-ruled.

Then the Defendant answered, and denied that he always converted the Lands to Tillage, or that the same were [121] not open to a Distress ; but said, That there had been often a Stock worth £250 upon the same.

Upon hearing the Cause, the only Equity insisted on was, That the Defendant employed all the Lands to Tillage, and kept no Cattle on the same. The Court would be attended with Precedents.

// One Precedent, 20 Jan. 1666, between Seymour, Boreman, and Yate : (viz.) Thomas Yate the Father, John Yate the Son, and Francis the Grandson. The Bill was grounded on an Agreement upon the Marriage of John Yate, with Francis his first Wife, by a Tripartite Indenture, 15 Car. 1 [1639-40], by which Thomas was made Tenant for Life, Remainder in Tail to John, who had Issue by that Marriage the Defendant, his eldest Son. The said John did afterwards, upon the Marriage with Elizabeth his second Wife, and Mother of Francis the then Plaintiff, covenant to levy a Fine, to the Intent that Elizabeth might, after the Death of Thomas and the said John, have and receive £150 per Annum out of the Lands for her Life ; and if he should have Heirs Males, then those Heirs Males should have another £150 out of the Lands [122] during the Life of Elizabeth ; and after her Decease, the Heirs Males of his Body and of Elizabeth should have £300 per Annum, with a Clause of Distress and a Covenant to make further Assurance.

John died in the Life-time of Thomas, his Father : then Elizabeth sold her Right to the £150 to the Plaintiff Boreman ; then Thomas died, and the Lands descended to

the Defendant as Heir to the Grandfather, being the eldest Son of John by the first Venter, and he had all the Deeds, and refused to pay the Rents, pretending the Lands were not sufficient, and that the Limitation was defective in Law; and that the Lands lay intermixt with others, and the Boundaries confused, so that the Plaintiff could not distrain: Therefore prayed Relief, and to discover and set forth the Boundaries and the Rents arrear, and that the same might be decreed, &c.

The Defendant in his Answer set forth, That the proper Remedy was at Law, and that Boreman had not a good Title, because the Grantee for Life did not attorn, and so the conveyance of the Rent to him from Elizabeth was not good.

[123] On the first Hearing, a Commission was directed to settle the Boundaries; and the Commissioners certified, That it was done, and that the present Rent was but £70 per Annum. On the second Hearing the Point was, That tho' the Limitation of £150 per Annum was defective in Law; for Francis being not named in the Limitation, that being to the Heirs Males, and he was not Heir Male, for John his Father had a Son by another Venter, the now Defendant; yet the Court was of Opinion, That by the true Meaning of the Marriage Agreement, the Plaintiff Francis is a Person well described to take the Rent, and yet to be relieved, and the Rent to be paid to the Plaintiff during the Life of Elizabeth.

The Difference between these Cases was (*viz.*), In the principal Case, the Rent was well limited to the Plaintiff Darcy in Point of Law, by the Name of the Son of the second Venter, and he might distrain; but in Boreman's Case, he had not any Remedy at Law for want of an Attornment, and by reason the Lands lay intermixt: Nor had Francis, the other Plaintiff any Remedy at Law, because he was not Heir Male to his Father, but the Defendant by another Venter was his Heir Male; yet they were relieved.

[124] Another Precedent, 22 Junii 1644, *Terrers ver. Noby. ff.* An Annuity was devised, and by the same Will the Lands were devised to another; this being a Rent-Seek, and without Seisin, and no Power of Distress, and the Devisee of the Lands having promised to pay the Annuity, the Court did decree him to give Seisin of the Rent.

And now in the principal Case it was insisted for the Plaintiff, That here was a Defect of Distress, and that the arrears of £200 per Annum were now £1000 and the Land but £200 per Annum; But the Court declared, That unless there was a Fraud to hinder the Plaintiff from distraining, they could not give Relief here; and that it should be referred to a Tryal at Law, whether there was any Fraud or not; and a Tryal was thereupon directed.

[125] SEABOURN *versus* CHILSTON.

Anno 20 Car. 2 [1668-69].

The Plaintiff's Father and Mother in their own Right were seised in Fee of the Lands in Question, in which one Price had an Estate for Life; and in the Year 1643, they covenanted to levy a Fine thereof to the Use of the Father and Mother for Life, and to the longest Liver of them, Remainder to their first Son (*viz.* the Plaintiff), in Tail-Male, with several Remainders over: The Father survived, and then (as the Bill suggests) forged another Deed, declaring the Uses of the Fine to be to the Father and Mother, and to the Survivor of them, and to his or her Heirs, under which Deed the Defendant purchased the Lands of the Father, who is since dead; and Price, the Tenant for Life, being still living, the Plaintiff exhibited his Bill, to perpetuate the Testimony of his Witnesses to prove the true, and to disprove the forged Deed.

The Defendant demurred to the Bill, for that he was a real Purchaser under the pretended Deed, believing it was a true and real Deed; and therefore inasmuch as it was to draw under Examination a Matter of Forgery against a [126] dead Person who could not answer for himself, and to get Aid to impeach a real Purchaser; the Defendant did insist upon it, that he ought not to answer, nor the Plaintiff be permitted to proceed any farther.

And upon Debate it appearing, that the Tenant for Life was still living, so that the Plaintiff could not try his Title at Law; and that this Court is obliged in Justice to preserve a Title at Law, which by such Impediment could not at present be tried, the Demurrer was over-ruled.

LANGTON *versus* ASHLEY.

Anno 20 Car. 2 [1668-69].

Ashley became a Purchaser from a Person who had conveyed the purchased Lands to one Tracy, in Trust for the Payment of all his Debts, and had a conveyance both from the Person himself, and from the Trustee Tracy.

The Plaintiff being one of the Creditors, exhibits his Bill against Ashley, as being a Purchaser under that Trust to pay Debts, &c.

It was insisted for Ashley, That the Conveyance to Tracy being general [127] (viz.) for Payment of all his Debts, who made the Conveyance, and none of his Creditors being Parties to it, that it was revocable at his Pleasure, and merely voluntary; and that it had been so adjudged by the Lord Keeper Coventry, that such Conveyances are ambulatory; and that if a Man make a Conveyance to another in Trust, to pay all his Debts mentioned in a Schedule, and all other his Debts, that as to all the Debts, besides those mentioned in the Schedule, such Conveyance is fraudulent against a Purchaser.

But for the Plaintiff it was insisted, That if the Deed to Tracy was revocable by the Party that made it, yet Ashley purchasing under that Conveyance, had now confirmed it.

PITT *versus* SCARLETT.

Anno 21 Car. 2 [1669-70].

The Plaintiff brought a Bill against the Defendant, as Executor of the Obligor, to discover Assets, and to compel the Payment of the Debt.

The Defendant demurred, for that the Plaintiff had brought an Action against him at Law; to which the Defendant had pleaded *Plene Administra*[128]-*rit*. But the Demurrer was over-ruled, and the Defendant ordered to answer without Payment of Costs.

BOOTH *versus* SANCTRY.

Anno 21 Car. 2 [1669-70].

The Plaintiff was indebted to the Defendant by Bond, and one Brown was indebted to the Plaintiff; Brown gave a Judgment to the Defendant for the Debt which was owing to him by the Plaintiff, and the former Bond was delivered up, and a new Bond given by the Plaintiff, That he would pay the Money, if Brown did not. Afterwards the Defendant promised the Plaintiff, That if at his own Charge he would extend Brown's Lands, he would deliver up the new Bond; and it being proved that he did make such a Promise, and that he did at his own Charge extend the Lands, the Bond was ordered to be delivered up, tho' the Extent would not satisfy the Debt; and Brown became insolvent.

[129] GLANVILL *versus* JENNINGS.

Anno 21 Car. 2 [1669-70].

The Bill was to be relieved against two Bonds, one given by the Plaintiff, and another by his Wife; the Defendant telling the Plaintiff, That his Wife (who was his Kinswoman) was a good Fortune, and that he would help her to the Plaintiff for a Wife, for which he must give him something for his Pains: Whereupon the Plaintiff gave him a Bond of £100 with a condition to pay £200 on a certain Day; and afterwards the Defendant went to the Woman, and got another Bond from her of the same Penalty, and upon the same Terms; and the Equity was, That this was a Cheat, for neither Husband or Wife had any Fortune.

But the Defendant proved, that the Plaintiff had £1200 with his Wife, and therefore insisted, that the Bond given by him was good; but the Woman being cheated; for that her Husband had no Estate, but was a broken Merchant, her Bond was ordered to be delivered up, and cancelled.

[130] ATTORNEY GENERAL *versus* SIR GEORGE SANDS.

In the Exchequer, Anno 21 Car. 2 [1669-70].

Sir Ralph Freeman purchased a Lease for Years of several Manors, and afterwards purchased the Inheritance in the Name of Sir George Sands, who was his Son-in-Law, in Trust for Sir Ralph and his Heirs. Sir Ralph by Will appointed, That Mr. Freeman, whom he made his Executor, and Sir George Sands, should join in a Conveyance of Part of the Estate to Freeman Sands, and other Part to George Sands, the two Sons of Sir George Sands, and to their Heirs, the Residue to all and every of the Sons of Sir George by his then Wife, and to their Heirs who should be living at the Time of the Death of the Testator; at whose Death, Sir George had two Sons then living, viz. Freeman and George Sands, but afterwards he had another Son named Freeman Sands.

Mr. Freeman the Executor renounced, and afterwards Administration was granted to Sir George Sands, no Conveyance being made either of the Lease or the Inheritance to George Sands the Son, by his Father Sir George, who had both the Term and Inheritance in [131] Trust for his said Son by the Will of his Grandfather as aforesaid.

Freeman Sands killed George his Brother, and was afterwards attainted, and executed for the said Murder.

The Question was, Whether either of these Trusts, either of the Lease or the Inheritance, were forfeited by this Attainder of Felony, to the King, of whom the Lands were held, who by his Attorney sued Sir George in the Exchequer on the Equity-side to answer the Profits, supposing the Trusts to be forfeited by the Felony.

The Case was several Times argued at the Bar, and at the Bench by Hale Chief Baron, and by Baron Turner; Rainsford being removed into the King's Bench, and Atkyns disabled by Age; and both argued, that this Trust was not forfeited. They both agreed, That *Cestui que* Trust in Fee or in Tail forfeits the same by an Attainder in Treason, and that the Estate was executed in the King by the Statutes 27 H. 8, vap. 10, and 33 H. 8.

That an Alien who is *Cestui que* Trust of any Estate, such Trust belongs to the King: And the Chief Baron said, That it was the Opinion of the Judges in Holland's Case, in which he was of Counsel Anno 23 Car. 1 [1647-48], that an Alien [132] hath no Capacity to purchase but for the King's Use

As to the King's Debt, both by the Common Law, and by the Practice of this Court which is part of that Law, *Cestui que* Trust, being indebted to the King, he shall have Execution of this Trust; for before the Statutes 4 H. 7, c. 17, and 19 H. 7, c. 5, there are many Precedents in the Reign of K. Henry the Sixth, that the Writ of *Extendi facias*, for levying the King's Debt, was not only on the Lands of the Debtor, but of any other Person whatsoever who was seised to his Use; and the Interest of the King's Debt did attach upon the Power which his Debtor had to revoke a Settlement which he had made of his Estate. Pasc. 4 Jac. [1606], Ford's Case: A Security taken in Trust for a Recusant, is liable to the King's Debt of £20 per Month: So that where the King's Debtor hath the profitable Part of the Estate, the King shall not lose his Debt by any Fiction of Law.

It was also agreed, That the Trust of the Inheritance could not be forfeited for Felony: And this the Court held clear, and cited 3 Rep. Marquiss of Winchester's Case; 12 Rep. 12; 5 Ed. 4, 2; 2 Cro. 513.

[133] That if an Inheritance is forfeited for Felony, it must escheat to the Lord for want of a Tenant. But here can be no such want, because the *Cestui que* Trust is Tenant; and therefore till the Statute 19 H. 7, cap. 15, the Lord could not seise the Lands of which the Villain was *Cestui que* Use.

Now if it should be demanded, What will become of this Trust if *Cestui que* Trust die without Heir? 'Tis answered, That in such Case the Lands will be discharged of the Trust: As if Tenant in Fee of a Rent die without Heir, or is attainted of Felony, the Land is discharged of the Rent.

'Tis true, a Lease in gross, the Trust thereof shall be forfeited for Felony, or upon an Outlawry in a personal Action, but not a Lease to attend the Inheritance. Earl of Somerset's Case; Hob. Dacomb's Case; 2 Cro. Babington's Case; Sir Walter Rawleigh's Case.

A Lease for Years, if 'tis of never so long Continuance, and assigned in Trust for

J. S. and his Heirs, yet it shall go to his Executors ; for Trusts are ruled according to the Course of Courts of Equity.

A real Chattel vested in the Wife survives to her Husband, but not the Trust of such a real Chattel. Co. Lit. 69.

[134] So if *Cestui que* Trust binds himself and his Heirs in a Bond, this Trust is not Assets in his Heir, tho' this hath been questioned in my Lord Hyde's Time ; but clearly the Trust of a Lease for Years is Assets to charge an Executor in Equity ; but a Trust of a Term to attend the Inheritance goes to the Heir, and not to the Executor, for 'tis only a Shadow kept on foot to answer some Purposes, and hath a great Resemblance to the Case of Charters and Deeds which go with the Inheritance to the Heir ; but if granted over, the Parchment and Wax shall go to the Grantee and his Executors. 4 H. 7, 10.

In the principal Case, the Trust of the Lease is not forfeited to the King, because the Lease it self was never in Freeman Sands, who was attainted of the Felony, nor the Trust in him as a Chattel ; for in such Case he must be either Executor or Administrator to George his Brother ; and it was never the Intent of the Testator that the Lease and the Inheritance should be confounded, but kept separate.

Besides Freeman could not have the Trust but as Heir to George, and as long as he had the Inheritance in him, and no longer. Judgment against the King's Attorney.

[Mews' Dig. Criminal Law, B. I, l. S. C. 3 Ch. Rep. 33 ; Hard. 488 ; Freeman, 129. See *Barrow v. Wadkin*, 1857, 24 Beav. 1 ; *Sharp v. St. Sauver*, 1871, L. R. 7 Ch. 353.]

[135] POREY *versus* JUXON.

Anno 21 Car. 2 [1669-70].

The Bill was against the Defendant Sir William Juxon, as Executor of the late Archbishop of that Name ; and sets forth, That he had the next presentation to the Mastership of St. Crosse, and that in his Life-time he did direct Sir William to give it to Dr. Porey.

Upon the Hearing, the Lord Keeper directed a Tryal at Law, Whether this was a Trust in Sir William Juxon the Executor or not ? And at the Tryal the Court declared, That a Trust might arise by Parole, or that the Executor might be a Trustee by the Will of the Testator, tho' it was not mentioned in the written Will : And a Verdict was found for Dr. Porey.

SEYMOUR *versus* NOSWORTHY.

Anno 21 Car. 2 [1669-70].

The Defendant pleaded, That he was a purchaser for a valuable Consideration : But this was ruled to be no good Plea, because he did not plead the Purchase made from one of the Plaintiff's Ancestors ; for a Purchase [136] from a Stranger who might have no Title, was held no good Plea ; and the Defendant was ordered to answer.

DOLBEN & AL. *versus* PRITTIMAN.

Anno 21 Car. 2 [1669-70].

Lands being devised by Mr. Houghton for the Payment of his Debts, the Creditors exhibit their Bill against the Heir and Executor to have the Lands sold, and had a Decree for that Purpose. And now the Creditors by Book and by Simple Contract move to have Interest for their Debts, which had been proved before the Master, and to be standing out above twelve Years, alledging that there was sufficient to pay all. But it was denied by the Court, for that Shopkeepers sold their Goods at a Price accordingly, when they were not paid in ready Money.

[137] DAY *versus* HESTER.

Anno 22 Car. 2 [1670-71].

The Bill was to have an Accompt of a Partnership ; to which the Defendant consented, upon Condition, the Plaintiff would seal the Indenture of Partnership, and pay £330.

The Matter was referred to Sir Justinian Lawin, to see the Plaintiff seal the Indenture and to state the Accompt.

Afterwards he made his Report, That the Parties had submitted to refer the Matters

in Difference to Arbitrators, and if they could not agree, then to an Umpire ; who, instead of taking care to settle the Indenture and the Accompt, did award, That the Partnership should be dissolved, and that the Defendant should pay back the £330. And the Master having grounded his Report upon this Award of the Umpire, the Defendant excepted to it, as grounded upon an Extrajudicial Award of Things not in Difference, and contrary to the Bill and Answer, and Order of the Court ; for which Reason he excepted likewise against the Award, and the Exceptions were allowed.

[138] WESTHALL *versus* CARTER.

Anno 22 Car. 2 [1670–71].

This was a Bill of Revivor, where the principal Cause was heard, and an Issue directed to be tried, and afterwards one of the Plaintiffs died before the Tryal ; yet it went on, and a Verdict against the Defendant.

Now the Plaintiff in the Bill of Revivor prayed to have all the Proceedings revived, and the Benefit of the Verdict.

The Defendant by his Answer sets forth, That the Plaintiff's Witnesses were examined in the first Cause twice to the same Thing, which was irregular ; and that a Witness examined in the Cause in this Court, and at the Tryal, swore Matters varying from what he had sworn in this Court, and so prayed he might have a new Tryal.

The Plaintiff replied, That she was Executrix to her Husband, and was entitled to the Bill of Revivor, and did demur to so much of the Answer as did set forth the pretended Irregularity in the Examination of the Witnesses in the Original Cause : And as to the Variation of the Evidence *Viva voce* at the Tryal, and what had been deposed here, she insisted, That it ought not to [139] be set forth in an Answer to a Bill of Revivor ; and upon hearing Counsel on both Sides, the Demurrer was allowed.

HOLCOMB *versus* RIVIS.

Anno 22 Car. 2 [1670–71].

The Defendant and one Collins were Factors for the Plaintiff in Spain before the Year 1654, and in that Year they sent him an Accompt to London, in which they charged themselves with several of the Plaintiff's Goods remaining there in Specie. Afterwards (*viz.* in the Year 1656), there happen'd to be an Embargo on English Ships and Goods which were in Spain, and all those Goods were seised, and the Defendants imprisoned. And now (Collins being dead) a Bill was exhibited against the Defendant, being the other surviving Factor, to have an Accompt of those Goods ; to which Bill, the Executrix of the dead Man was not made a Party.

It was insisted for the Defendant, That by reason of the said Seisure and Imprisonment he could not accompt, having lost his Books in the Seisure, and never seen them since ; and that he had been twice in England with the [140] Executrix of Collins since the Embargo, and that she was made no Party ; and that in this length of Time it would be hard to draw him into an Original Accompt.

The Court declared and resolved for Law, That tho' amongst Merchants *Jus accrescendi* hath no Place, yet the surviving Factor is to accompt for what was made or received by himself or Co-factor ; and yet it was agreed in this Case, that an Accompt lies against the Executrix of the dead Factor : And it was ordered, That since there was no Exception to the Accompt which was sent thither, nor any till after the Seisure, that therefore the Defendant should only accompt for, and satisfy, what had been made by Sale of the Goods in the former Accompt before the Seisure, and that he should not be charged for more than what upon his own Oath he should declare to have made.

[S. C. *sub nom.* *Holstcomb v. Rivers*, 1 Chan. Cas. 127.]

[141] GLADWIN & AL. *versus* SAVILL.

Anno 22 Car. 2 [1670–71].

The Plaintiffs and the Defendant were all Creditors of one Steer, who was a Lead-Merchant, and who on 19 Jan. 18 Car. 2 [1667], was declared a Bankrupt ; and the Commissioners assigned his Estate to the Plaintiff and others in the Month of October Anno 19 Car. 2 [1667].

The Defendant was then in Possession of this Estate, and refusing to deliver it to the Assignees, they brought their Ejectment.

Now tho' the Deed under which the Defendant held the Lands was dated in February, after Steer was declared a Bankrupt, yet the Plaintiffs were non-suit. Then they brought a Bill, to discover whether the Defendant did not know at the Time of executing his Deed, that Steer had committed an Act of Bankruptcy, and so to set forth the Fraud of obtaining the Deed, and to have a new Tryal.

The Defendant pleaded his Deed, and that Steer was really indebted to him at the Time it was executed, and demanded Judgment, whether he should [142] discover any thing to weaken his Title ? And upon long Debate the Plea was allowed.

BUTLER *versus* COOT.

Anno 22 Car. 2 [1670-71].

The Plaintiffs being Legatees, exhibit their Bill against the Defendants, who were Executors, to have an Account of the Testator's Estate, and that their Legacies might be paid.

The Defendants submit to the Judgment of the Court, whether they may not retain their own Legacies in the first Place ; and if so, there will not be sufficient Assets to pay the Plaintiffs Legacies. But it was decreed, That after Debts are discharged, all Legacies shall be paid in Proportion so far as the Estate will extend ; and not like the Case at Common Law, where Executors may retain their own Legacies, or pay him who first gets Judgment.

[143] GASCOIGNE *versus* STURT.

Anno 22 Car. 2 [1670-71].

The Bill was to have a Judgment vacated, by Virtue whereof a Lease was extended, and sold by the Sheriff to one Parker in Trust for the Defendant, who had obtained the Judgment, and that the same, together with the Bill of Sale made by the Sheriff, might be set aside, and an Accompt of the Profits since the Sale, and likewise that the Possession may be restored, it being alledged, that the Lease was of a far greater Value than what was really due on the Judgment.

The Defendant demurred to the Bill, for that 'tis not consistent with the Rules of Equity, after Judgment executed by Seisure of a Chattel-Lease duly appraised, and sold by the Sheriff, to dispossess a Purchaser for a valuable Consideration, but upon a bare Pretence, That the Lease is of greater Value than what was due upon the Judgment, and than what it was appraised and sold for by the Sheriff, who is an indifferent Party ; neither did the Plaintiff offer by his Bill to reimburse the Defendant what he really paid for the Purchase : And [144] the Defendant denied by his Answer, that he used any indirect Means with the Sheriff to have the Lease sold at an under Value.

But it was ordered, That the Plaintiff should reply to the Answer notwithstanding the Demurrer, and proceed to examine Witnesses, and hear the Cause : so the Demurrer was over-ruled, but without Costs : And upon the Hearing, the Defendant was decreed to accompt, and to reconvey.

JOHN HANBURY, next friend of Anna-Maria Hanbury, Plaintiff,
ver. THEOPHILUM WALKER, Defendant.

Anno 22 Car. 2 [1670-71].

The Plaintiff as Grandfather, and next Friend of the infant Mary Hanbury, exhibited his Bill to call the Defendant to an Accompt, as well for the personal Estate, as for the Rents and Profits of the real Estate of the said Infant, suggesting that the personal Estate was of the Value of £5000, and the real Estate £500, and that the Defendant, who claimed the Guardianship at Law as Great-Uncle by the Mother's Side, was a Batchelor, and that he failed in his Estate, and became a Journey [145] man to another, and that he was a Person disaffected to the Doctrine and Discipline of the established Church, and did conceal the Infant from the Plaintiff and his Wife, and endeavoured to instruct her in a separate Way from the Church, and therefore was not a fit Person to educate her, or to have the Care of her Estate.

The Defendant demurred, for that by the Law he hath a Right to the Guardianship

of the Infant during her Minority, he being the next of Kin by the Mother's Side, who can have no Benefit by the Death of the said Infant ; and that the Plaintiff having no manner of Right to the Guardianship, or to the said Infant's Estate, cannot give the Defendant a Discharge ; and therefore he ought not to be compelled to give any Accompt to him of the said Infant's Estate.

But it was ordered, That the Defendant shall answer to so much of the Plaintiff's Bill as demands an Accompt of the Infant's Estate, and where she is, and how she is educated, but without Costs ; and this is to be without Prejudice to the legal Right of the Defendant, both as to the Custody of the Infant, and the Management of her Estate ; but that he may proceed to take [146] Care of the said Estate for her Benefit : And afterwards the Defendant having answered, the Court ordered him to accompt yearly, but saw no Cause to make him give Security, till there was a plain and apparent Fault in his Management of his Estate.

HIGGINS *versus* TOWN OF SOUTHAMPTON.

Anno 22 Car. 2 [1670-71].

The Plaintiff was Heir at Law to John Mills, who in the Year 1636, devised £37 per Annum to Charitable Uses, to be issuing out of his Manor of Wolston ; and a Decree was made for that Purpose, to which the Plaintiff excepted, for that the Manor was held *in Capite*, and so the Testator could charge only two Parts in three by his Will, which would not amount to £37 per Annum.

After a long Argument, and many Cases cited (*viz.*), Montague's Case in the Court of Wards, and Cro. Car. Ascough's Case ; the Court was of Opinion, That the whole was chargeable by the Will, and that by Vertue of the Stat. 43 Eliz. Of Charitable Uses, which was an enabling Statute, and that the Testator had only mistaken the Manner [147] of the Conveyance, for if he had done it by Grant, it had been good for the whole ; and being by Will, the Statute made it a good Appointment for the whole in like manner.

LLOYD MIL. *versus* LORD POWYS.

Anno 22 Car. 2 [1671].

The Plaintiff exhibited a Bill against the Father of the now Defendant, and revived it against the Defendant as his Son and Heir, which was afterwards dismissed with Costs : And the Question was, Whether the Defendant should have the Costs expended by his Father in the Suit, before the Proceedings were revived ? And it was ruled, That he could not, for they were dead with the Person.

[S. C. Dick. 16 ; 3 Rep. Ch. 65.]

[148] WILSON *versus* BARTON & AL.

Anno 23 Car. 2 [1671-72].

The Plaintiff being Improprator of a Rectory, sued the Defendants in the Spiritual Court for detaining his Tythes, and thereupon they obtained a Prohibition, and the Plaintiff declared ; and the Cause being at issue to be tried at York Assizes, the Parties agreed to refer it, and enter'd into Bonds of £200 Penalty to stand to an Award. Afterwards the Plaintiff countermanded the Reference, and thereupon the Bond was put in Suit against him ; and now he exhibited his Bill, to be relieved against the said Bond and Penalty.

It was insisted for the Defendant, That no Relief could be had in this Cause, because it was a wilful Breach of the Plaintiff, and not like the Case of a Failure to pay Money on the Day, because Payment of the Money at another Day, with Damages in the mean time, makes a Recompence for the Failure ; but here the Plaintiff, by his wilful Revocation, hath submitted to pay the Penalty which he had bound himself to pay.

[149] But Sir John Churchill insisted for the Plaintiff, That this Court had relieved in the like Cases. Whereupon the Master of the Rolls granted an Injunction against the Penalty, and directed a Tryal to try what the Defendants were damnified by the Countermand.

STRICKLAND *versus* LASKE.

Anno 24 Car. 2 [1672-73].

A Lease was made in the Year 1640, to several Persons in Trust, to raise Money for several Uses, &c., and the Overplus to be to the Heir of the Lessor.

The Plaintiff, as Nephew and Heir of the Lessor, exhibited his Bill by his Guardian in the Year 1663, to have an Account of the Profits, and died ; and the now Plaintiff, being his Brother, revives the Suit by his Guardian ; and the Account was settled, and there being £93 Surplus in the Hands of the Defendants, the same was decreed to be paid unto him, being then about the Age of 19 Years, which Money was paid accordingly.

Afterwards, when the now Plaintiff came of Age, he administer'd to his [150] Brother, and exhibited an Original Bill against the Lessor, without taking Notice of the former Suit.

The Defendants plead the Decree, and Payment of the £93 in Bar of this Bill : but it was over-ruled, by which it appears, That tho' the Plaintiff had an Account as Heir, yet he might have it again as Administrator.

PORTER *versus* HUBERT.

Anno 24 Car. 2 [1672-73].

The Plaintiff's Father, in the Year 1636, mortgaged the Manor of Almarthing to one Dawes for £5000. The Mortgagee enter'd in the Year 1641, no Interest being paid in those five Years, and he enjoyed it till the Year 1649, and then died.

After whose Death, his Executors assigned the Mortgage to the Defendant's Father, who enjoyed the Lands till the Year 1663, and he having charged the same with £5600, died.

In the Year 1667, the Plaintiff brought a Bill to redeem : the Cause was heard two Years afterwards, and a Redemption decreed, and the Interest from 1642 to 1648 to be moderated at £4 per Cent., and the Defendant to account for the Profits.

[151] From this Decree made by the Master of the Rolls, the Defendant appealed to the Lord Keeper Bridgman, who being assisted by Justice Moreton, Tyrrell, and Wild, ordered the Interest to be set against the certain Profits, but the Defendant to account for the casual Profits ; and that the Interest of the £5000 from 1641 to 1649, should be made Principal, at which Time the Assignment was made, and Interest to be computed for the whole from that Time.

The Plaintiff acquiesced under this Decree four Years, and then appealed to the Lord Chancellor Shaftsbury, who upon hearing the Cause declared, That no Assignee of a Mortgage should be in a better Condition than the Mortgagee himself, and ruled Interest to be paid only for the £5000 from the Time it was lent.

And as to the Abatement of the Interest, it was alledged, That there was an Ordinance made in the Year 1653, which gave Power to the Court to abate Interest in those troublesome Times, between the Years 1642 and 1648, as the Circumstances of the Case should require.

But Mr. Keck argued, That it ought to be at £6 per Cent. from 1636, the Time the Money was lent, for that [152] the Act made in the Year 1660, to settle Interest at £6 per Cent. look'd back to all Contracts made before that Time ; and that it was the constant Practice in the Exchequer to allow that Interest, he being over-ruled in it himself, when he insisted on an Abatement, by the Lord Chief Baron Hale, who drew that Act.

But the Lord Chief Justice Vaughan argued for the total taking away all Interest between 1642 and 1648, because most Men buried their Money in these Days, and made no Interest of it ; and the Reason was, because they might command it as Occasion served, which if lent upon a Mortgage they could not do.

The Court directed an Account, both of Casual and Accidental Profits, from the Year 1641.

Anno 1689.

[153] COOPER *versus* COOPER.

February 1, at the Rolls.

John Cooper, the Grandfather of the Complainant, made a Mortgage of Lands in Fee to one Hatfeild : the Mortgagor Cooper had two Sons, John and Edmond, and he devised the Equity of Redemption to his youngest Son Edmond, and his Heirs, and soon after died. Edmond entered into the mortgaged Lands, and enjoyed the same two Years, and then he died, leaving a Son an Infant. After the Death of Edmond, his elder Brother John entered on these Lands, and having Occasion for Money, he joined with the Mortgagee in an Assignment of the Mortgage to another Person, of whom he borrowed a farther Sum, and which the Assignee advanced, having no Notice

of the Will of John Cooper. Afterwards the Heir of Edmond came of Age, and then he exhibited a Bill, to be let into the Equity of Redemption upon the Foot of the first Mortgage, and that the [154] Assignee might discompt for the Profits upon that Foot.

Hutchins, of Counsel for the Complainant, insisted, That the Assignee could be in no better Condition than the Mortgagee; and that if there had been twenty Assignments for more Money, if the Mortgagor, or he who legally represents him, had not joined, he shall not be barred, but ought to be relieved.

Sir Charles Porter, for the Defendant, insisted, That he was a Purchaser for a valuable Consideration without Notice of this Incumbrance by the Will, and that he had a good Title, having taken an Assignment from the Mortgagee, wherein the visible Heir of the Mortgagor was a Party; and therefore if the Complainant would redeem, he ought to pay the whole principal Sum, and Interest.

But the Court was of Opinion, That the Complainant's Title was not barred by this Assignment: However, it was referred to the Master to make a Case of it; and afterward it was argued chiefly upon the Points before mentioned, and decreed, That the Plaintiff should be let into the Equity of Redemption upon the Foot of the first Mortgage.

[155] JOYCE'S CASE.

Anno 1689, at the Rolls.

The Father having a Son and a Daughter, made a Will, and devised in these Words following (*viz.*),

And as for my worldly Estate with which God hath blessed me, I give my Daughter Ten Pounds, to be paid by my Executor; and I give her Ten Pounds a-Year during her Life, to be paid by Quarterly Payments: And all the Rest of my real and personal Estate I give to my Son, &c.

The Defendant had imbezil'd the personal Estate, and was gone into White-Friers: And now the Complainant exhibited a Bill, to charge the real Estate with the Payment of this Annuity of Ten Pounds a-Year.

Philips for the Complainant argued, That the real Estate ought to be charged in Equity with the Payment thereof, because the Testator having the Prospect of his whole Estate before him, did out of it devise this Annuity to be paid to his Daughter by express Words, and that by the Words following (*viz.*), All the Rest of my real and personal Estate [156] I give to my Son, &c., it must be reasonably adjudged, that he intended his real Estate should be charged with this Annuity, for the Words, All the Rest of my real Estate, &c., must import All the Rest after the Annuity satisfied, and can have no other Construction.

The Court doubted of this Matter, but said, It was reasonable the Defendant should give Security to perform the Will: Which the Complainant having not prayed in her Bill, neither did she set forth, that the Defendant was in a privileged Place, or that there was not a sufficient personal Estate for the Payment of this Annuity, she pray'd she might amend her Bill as to these Matters, and that she might have a Decree for what was now due; which was ordered accordingly.

[157] Hillary Term, 1 Willielmi [1690].

WRIGHT *versus* CAREW.

In Court.

The Complainant was a servant to the Defendant's Testator fourteen years, and having received no Wages, he now exhibited a Bill against the Executor to discover Assets.

The Defendant pleaded the Statute of Limitations; to which the Complainant replied, and the Defendant joined Issue; and upon hearing the Cause,

Sir Fr. Winnington for the Complainant insisted, That the Plea being foreign to the Bill, and the Complainant having replied, and the Defendant joined Issue upon an erroneous Plea, the Bill must be taken as true, and stand good.

Then the Counsel for the Defendant asked him, What Decree he would have upon such a Bill, which was exhibited for £75, upon an Accompt stated, and yet no Accompt was proved in the cause.

Curia. The Complainant alledged, That he was the Testator's Servant fourteen Years, for which he might bring a *Quantum meruit* against the Executor, [158] and

recover Damages at law. And tho' it is usual to prefer Bills to discover Assets before they begin at Law, that if any are discovered, the Plaintiff might produce the Answer in Evidence at the Tryal at Law : yet in this Case, he having proved no Sum certain due, nor any demand, the Bill must be dismissed with Costs, and so it was order'd.

BERRISTE *versus* BERRISTE.

Hillary Term, 1 Will. [1690].

William Berriste being possessed of a great personal Estate, and being likewise seised of a real Estate, had two Children, William and Miles Berriste : and the Father by his Will appointed, That his Executors should see his Children educated, they being both Infants ; and he gave them an allowance not exceeding £15 a Year for the eldest, and £10 a-Year for the youngest, until they came of Age, and soon after died.

Thomas Berriste, the Brother of the Testator, afterwards agreed with the Executors to diet and educate the Children of his Brother William at a lower rate : and thereupon they were placed with him, and continued there three Years, and then Thomas died.

[159] After whose Death, Mary Berriste, his Widow and Executrix, exhibited a Bill against the Executors of William Berriste, wherein she prays an Allowance of £75 for the three Years Diet and Schooling, &c., of the said Infants.

The Defendants by their Answer confess the Allegations in the Bill ; but farther say, That Thomas Berriste, the Complainant's late Husband, and whose Executrix she now is, was in his Life-time indebted to William Berriste, his Brother, and whose Executors they are, in £50 upon simple Contract, which was not yet paid, and which they say ought now to be discompted by the said Complainant Mary, his Executrix, and that they ought not to allow her so much as the will appoints for the Education of the Children, because her Testator had agreed to diet and bring them up at a lower Rate. All which being proved in the Cause,

The Court decreed, and said, That the Executrix should be allowed what the Father had allotted for the Maintenance of his Children, if there had not been an Agreement proved, that her Testator would educate them at a lower Rate, and then the Surplus shall go and be for the Benefit of the Infants ; and that the Executrix ought to discompt [160] the £50, altho' it was a debt upon simple Contract owing by her late Husband the Testator, and the Payment or Discompt thereof shall be no *Devastavit* in her, if there should happen to be any Debts or Bonds owing by her Husband which should afterwards be put in Suit against her, because the Discompt was made for the necessary Support of the Infants, and that if it should be otherwise construed at Law (viz.), that 'tis a *Devastavit*, this Court will protect her against Judgment recovered there upon such Construction.

WATKINS *versus* STEEVENS.

Hillary Term, 1 Will. [1690].

John Gore being seised in Fee of the White Lyon Inn in Temple Street in Bristol, had two Daughters (viz.), Hannah married to the Complainant, and Elizabeth to the Defendant Steevens. The said John Gore after his Marriage, and after the Birth of his said Daughters, made a voluntary Conveyance of the said House, by which he settled the same upon them equally. Some time afterwards he mortgaged the House to Steevens the Father for a Term of Years to secure the Payment of £700. But having Notice of the said volun-[161]-tary Conveyance, the Mortgagee took collateral Security to indemnify him ; and having made his Will, and his Son Steevens, the now Defendant, Executor thereof, he died. After whose Death, the said John Gore the Mortgagor, upon the Marriage of his youngest Daughter Elizabeth with the Defendant Steevens, the Son of the Mortgagee (and in whom the Term was now vested as Executor to his Father), settles the Equity of Redemption thereof upon the Defendant Steevens and the Issue by that Marriage. And now the Question was, Whether this voluntary Conveyance upon Notice shall be good against the Defendant, who was a Purchaser for a valuable Consideration, as the Counsel on both Sides agreed Marriage to be ?

Serjeant Hutchins for the Defendant insisted, That a voluntary Conveyance is a fraudulent Conveyance against a Purchaser for a valuable Consideration, and therefore Notice or no Notice is not material in such Case : And the Court seemed to incline to that Opinion, but persuaded the Parties to agree, being near Relations, and made no Decree.

[162] ANONYMUS.

Nota : A Mortgage in Fee was forfeited, and afterwards the Mortgagee died : and now the Question was, Whether the Money due on the Mortgage shall go to his Heir, or Executor ? And it was decreed, That if there are not Assets sufficient to pay the Testator's Debts and Legacies, it shall go to his Executor ; but where there is a personal Estate sufficient for the Purposes aforesaid, it shall go to the Heir. And this is now the constant Practice, having been often so decreed since that Time.

ALFORD *versus* Earle.

Lords Commissioners, Hillary Term, 1689.

Joseph Jackson the Elder being possessed of a Term for 99 Years, if John Jackson should so long live, to commence after the Death of Philip Jackson, devised his Interest thereof to his Daughter Sarah, in these Words (*viz.*),

And for my Interest in Barton Regis, in which I have Liberty by my Lease to change my brother John Jackson's Life for Nothing at any Time these nine Months, I do give unto my Daughter Sarah, and do [163] desire that her Life may be put in for my Brother John Jackson's.

The Testator in the same Will directs, That the Surplus of his Estate, after Debts and Legacies paid, should be divided amongst several Persons whom he made residuary Legatees, of which the Defendant Earl was one, who was also the surviving Executor.

About a Year after the making the said Will, the aforesaid Joseph Jackson surrendered the said Term (having Liberty by his Lease so to do), and renewed it again in his own Name for 99 Years, if Joseph Jackson should so long live ; but did not revoke his Will, nor alter any of the Legacies, only he added several Codicils to it, and died.

The Question now before the Court was, Whether the Devise of this Term to Sarah, who married the Plaintiff Alford, stands revoked at Law by the Surrender of the old Lease ; and if so, then whether the annexing the Codicils to his Will doth amount to a new Publication thereof, and so shall be supported in Equity ? And it was decreed, that tho' the surrender of the Lease was a Revocation of the Devise of the Term granted by that Lease in Law, yet the annexing of the Codicils did amount [164] to a new Publication of that Will, and it was decreed for the Plaintiff Sarah accordingly. See Beckford and Parncott's Case, Cro. Eliz. 433. The same reported by Sir Francis Moor, fol. 404, Roll. Tit. Devise, 618.

BLADEN *versus* EARL OF PEMBROKE.

Lords Commissioners, Michaelmas Term, Anno 1690.

The late Earl of Pembroke, upon his Marriage, raised a Term of Years out of part of his Estate, which he settled upon Trustees during his own Life ; and afterwards, that his Lady should receive the Rents and Profits thereof during her Life ; and that after her Death, the same should remain to the said Trustees under the yearly Rent of a Pepper-Corn, upon Trust to attend the Inheritance, &c.

The said Earl did likewise raise another Term of Years out of another Part of his Estate by Demise and Re-demise ; and this was to secure £1300 and £1500 per Annum, to be paid according to certain Marriage-Articles, and afterwards died.

There were, at the Time of his Death, many Debts due and owing by him on [165] Bonds, and more upon simple Contracts : And now, upon a Bill exhibited by the said Creditors, the Question was, Whether the Remainder of those Terms shall be Assets in the Hands of his Executors to pay the said Debts ?

The Counsel for the Creditors insisted, That the Remainder of both the said Terms shall be Assets, and subject in Equity to pay the Debts, and subject likewise at Law for the same Purpose ; and that the legal Estate of both the Terms for Years was vested in the Executors of the Earl, notwithstanding one of them was affected with a Trust to attend the Inheritance.

Those who argued on the other Side said, That even the Courts at Law take Notice of Trusts ; and to that Purpose, there was a famous Case before the Lord Ch. J. Hale, between Lawrence and Beverly, which was thus :

ff. Upon a special Verdict (*viz.*), one Mrs. Care had £1000 Portion, which was given to her by her Father, and which was then in her Brother's Hands, with whom Mr. Beverly treated, in order to marry his said Sister ; and thereupon the Brother

covenanted with Mr. Beverly. That in a short Time after the Marriage should take Effect, he would pay unto the said Mr. Beverly, [166] his Executors or Administrators, the said £1000 to the Intent the same should be laid out in a Purchase of Lands, &c., and settled upon his Sister for Life, and afterward upon the Issue of that Marriage.

The Marriage took Effect ; the £1000 was not laid out in a Purchase : Mr. Beverly owed several Debts ; and having made a Purchase, and his Wife Executrix, he died without paying his Debts.

His Widow the Executrix afterwards received this £1000, and the Creditors of her late Husband Beverly brought Actions against her as Executrix to him : All which Matter being found specially, the Question was, Whether the Money was Assets in her Hands to satisfy her Husband's Debts ? And upon arguing this special Verdict, it was adjudged not to be Assets : because tho' she received the Money, yet it was neither in her own Right, or as Executrix to her Husband, but upon a Trust, That it should be laid out in a Purchase of Lands, and she herself was to have the Property and Use of those Lands when bought.

And as to the principal Case, the Residue of those Terms is not vested in the Executor, but shall go to the Heir, [167] *quatenus* Heir, after the Trust is satisfied.

If any man who is seised in Fee make a Lease, rendering Rent : 'tis true, this Rent is a Chattel, but it being extracted out of the Freehold, it shall go to the Heir of the Lessor after his Death, and not to the Executor.

So if a Copyholder in Fee makes a Lease for Years of his Copyhold with Licence from the Lord, the Term is not liable to an Execution by a *Fieri facias* for his Debts, because the Copyhold Lands themselves are in no sort liable.

'Tis true, where a Lease was made for 99 Years, if three Persons therein named should so long live, and afterwards the Lessee Mortgaged this Lease, and then made a Will, and devised it for the Payment of his Debts, and died : In this Case his Creditors were let in, and the Reason was, because by his Will he had subjected the Equity of Redemption to the Payment of his Debts.

And they made a great Difference, where the Equity of Redemption is upon a Mortgage in Fee, and where 'tis upon a Mortgage of a Chattel-Lease or Term : for in the first Case (viz.), where the Equity of Redemption is upon a Mortgage in Fee, there a Bond-[168]-Creditor shall never be let in, because, after the Debt is paid, the Lands are vested in the Heir : but 'tis otherwise where a Term is mortgaged : for the Equity of Redemption of a Term for Years comes to the Executor, and in such Case a Bond-Creditor shall be let in, because if the Term it self should be reconveyed, it would be Assets in his Hands.

It was argued likewise in this Case, That nothing shall be Assets but a Term in Gross ; and That a Term raised upon Trusts for any particular Purposes, as to make Provision for Daughters, or younger Children, or the like, after such Trusts are satisfied : and supposing the Words, to attend the Inheritance, are omitted, yet it shall not continue or be stretched farther than the Parties intended it, whose Meaning must be, That after the Annuities are satisfied, or the Trusts performed, that the Term should then sink into the Inheritance, and not be kept on foot to be made liable to their Debts.

But whatsoever may be done with a Term, settled in Trustees after the Trust is satisfied, the Reason cannot be the same where a Term never was in Trustees, as in this Case it was not : for by the Re-demise, the Term demised [169] was vested in the Earl himself, subject to the Performance of the Agreements therein mentioned, and when those are satisfied, it must of Course sink into the Inheritance, and can never be Assets in the Executors, and made liable to Debts, and the Demise can never afterwards stand by it self : For that and the Re-demise are but one Conveyance in the Law, and such a Conveyance is better than a Grant of a Rent-Charge, because all subsequent Grants stand upon an equal Bottom with the first : and therefore if the last Granter make the first Distress, he will be first satisfied : Therefore this Conveyance was found out for the Benefit of the Person who is to have the Rent-Charge.

The Court was of Opinion, That the Remainder of those Terms were not Assets in the Hands of the Executors of the Earl, for the Reasons insisted on by the Counsel before mentioned, and so decreed accordingly.

[170] EARL OF SALISBURY *versus* BENNET.

Lords Commissioners, Mich. Term, 1691.

Simon Bennet, by Will, devised £20,000 to his Daughter, so as she married after the Age of 16, and with the Consent of the Trustees named in the said Will ; but if she married before she was 16, or without the Consent of the Trustees, then he devised to her £10,000 and no more, and that the other £10,000 should go into the Bulk of his Personal Estate, and be laid out in the Purchase of Lands, and settled as he had directed.

The Earl of Salisbury married the Daughter before she was 16 Years old, but with the Consent of the Trustees : And it was proved in this Cause, that Mr. Bennet the Testator had in his Life-time made some Overtures of marrying this Daughter to the said Earl : and thereupon the Court decreed, That the Earl should have the Portion (*viz.*), £20,000.

There was an Appeal brought from this Decree to the House of Peers, and there it was confirmed.

[171] *Nota*, That in arguing this Case, this Difference was taken and allowed both at Bench and at the Bar (*viz.*), That where there is a Devise of £1000 to a Daughter, if she married with the Consent of Trustees named in the Will, and if she did not marry with their Consent, then she should have but £500, this is only in *Terrorem*. And tho' she should afterwards marry without such Consent, yet she shall have the whole £1000.

But where the Devise is of £1000 if she marry with Consent as aforesaid ; and if she doth not, then the £1000 is devised over to another Person ; in such Case, if she marry without the Consent, the Devise over is good, and she can never be relieved : And this was Fry and Porter's Case. *Nota* the Difference, for there was no Devise over of the £10,000 to any particular Person in the principal Case, but only that it should sink into the Bulk of his personal Estate.

[172] ANONYMUS.

One Mr. Denton by Will made his Wife Executrix and Residuary Legatee, and died : His Widow afterwards married Mr. Battersby, who in like manner made a Will, and made her Executrix thereof, and also Residuary Legatee, and then he died. After the Death of her second Husband, she being then a Widow, she made her Will, and devised several Legacies to Trustees for the Use of particular Persons named in her said Will, and made an Executrix, to which Will she afterwards annexed a Codicil in these Words :

//. Memorandum, I do farther devise to my Executrix, and to A and B (who were now Plaintiffs), all my Houshold-Goods, Bonds, Bills, Ships at Sea, Book-Debts and Accompts, not before devised, and which were mine as Executrix to Mr. Denton, my first Husband : all which shall be equally divided amongst, and not to be taken by, my Trustees in my Will.

The Testatrix died, and her Executrix refused to administer, for that the Question was, To whom the Administration should be granted ?

[173] And the Court decreed, That it should be granted to the next of Kin to the Executrix, and not to those who were next of Kin to Mr. Denton, her first Husband ; and so it should have been if his Widow had died before Probate of his Will, and that the Plaintiffs should have whatever remained of the first Husband's Estate, for whoever takes an Administration to that, are but Trustees for them.

ARMSTRONG'S CASE.

Michaelmas Term, Anno 1691.

George Armstrong being possessed of a Chattel-Lease, died Intestate, leaving a Widow and one Child : the Widow took out Administration in the Bishop's Court at Exeter, which she ought not to have done, because the Intestate had *Bona notabilia*, and for that Reason she should have administer'd in the Prerogative Court.

But by Vertue of this Administration she entered upon the Lands so leased to the Intestate, and paid some of his Debts by the Perception of the Profits ; and afterwards

she mortgaged the said Term to raise Money to pay one of his Bond Creditors, and then she died Intestate.

[174] The Question was, Who should redeem, either the Administrator of the Wife, or the Administrator *De Bonis non*, &c., of her Husband, the first Intestate? For such an Administration was granted, because tho' the Wife had a Right to administer, yet she took out a wrongful Administration.

And the Court decreed, That the Administrator *De Bonis non* should redeem, but that he should allow what the wrongful Administratrix had paid in Discharge of the just Debts of her Husband the Intestate.

SIR THOMAS CLARGE'S CASE.

Mich. Term, Anno 1691.

The old Duke of Albemarle devised his Jewels and Plate to his Wife for her Life, and afterwards to his Son Christopher. Now tho' this was a plain Devise of a Chattel Personal, with a Remainder, which cannot be by the Rules of Law; yet the Master of the Rolls held, this should be intended a Devise of the Use of Jewels, in order to support the Will and Intention of the Testator, and so decreed.

[175] WEBB *versus* SUTTON.

Mich. Term, Anno 1691.

Doctor Sutton being seised in Fee of an Advowson in Gross, did make a Mortgage thereof in Fee, for securing the Repayment of £200 to the Mortgagee, which Mortgage afterwards became forfeited.

The Doctor having Children by several Venters, granted the next Avoidance to Trustees for the Benefit of his Wife; and afterwards made a Will, and devised to his Daughter Arabella £500, to be paid within 12 Months after his Decease, and Interest in the mean time: And then he devised the said Advowson to his Son Theodosius, and his Heirs, upon Condition that he gave a Bond to his Sister Arabella, to pay her this Legacy of £500 according to his Will.

Theodosius died in the Life-time of his Father Dr. Sutton; then the Doctor died; and afterwards Webb, the now Plaintiff, married Arabella, and upon the next Avoidance he was presented by the Mother. And now he exhibited a Bill against the Heir at Law, upon whom the Inheritance descended after [176] the Death of Dr. Sutton, for this £500, which he had devised to his Daughter as aforesaid. And it being made a Case for the Opinion of the Court,

Serjeant Phillips argued for the Defendant, That the Advowson ought not to be charged in his Hands as Heir, because it was Dr. Sutton's Intention only to charge it; and Theodosius dying in his Life-time, it must be then undisposed, because the Party was dead who had a Power either to leave it as a Charge upon the Advowson, or to charge his own Person by a Bond for the Payment of it.

If Dr. Sutton the Father intended that the Advowson should be charged with the Payment of this £500, the Mother might likewise intend, that the Grant of the next Presentation to the Husband of the Legatee should be a Discharge thereof.

But Mr. Vernon, who argued for the Plaintiff, said, That could never be intended, because the Legatee was to have the Money twelve Months after Dr. Sutton's Death, and Interest for it till paid. That the Doctor having no other Estate, he must necessarily intend this as a Charge on the Estate which he had; so that his Meaning must be, That the Advowson should be sold, and that [177] his Daughter shall have the £500 out of the Money arising by such Sale, without any Prejudice by the Presentation of her Mother upon the next Avoidance, and if this was not his Intention, she could never have it.

The Court was of Opinion, That this was a good equitable Charge subsisting, notwithstanding the Death of Theodosius; for if he had been living, and had refused to give Bond for the Payment of the £500 as directed by the Will, the Advowson should be chargeable.

Then the Question will be, Whether the Presentation of the Mother, who presented the Plaintiff, the Husband of the Legatee, shall not be intended as a Discharge of this Legacy? (which the Lord Commissioner Hutchins said was no Simon). But there being nothing of this in Proof, the Court delivered no Opinion as to that Matter, but

ordered that the Cause should come before them upon Proofs, it seeming unnatural that the Daughter should run away with the whole Estate, and therefore they ordered that the Mother who presented should be examined, and said, that she was a good Witness in this Case ; as, Where an Heir is sued, an Executor shall be a good Witness to prove the Debt paid out of the personal Estate.

[178] And as to Intentions to charge Land, the Lord Commissioner Hutchins cited these cases (viz.), one Pelham's Case of Grey's-Inn, which was thus :

ff. A Man seised in Fee, devised his Lands to George Pelham, and the Heirs of his Body, and in the same Will desired the said Mr. Pelham to pay all his (the said Testator's) Debts. The Lord Chancellor Jefferies decreed the Lands should stand charged with the Payment of the Debts, tho' it was but a kind of a Devise for that Purpose after an Estate-Tail : and upon an Appeal, this Decree was affirmed in the House of Peers.

Now tho' it was held equitable, That a desire to pay just Debts should extend to charge the Testator's Lands ; yet a Desire to pay a Money Legacy was not allowed to be a good Charge upon the Land for the Payment of the Legacy : And for that, he cited one Clowsley's Case, which was a Devise to A of £300, who was likewise Heir at Law to the Testator ; and in the same Will, he desired her to pay £200 to his other Daughters.

A died in the Life time of the Testator ; then he died, and after his Death the Legatees exhibit a Bill against the [179] Heir : To which, Serjeant Hutchins being then of Counsel for the Defendant demurred, and he said, When Maynard, Keck, and Rawlinson, were Commissioners, they all held the Demurrer to be good, because this was not any Charge upon the Land.

THE CASE OF THE CREDITORS OF THE LADY CHOLMLEY.

Michaelmas Term, Anno 1691.

The Bill was, to have an Accompt of several Jewels which were valued at £1800.

The Defendant, in her Answer, set forth the Number and Quantity of the Jewels, but claimed them as her Paraphanalialia.

Upon hearing the Cause at Powys-House, before the Lords Commissioners Rawlinson and Hutchins, it was alledged by the Counsel for the Creditors against the Lady, That her Husband being a Citizen of London, she was now barred by the Custom, of all manner of Right to any Paraphanalialia : Whereupon it was directed to the Lord Mayor and Court of Aldermen to certify the Custom, Whether she was barred or not ? Who certified, That the Custom was, for a Citizen's Widow to retain some part of [180] her Jewels as Paraphanalialia, but not the whole.

But *Sir William Williams*, who was of Counsel for the Lady, argued, That the Paraphanalialia were so appropriated to her Person, that they could not be disposed by the last Will and Testament of her Husband, as in this Case ; but it must be by some Act executed, and which was to take Effect in his Life-time, and if there was no such Disposition, then they were a Gift in Law to the Wife ; for if a Husband in his Life-time will permit his Wife to wear Jewels which are proper for her Person and Condition, 'tis an implicit Gift to her by Law, and they shall not afterwards be taken from her by any of his Creditors.

On the other Side it was insisted, That the Defendant, the Lady Cholmley, had a Jointure settled on her before Marriage, which she accepted in full Satisfaction and Discharge of her Thirds at Common Law, which she might at any Time claim out of the real or personal Estate of her Husband, or for or by reason of any Custom, or otherwise howsoever, by which Agreement she is now barred : For tho' the Paraphanalialia are no part of her Thirds, yet they are incident to the Thirds ; and if she is [181] barred from the Principal, 'tis reasonable she should be likewise barred from the Incidents.

The Court made no Decree, but took Time to consider, Whether she was totally barred ? And recommended it to the Lady, to consider in the mean time what Jewels she had most Inclination to keep, and that she should not be unreasonable in her Choice.

UNDERWOOD *versus* MORDANT MIL.

Mich. Term, Anno 1691.

Ralph Suckling of Des Communes, by Articles of Agreement before Marriage, contracted and sold to the Plaintiff Underwood all his Houshold-Goods, Plate, &c.,

which he then had in Trust for his Wife, if she should happen to survive him, with whom he had £1000 Portion ; but there was no Schedule to those Articles.

The said Suckling became indebted to several Persons, and particularly to Sir John Mordant, by Judgment.

After the Death of Suckling, the Plaintiff Underwood assigned the Goods to his Widow, for her sole and proper Use and Benefit : And soon afterwards, the Defendant, Sir John Mordant, took out [182] an Execution upon the said Judgment, and the Sheriff being about to execute the same, the Plaintiff Underwood produced those Articles made before Marriage, and gave him Security to indemnify him against the Creditors of Suckling ; which being done, the said Sheriff returned *Nulla Bona*.

Thereupon Sir John Mordant brought an Action against the Sheriff for a false Return, and obtained a Verdict against him, and £120 Damages, and upon a Writ of Error brought, the Judgment was affirmed.

And now the Plaintiff exhibited a Bill to be relieved against the same, alledging, That such Verdict and Judgment ought not to be had or given against him, for that the Goods were protected by the Marriage Articles, and bound in Equity, tho' there was no Schedule annexed to it.

And upon hearing the Cause, his Counsel argued, That a Devise of Goods, or of a Term for Years, with a Remainder over, is good in Equity, tho' 'tis not to be supported by Law ; and that tho' these Articles were defective for want of a Schedule, yet this Court hath often supplied defective Agreements, and hath given Relief after Judgment obtained at Law : As in the Case [183] of Burgh and Francis, when my Lord Nottingham was Chancellor, which was thus :

// Burgh made a Feoffment in Fee, by way of Mortgage, of several Houses in London, for securing the Payment of £400 and Interest, and being likewise indebted to several other Persons by Bonds, he died before the Money due on the Mortgage was paid. After his Death, the Bond-Creditors demand their respective Debts of his Heir, who had nothing to pay them but the Equity of Redemption of this Mortgage. One of the Creditors, Mr. Berry, undertook to satisfy the Mortgage, which he did, in order to let himself into the Estate, and hold it 'till his Bond Debt was paid ; but having discovered that there was no Livery and Seisin endorsed on the Feoffment, he brought an action of Debt against the Heir upon the Bond of his Ancestor, and got Judgment : But before Execution, the Seal was opened on Purpose for a Subpœna, which was taken out, and a Bill filed, to help this defective Conveyance, which was supplied accordingly, and the Mortgagee had his Money.

[184] So if a Man article to sell the Manor of Dale, and afterwards Judgment is obtained against him, and the Judgment-Creditor having Notice of the Articles for Sale, will yet execute his Judgment ; this Court hath relieved against such Execution, and this was in a Suffolk Cause.

Now in the principal Case, there was no Property of these Goods in Suckling, for that was gone by the Bargain and Sale, tho' it was defective : and afterwards there was only a Trust of a Property in the Plaintiff Underwood, which might lawfully be assigned over, and which accordingly was assigned for the Benefit of the Widow : And if her Husband had been living, and she had applied to this Court before the Defendant had executed this Judgment, he would have been decreed to make a Bargain and Sale of these Goods, with a Schedule annexed, according to the Marriage-Articles, which would have protected them against this Judgment.

Mr. Finch for the Defendant argued, That there were no manner of Circumstances in this Case, which varied it in Equity from what it was at Law, that Sir John Mordant had recovered a Judgment at Law ; and afterwards Equity [185] will not say, that a Deed which is void in its Limitation shall protect those Goods against a lawful Judgment ; and if these Articles should be construed in Equity to be a Trust of the Property in the Plaintiff, yet 'tis void at Law against the Defendant, because he is a Creditor for a just Debt, and, as such, the Property must be in him : It cannot be in the Sheriff, either by the Return of the *Nulla Bona*, or the Recovery against him, for he can have no Property in the Goods, because he says there were none, and they who gave Security to the Sheriff, can have no Colour of Property ; it must be therefore in Suckling whilst living, or in those who represent him after his Death : And to shew that the Property was in him, suppose that the Judgment had been executed in his Life-time, and afterwards the Sheriff had delivered the Goods back again to him, could Sir John Mordant recover them again of him ? He could not, for it he should bring an Action against

him for the Goods, the other might have an *Audita Querela*, and plead a former Recovery in Bar to that Action ; and for these Reasons, the Bill was dismiss'd with Costs.

[186] SANDS *versus* FLEETWOOD.

Mich. Term, Anno 1691.

The Bill was, to compel the Defendant to perform an Agreement : The Case upon the Pleadings was thus ;

ff. Sir John Pettus, in the Year 1637, upon the Marriage with his Lady settles his Estate and Lands upon Trustees and their Heirs, to the Use of his Mother for Life ; and after her Decease, then to the Use of himself for Life ; and after his Decease, then to the Use of his Wife for Life ; and after her Decease, then to the said Trustees and their Heirs ; upon Trust, That out of the Profits thereof, or by Sale or Mortgage, they raise the Sum of £2000, which shall be for the benefit of such younger Child or Children, to whom the said Sir John by his last Will or Testament in Writing, or by any other Writing by him executed in his Life-time, should devise, appoint, limit or declare ; and for want of such Devise or Appointment, then to his younger Child, if but one ; and if more than one, then to be equally divided amongst them. And [187] that from and after the said £2000 should be raised, and in case Sir John should have no younger Child or Children, that then the said Trust should cease, and that the Estate should be and remain to the said Sir John Pettus, his Heirs and Assigns, for ever.

Sir John had issue by this Marriage, one Son and a Daughter ; the Son died without Issue, and the Plaintiff Mr. Sands married the Daughter.

After the Death of Sir John, there was a Treaty between the said Mr. Sands and one Mr. Bird, for the Sale of their Lands ; and an Agreement was made, that Mr. Bird should pay the said Mr. Sands £1100 for his Interest and Title ; which the Defendant Fleetwood understanding, he procured one Mr. Bagnall an Attorney, and an Agent between the said Mr. Sands and Mr. Bird, to break off the Agreement, which not being reduced into Writing, was accordingly done ; and the Defendant Fleetwood did thereupon agree to give Mr. Bagnall and Mr. Bird each of them 20 Guineas, and gave a Note under his Hand to pay unto the Plaintiff Mr. Sands £1200 for his Title, which he now refused, pretending that he had purchased the Estate by buying in two Extents, and other Incumbrances, which he set [188] forth in his Answer, and that the Plaintiff had no Title to convey.

Sir William Whitlock and *Mr. Finch*, who argued for the Plaintiff Mr. Sands, said, That here was a Provision made for a younger Child, which the Father could not defeat by any subsequent Incumbrance he could make on the Estate. The Question is, Whether the Plaintiff's Wife shall now come under that Denomination, and be accounted a younger Child ? 'Tis true, she is Heir at Law, but she has no Inheritance descended on her, for there was not any Thing to descend, Sir John had so incumber'd the Estate.

It was admitted on all Sides, That if the Son had died and left Children, in such case the Plaintiff's Wife should be accounted a younger Child, because the Inheritance had then gone from her : If then the Daughter had a Title when younger Child, and when the Inheritance would have gone from her, why should she not have a Title when she is eldest, and has no Inheritance ?

Sir Ambrose Phillips for the Defendant alledged, That when he gave the Note for the Payment of this £1200, he had no Notice of this Marriage-Settlement ; but yet that it seemed plain that the Plaintiff had no Title by the Marriage [189] of the Daughter, because if there had been any Inheritance, or any Thing to descend, it would have descended on her ; which shews that she is the eldest, and not a younger Child ; for an Inheritance by the Rules of Law can never descend on the youngest. If therefore she cannot be comprehended under that Denomination, the Plaintiff can have no Title in her Right by his marrying her, and if he hath no Title, this Court will never compel the Defendant to pay this Money. 'Tis like the Case, where a Man articles with B for the Purchase of the Manor of Dale, and upon looking into the Writings it appears, that B hath no Title to that Manor ; this Court will never decree the Payment of the Purchase-Money. He farther said, That if Sir John Pettus had sold this Estate after the Death of his Son, the Sale had been good.

The Court made no Decree, but directed them to go to Law, to see what could be recovered there ; for if the Plaintiff had a good Title (as they seemed to incline he had), it would be a prior Incumbrance, and he might recover there.

[190] CHEW AND OTHERS *against* CHEW.

Mich. Term, Anno 1691.

The Bill was to have Execution of a Trust of a Copyhold Estate. The Case was thus :

// A Copyholder of the Manor of Painswick, in the County of Gloucester, surrender'd the same to one Harding and his Heirs, and declared to him by Parol, that his Wife should have this Copyhold, if she happened to survive him ; and if they both should die, that in such Case it should be sold, and that the Money arising by such Sale should be equally divided amongst the now Plaintiffs, Share and Share alike.

He afterwards made a Will, in which he took no Notice of this Copyhold ; and both he and his Wife in a little Time died of the Small-Pox.

The Defendant was Heir at Law : and the Court decreed, That where a Surrender is made to a Stranger and his Heirs, he is but a Trustee for the Heir at Law.

[191] ANONYMUS.

The Case was (viz.) : A Man entered into a Bond for the Payment of a Sum of Money which he borrowed : He afterwards rented Land, but not upon Lease, and died, the Rent being behind, and unpaid : After his Death, an Action of Debt for Rent arrear was brought against the Administrator, who paid the Money. And now upon a Bill brought against him by the Bond-Creditor to discover Assets, and to be relieved upon his Bond ; and upon the Defendant's Answer, all this Matter appearing, and that he had not Assets beyond the said Sum paid for Rent, the Court decreed,

That Debt for Rent, tho' not upon Lease, was of as high a Nature as Debt upon Bond, because it founded in the Reality ; and it appearing that the Defendant had no Assets beyond what he had paid for Rent, the Bill was dismissed.

[192] DASHWOOD Vic. London *versus* MANLOVE.

Mich. Term, Anno 1691.

The Defendant, Mr. Manlove had obtained two Judgments against one Seabright, and took out a *Fieri facias*, which he gave to one Cooper, a Serjeant of the Compter, to execute, and directed him to the Place where the Goods were, and told him, That he would indemnify him for serving the Execution on those Goods. Thereupon the Officer took the Goods in Execution, and the Sheriff made a Bill of Sale thereof to the now Defendant Mr. Manlove.

Afterwards Mrs. Harvey, who had the legal Propriety in these Goods, brought an Action against the Sheriff for taking them, and recovered a Verdict and £80 Damages. And now the Sheriff exhibited a Bill against Mr. Manlove, to make him liable in Equity, for that the Seizure of the Goods was tortious, and by his Direction, who by that Means had got them into his Possession, and so was become a Gainer by his wrongful Act.

Mr. Finch for the Defendant. If this should be Equity, here is a Way found [193] out to destroy all Executions : The Property of the Goods are bound by the Sale, and the Sheriff has received his Poundage-Money, and cannot in Equity charge Mr. Manlove ; 'tis true, Mrs. Harvey might have charged him in an Action of Trover for these Goods, and that had been the proper Way to have made him liable : but she hath taken another Course : and it being long since, she is now barred by the Statute of Limitations, so the Bill was dismissed.

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TAYLOR *versus* WOOD.

Lords Commissioners, in Hillary Vacation, Anno 1691.

The Case was ; (viz.) Nathaniel Taylor, by his last Will and Testament devised his Lands to the Defendant Wood, upon Condition that he paid the several Legacies which he had bequeathed to several Persons therein named ; by which Will he gave one Legacy of £200 to Phoebe Taylor, when she shall attain and come to the Age of 21 Years ; provided, That if the said Wood should fail in the Payment of the said Legacies, that then the Legatees should have Power to enter, or such of [194] them whose Legacy was not paid, and detain the said Lands till he or she should be satisfied.

Phoebe Taylor died before she was 21 Years of Age : And now her Administrator exhibited a Bill against Wood the Defendant, in order to obtain this Legacy, and the Question was, Whether this was a Devise of the £200 to Phoebe Taylor *in presenti*,

for if so, then her Administrator will have a Right to it ; or whether nothing is due till she should be of the Age of 21 Years ?

Somers, Solicitor General, argued for the Administrator, That this was a Devise *in presenti* ; That the Words which gave the Legatees Power to enter, should relate to the Time of Payment, and not to the Substance of the Devise : That if the Words had been, I give to my Daughter Phœbe Taylor £200 to be paid at the Age of 21 Years, that had been *Debitum in presenti*, tho' it had not to have been paid till 21 ; and where 'tis *Debitum in presenti*, if the Legatee had died before the Time of Payment, it should have gone to her Administrator : That there was nothing varied this Case from that, but the Word when, which made no material Difference.

[195] *Curia*. This is not a present Devise, neither shall it take Place till after the Devisee hath attained the Age of 21 Years ; and as the Words stand together, the Meaning of the Testator must be thus (*viz.*), I give to my Daughter Phœbe Taylor £200 when she shall attain the Age of 21 Years, with Power to enter on my Lands if the Legacy be not then paid.

This Court hath several times made strained Constructions of Wills to help Infants, but never to help an Administrator.

In the Case of Clobery and Lawpeen, which was heard three times in this Court, and a Decree made and affirmed in the House of Lords, this Difference was taken, That where a Devise was of a Sum of Money, to be paid to a Daughter at the Age of 21 Years, with Interest, there the Word Interest made it *Debitum in presenti*, because after 21 she shall have no Interest.

Nota : Upon a Motion to stay the Signing and Enrolling a Decree, that it might not be pleaded in Bar against the now Plaintiff, who had discovered new Matter, and had [196] thereupon preferred a new Bill ; it was ordered, That the Signing and Enrolling should stay till the Defendant had answered ; but that no Cause should be shewn against a decretal Order, without depositing £5 in Court.

The Plaintiff in this Case could not bring a Bill of Review, because in such Case no Proofs are to be admitted, but such as were made in the Original Cause.

DUTCHESS OF ALBEMARLE *versus* EARL OF BATH.

Lords Commissioners, May 23, 24, in Easter Vacation, Anno 1692.

The Case was, That in the Year 1675, Duke Christopher Monk made his Will, and (amongst other Legacies) devised the greatest Part of his Estate to the Earl of Bath, who was his Cousin-German, and charged some Lands with Legacies, to be paid out of such Lands ; which he had no Power to do, because they were entailed by Duke George, his Father.

Afterwards, in the Year 1681, Duke Christopher executed a Deed, supposed to be drawn by Sir William Jones, in which [197] the Will of 1675 was recited, and which he mentioned to be to confirm and corroborate that Will ; by which Deed he also gave the greatest Part of his Estate to the said Earl ; but he reserved a Power of Revocation, so that he revoked it in the Presence of six Witnesses, whereof three of them were to be Peers.

Afterwards Duke Christopher, in the Year 1687, made another Will, which he publish'd at Sir Robert Clayton's House, in the Presence of three or four Witnesses ; which Will was drawn by the Direction of the late Chief Justice Pollexfen, and by that Will he devised the greatest Part of his Estate to the Dutchess, and he devised his Plate and Houshold-stuff to such Person to whom the Inheritance of his House, Newhall, should be and appertain.

The Will of 1675, and the Deed of 1681, were both delivered to the Earl under the Duke's Seal ; who afterwards sent for the Will, and it was delivered to him, and shewed to the Chief Justice Pollexfen, who was then his Counsel when he made the last Will in 1687, but the Deed was not produced till after his Death.

When he was about making his last Will in 1687, he advised with his [198] Counsel, Whether that Will would be a Revocation, and whether it would destroy the Deed in 1681 ? And being advised that it would not, unless the Power of Revocation were pursued, he then published this second and last Will in the Year 1687.

Afterwards Duke Christopher died without any Revocation, according to the Power reserv'd ; and soon after, the Earl of Bath produc'd the Deed dated in 1681, and insisted upon his Title to the Lands therein mentioned : Whereupon the Dutchess

exhibited a Bill in Equity to be relieved against that Deed, and to supply the Power of Revocation, in regard Duke Christopher died in Jamaica, where he could not have three Peers to be present at the Time he would have revoked it, and insisted, That it was obtained by Surprize, &c.

Thereupon an Issue was directed at Law to try the Right, and a Tryal was accordingly had at the King's Bench Bar, at which Tryal it was found to be a good Deed, and well executed; and the Cause coming back to this Court upon the Equity reserved.

Mr. Finch, and others of Counsel for the Dutchess, argued, That the Deed of 1681 being a voluntary Conveyance, shall never be supported in Equity [199] against another voluntary Conveyance (for such the Will in 1687 must be), especially when there are so many plain and apparent Circumstances to induce the Court to be of Opinion, That the Deed of 1681 was obtained by Surprize.

And as to that, there is no Proof of the Manner of obtaining this Deed; or that the Duke gave any Directions for drawing it; or that he was so much as privy to the Contents thereof; or of his Intention to give the Estate to the Earl; or of the Duke's concealing it; or any Reason shewn, why there was no Counterpart.

Tis true, here is a Deed produced, which gives away the Estate contrary to the manifest Intention of the Duke, which appears in his Will in 1687, which he made and published with as great Advice and Deliberation as ever any Will was made. If therefore this Deed should be construed to have an Operation contrary to the apparent Intent of the Duke himself expressed in his Will in 1687, can any Man imagine, that it was not obtained by Surprize? Or can it be thought, that the Duke took so much Advice and such Pains to make a Will, intending that it should signify nothing, but rather [200] on purpose to leave his Family in a chargeable Controversy.

It cannot be denied but the Deed in 1681 is a voluntary Conveyance; that it was obtained without any manner of Consideration, and afterwards concealed from the Duke, and forgotten by him; for it must be presumed that he never remember'd the making any such Deed; for if he had, he would certainly have taken some Care to destroy it, because it was so directly contrary to the Will he made in the Year 1687.

There are some Things in the Deed it self, which plainly shew that the Duke was surpris'd in making it; for it recites the former Will made by him in 1675, and then declares, that the Deed was to confirm and corroborate that Will. Now tho' a Deed to confirm a Will is a very extraordinary Thing, and not usual, because the Estate passes by the Deed, and not by the Will; yet this Deed in 1681 is so far from confirming the Will in 1687, that it contradicts it; for the Deed recites, That he had devised the Manors of Dalby and Broughton to the Dutchess, which he had not done: Then he recites his Intention for a Maintenance and Provision for some younger Children of a Relation, out of certain Lands which [201] he had no Power to charge, because those very Lands were entailed by Duke George, his Father. All those Things were Arguments, that he was surpris'd in making that Deed.

There were six Years between the Time of the making the Deed and Will, which was a sufficient Time of Deliberation, in which Time there happened many Alterations in the Duke's Family; therefore it must be supposed, that he would never suffer the Deed to remain in Force, if he had not forgot it when he made his Will.

This Case depended a long Time, and the Arguments on both Sides at the Bar, and afterwards at the Bench, are very long; but because they are printed at large by themselves, I shall repeat no more here, but refer the Reader to that printed Report.

[S. C. 2 Rep. Chan. 417; 3 Chan. Cas. 55.]

[202] POWELL'S CASE.

Pasc. Anno 1692.

A Mortgagee, who had nothing left but an Equity of Redemption of the mortgaged Lands, devised the said Equity of Redemption for the Payment of his Debts, and some Legacies which he had bequeathed to several Persons by his said Will: The Question was, Whether the Creditors should be paid before the Legatees? And it was decreed, That if the said Estate did not stand charged with the Debts before, but only by the Will, that in such Case both Creditors and Legatees shall come in *pari passu*.

In the Argument of this Case it was held, That if a Man devise an Annuity to a Child, to be issuing out of certain Lands, and by the same Will he deviseth the same

Lands for the Payment of his Debts and Legacies, that the Devise of the Annuity is a subsisting Charge on the Lands, and shall be good.

[203] STRODE *versus* ELLIS.

Somers, Lord Chancellor, Pasc. Anno 1692.

The Testator Mr. Strode, by his last Will and Testament, devised £3000 apiece to his Daughters at their respective Ages of 18 Years, and appointed Trustees to sell Lands in Lincolnshire for raising the said Portions; and if that fell short, then he devised, That the Rents and Profits of certain other Lands in Somersetshire should be applied towards the Payment thereof, and that each of his Daughters should have £50 per Annum for their Maintenance, till their Portions respectively became due.

Then he devised several specifick Legacies to his Wife and others, which he appointed to be paid out of his personal Estate; and devised all the rest and Residue of his Goods and Chattels to his Wife, not disposed by his Will, and which shall not be disposed by any Codicil thereunto annexed, to the end she should pay all such Debts and Legacies which he had appointed to be paid out of his said personal Estate, and made his said Wife sole Executrix, and died.

[204] The Lincolnshire Estate was sold for £1750, which Sum was placed out at Interest, and the Rents and Profits of the Somersetshire Estate fell short of the Payment of the Portions, and, by reason of the Taxes, could but little more than pay the £50 a Year for the Maintenance of the Daughters; but the personal Estate was more than sufficient to pay all the Debts and Legacies.

And upon a Bill exhibited, to subject the said Personal Estate to pay what the Lands and Rents fell short to make up the said Portions, the Question was, Whether it should be liable in Equity, or whether the Executrix should have it as residuary Legatee? And decreed, That it should be liable to make up the Deficiency of the said Portions, so much as the said Lands fell short to pay the same.

[205] THOMAS HOLTHAM, and KATHERINE his Wife, formerly the Widow of THOMAS RYLAND, *ver.* JOHN RYLAND, Brother and Heir of the said THOMAS RYLAND.

Pasc. Anno 1692.

The Bill sets forth, That about the Month of October, 1693, there was a Treaty of Marriage to be had between the said Thomas Ryland, and Katherine, one of the Daughters and Co-heirs of Allen Lock, who had in her own Right, Lands in Fee of about the yearly Rent of £15, and some Money at Interest, upon Securities taken in her own Name, or in the Name of some Person in Trust for her.

That thereupon the said Thomas Ryland, in Consideration of the said intended Marriage, and of the said Portion which he was to have with the said Katherine, did agree to settle on her for her Jointure, in case the said Marriage should take Effect, and she should survive him, All that capital Messuage in which he then lived, together with four Yards Land thereunto belonging, lying dispersed in the common Fields in Wimpston in the County [206] of Worcester, in Trust, and for the Use of himself during his Life; and after his Decease, then to the said Katherine for her Life for her Jointure, and in full Satisfaction of all Dower, &c. and after her Decease, to the Heirs of the Bodies of the said Thomas and Katherine lawfully to be begotten, with several Remainders over.

The Plaintiffs farther set forth, That the said Agreement was reduced into writing, and duly executed by the said Thomas Ryland; and that, for the better Performance thereof, he signed and sealed a Bond of the Penalty of £200 with a special Condition, reciting the said Agreement to make her a Jointure, &c.

That afterwards the said Marriage took Effect, and the said Thomas Ryland held and enjoyed the said Lands, in Right of the said Katherine, all his Life time, and the Securities for Money in her Name were taken up and delivered to him, and new Securities taken in his Name for the same.

That Thomas Ryland being by the said Means as well intitled to the real Estate of the said Katherine, as to her Money, and being likewise seised in Fee of the said Messuage and four Yards Land in Wimpston, and also possessed of a per-[207]-sonal Estate of above £500 Value: did, about January 1695, die intestate without Issue,

and without making any Settlement on the said Katherine according to the said Marriage-Agreement.

That she, since her Husband's Death, hath applied herself to the Defendant, desiring him to settle the said Lands on her, which were now come to him as Brother and Heir of her late Husband ; which he refused to do, pretending there was no such Agreement ; or if there was, that he is not obliged to perform the same, for that the Lands were entailed on him ; tho' in Truth there was no such Entail, but that his Brother was seised in Fee as aforesaid, and that the same ought to be settled on the said Katherine.

Upon hearing this Cause before the Lord Chancellor Somers, there was no other Agreement appeared but the Bond with the special Condition, as aforesaid : and this was held to be a sufficient Evidence of such Agreement in Writing, and he decreed the Settlement to be made accordingly on the said Katherine by the now Defendant John Ryland, and if he refused to do it within six weeks, then he should pay Costs.

A General ABRIDGMENT OF CASES IN EQUITY, Argued and Adjudged in the HIGH COURT OF CHANCERY, Etc. Vol. I. [1667-1744].

CAP. I.

ABATEMENT AND REVIVOR.

- (A) What shall abate the Suit & *e cont'*.
- (B) Who may revive the Suit, and against whom.
- (C) In what Manner may a Suit be revived.

(A) WHAT SHALL ABATE THE SUIT & *e cont'*.

1. *A. Made J. S.* and his Widow Executors ; the Widow was made Executrix upon Condition that she did not marry ; they exhibit a Bill, and, pending the Suit, the Widow marries ; and it was adjudg'd upon a Reference to *Bridgman*, C. J., that the Widow's Marriage abated the Suit, altho' it was urged that her Executorship was only conditional. 18 *Car.* 2 [1666-67]. *Hamden and Brewer*, 1 *Chanc. Ca.* 77.

(If any of the Parties, Plaintiffs or Defendants, die, or if a Feme Plaintiff marries, regularly the Suit abates ; but with Respect to an Abatement by the Death of the Parties, it must be by the Death of such as are so far material Parties, and concerned in Interest, as to make it necessary to have their Representatives before the Court, before there can be a final Determination of the Cause.)

2. If a Promise be made to the Husband and Wife during Coverture, and they bring a Bill for Performance, and, pending the Suit, the Wife dies, yet this shall be no Abatement, *Cary* 88, *Thorne and Brend & al'*, 19 *Eliz.* [1576-77]. *For the whole Interest survived to the Husband.*

3. So if the Husband and Wife sue in the Wife's Right, and, pending the Suit, the Husband dies, yet the Wife may proceed. *Dr. Pary and Juxon*, *Hil.* 21 & 22 *Car.* 2 [1670], *Bridgman*, L. K. 3 *Chan. Rep.* 40.

4. So if a Bill be exhibited for a Legacy against Baron and Feme, who is Executrix of the Testator, and, pending the Suit, the Husband dies, this shall be no Abatement of the Proceedings ; but had it been concerning the Wife's Inheritance, it might be otherwise. *Mich.* 1691. *Shelberry and Briggs*, 2 *Vern.* 249.

5. If Jointenants, or Tenants in Common exhibit a Bill, and, pending the Suit, one of them dies ; yet *per Bridgman*, L. K., the Suit shall not abate. *Wright and Dorset*, 24 *June* 1671, 3 *Chanc. Rep.* 66. *But Q. as to Tenants in Common, for a Right descends to their Representatives.*

[2] 6. If a Cause has been heard on a Bill of Interpleader, and a Trial at Law has been directed to settle the Right between the Defendants, this puts an End to the Suit as to the Plaintiff ; so that if he afterwards dies, the Cause shall still proceed, and there needs no Revivor ; each Defendant being in the Nature of a Plaintiff. Ruled on Motion, *M.* 1685, *Anon.* 1 *Vern.* 351.

7. The Legal Estate in Question in this Case was vested in two of the Defendants as Trustees in Fee, and the equitable Interest in Fee in another of the Defendants ; and the Bill was brought by the Plaintiff now *Earl of Winchelsea*, the *Earl of Nottingham* and his four Sons, to supply the Defective Execution of an Agreement made by the Lord *Winchelsea's* Father, whereby the Estate was to be settled on the Plaintiffs

severally for Life, with Remainder to their first and other Sons successively in Tail, and a Decree was obtained accordingly; and it was referred to the Master to settle the Conveyance; after which the *Cestui que Trust* in Fee dies; notwithstanding which the Earl of Nottingham and his Sons attend the Master, who reported that he approved of a Draught of a Conveyance, which was a Conveyance only from the Trustees, in whom the legal Estate was vested, to the Use of the Plaintiffs, according to the Decree; but the Plaintiff *Finch*, now Earl of Winchelsea (who by a former Settlement was to have been Tenant in Tail) took Exceptions to the Report; one of which was the Abatement of the Suit by the Death of *Cestui que Trust*; and that the Master had no Power to proceed till the Suit was revived. But the Court overruled the Exception, and held clearly that when there were several Plaintiffs or Defendants, the Death of any of them made an Abatement of the Suit only as to themselves, and that the Suit continued as to the rest who were living; and therefore as to the Defendants the Trustees, that they might well execute a Conveyance of the legal Estate, and were not to wait for any Thing that was to be done by others; but if the Plaintiffs should hereafter desire a Conveyance of the Equitable Interest, they must revive against the Heirs at Law of the *Cestui que Trust*; and so in all Cases where any Thing was required to be done by the Representatives of the party dying. It was likewise held, that if some of the Plaintiffs refuse to join in bringing a Bill of Revivor, the others may bring such Bill, and make those who refused defendants. And it was agreed, that a defendant might bring a Bill of Revivor, as well as the Plaintiff. And it was likewise said, that it was every Day's Practice to order Money out of Court to the Party entitled by the Decree, notwithstanding the Death of some of the Parties. *Mich.* 1727. *Finch* and Lord *Winchelsea*.

(B) WHO MAY REVIVE THE SUIT, AND AGAINST WHOM.

1. A Devisee cannot bring a Bill of Revivor for want of Privity, admitted [*Backhouse v. Middleton*], 1 *Chanc. Ca.* 174, *T.* 22 *Car.* 2 [1670].

(The Reasons why regularly a Devisee or Assignee cannot bring a Bill of Revivor are, 1st, Because a Suit hath been looked upon as a *Chose in Action*, and consequently not assignable for fear of Maintenance. 2dly, And which seems the better Reason, because where the Party devises or assigns his Interest and dies, if the Devisee or Assignee were to bring his Bill of Revivor against the defendant, the Heir or Executor would be pretermitted, who might have a Right to contest such Disposition, and therefore he must bring his original Bill, and make the Heir or Executor Party.)

2. *Per Cur'*: An Assignee shall not have a *Sci. Fa.* to revive a Decree, that is not signed and inrolled; but after the Decree is inrolled, an Assignee may bring a *Sci. Fa.* to revive it, in like manner as at [3] Law: If there be Judgment for an Annuity, and the Annuitant afterwards sells the Annuity, the Vendee shall have a *Scire Facias* on this Judgment. (But though in the Principal Case *L. K.* disallowed the *Scire Facias*; yet it was without Costs, because Defendant might have demurred.) *M.* 1684, *Dunn* and *Allen*, 1 *Vern.* 283, but *vid.* 1 *Vern.* 426, *S. C.* where it is said that the *Scire Facias* was disallowed for want of Privity, and a Bill of Revivor was brought, and allowed of by the Master of the *Rolls*, altho' it was objected that an Assignee or Purchaser, who came not in Privity, could in no Case revive, but ought to bring an Original Bill to have a Parallel Decree made, in which it may be used as an Argument to induce the Court to make the like Decree, that there was such former Decree.

(Note. To this decision the reporter makes a *quære*.)

3. As when a Devisee having brought an Original Bill in Nature of a Bill of Revivor, the Question was, whether the Defendant should be at liberty to make a new Defence, it was held by Lord *Keeper*, that where a Bill, altho' an Original, is only to supply the Want of Privity, and is in all other Matters as a Bill of Revivor, the Decree ought to be carried on in the same Manner as it would have been on a Bill of Revivor, if the Plaintiff had claimed in Privity; and there is no Reason why the Devisee should not have the same Advantage of the Decree, as an Heir or Executor, without entering again into the Merits of the Cause; and the Decree on this Bill ought not to be longer or shorter than the first. *Clare* and *Wordell*, *Pasch.* 1706, 2 *Vern.* 548. [*S. C.* *Dick.* 20. See next case.]

4. So if a Bill in Nature of a Bill of Revivor be brought against a Devisee, he cannot dispute the Justice or Validity of the Decree; for then he would be in a better Case

than an Heir or Executor. *Easter 1711, Minshull and Lord Mohun, 2 Vern. 672* [S. C. 6 Bro. P. C. 32].

5. If there is a mutual Account Decreed, and there happens an Abatement, the Defendant as well as Plaintiff may in such Case revive; Lord *Stowell and Cole, 2 Vern. 219; Lady Stowell v. Cole, 2 Vern. 296, vide supra* (A) Case 7 [1 Eq. Ca. Abr. 2], that the Defendant in any Case may revive, as well as the Plaintiff.

6. If an Administrator obtains a Decree, but dies before Inrollment, the Administrator *de bonis non* may revive this Decree within the Equity of the Statute of 30 *Car. 2, c. 6*. (By which it is enacted, that an Administrator *de bonis non* may sue a *Scire Facias*, and take Execution upon a Judgment had in the Name of an Executor or Administrator.) *Owen and Curzon, 2 Vern. 237*.

7. If a Creditor is admitted by Order to come in before the Master, and prove his Debt, and pay his Contribution, he is intitled to revive if the Cause abates. *Trin. 1702, Pitt and the Creditors of the Duke of Richmond*.

8. If the Plaintiff revives against two only, when there were three Defendants to the Original Suit, his Bill shall be dismissed. *Cary 78, Quære*.

9. But it is not necessary to revive against a Defendant who never answered. *Hil. 1684, Oxburgh and Fincham, 1 Vern. 308*.

10. If a man marries an Administratrix, and the Plaintiff obtains a Decree against him and his Wife, and the Wife dies, the Plaintiff may proceed against the Husband without reviving against the Administrator of the Wife; but the Husband is not bound to answer farther than the Estate he had with his Wife, *Jackson and Rawlins, Mich. 1690, 2 Vern. 195*.

(Note, the book states the rule in equity to be, that where several are liable to a demand, you cannot proceed against one alone, but must bring all the parties before the Court.)

11. The Plaintiff's Intestate had obtained a Decree against the Defendant for Payment of a Sum of Money, and also for conveying of [4] Lands and Delivery of Deeds; but before any Thing was done upon it, died intestate; and the Plaintiff having brought a *Scire Facias* to revive the Decree, the Defendant demurs, because the Heir was not made a Party, and a Decree cannot be revived by Parts; and if the Heir will not join as Plaintiff, he ought to have been made Defendant. On the other Side 'twas said, that the Heir and Administrator are not jointly concerned, and each may prosecute *pro interesse suo*, and cannot join; and if he had been made Defendant, the Decree would not have been revived against him, because the Bill could only have prayed it might have been revived, as to the personal Estate; and the Court overruled the Demurrer, and said it was like a Judgment at Law in Waste, where there may be two Revivors. It being then objected that the *Scire Facias* is to revive the whole Decree; whereas it ought to be only as to the Personalty; the Court allowed the Demurrer as to the Realty, but ordered the Decree to be revived as to the Personalty. *Ferrers and Cherry, Mich. 1701*.

[Mews' Dig. Executor and Administrator, XIII. c. See *Jones v. Smith, 1841, 1 Hare 56; Jones v. Smith, 1843, 1 Ph. 249*. For other proceedings, see 1 Eq. Ca. Abr. 331; 2 Vern. 384.]

(C) IN WHAT MANNER A SUIT MAY BE REVIVED.

1. If the Suit abates, the Plaintiff may bring either an Original Bill or a Bill of Revivor, at his Election: Adjudged between *Spencer and Wray, Trin. 1687, 1 Vern. 463*.

(When a Suit abates, the Plaintiff may bring, either an Original Bill, praying that a parallel Decree may be made, or Bill of Revivor, which revives all the Proceedings had therein before the Decree is signed and inrolled; but if the Decree is signed and inrolled, it ought regularly to be revived by *Scire Facias*.)

2. A Bill of Revivor upon a Bill of Revivor lies, *Mich. 13 Car. 2 [1661], Hard. 201*. Agreed *per Cur'*, Attorney General and Sir Edward Barkham in *Scaccario*.

3. If one be named Defendant in the Original Bill, who is yet alive, he ought not to be named in the Bill of Revivor, because the Suit never abated *quoad* him. *Ibid*.

4. But if named in the Bill of Revivor only, he may be named in every Bill of Revivor after, because he was not named Defendant in the Original Bill. *Ibid*.

5. A Cause being heard, and the Decree signed and inrolled, the Plaintiff (the Suit having abated) brought a Bill of Revivor, and the Defendant insisted that he

should have revived by *Scire Facias*, there being a Decree in the Cause ; but in Regard there were Proceedings relating to Costs, &c. after the Decree was inrolled, which the *Scire Facias* would not revive, the Court held it well enough. 24 Car. 2 [1672-73], *Croster and Wister*, 2 Chan. R. 67.

6. If a Cause has slept 12 Months in Court, there shall be no Proceedings had upon it, without first serving a *Subpoena ad Faciend. Attornat.* T. 35 Car. 2, 1683. *Ann.* 1 Vern. 172.

[5] CAP. II.

ACCOUNT.

- (A) Who are intitled to have an Account, against whom it lies, and in what Cases.
 (B) Matters to be brought into the Account, what shall be allowed or discounted, when an Accountant may charge or discharge himself, and how the Particulars are to be ascertained.
 (C) What shall be a good Bar to a Demand of an Account, and where an Account once stated shall be conclusive.
Vide the several *Titles* of Guardians, Executors, and Trustees, how they shall be charged, and what Allowances they shall have.

(A) WHO ARE INTITLED TO HAVE AN ACCOUNT, AGAINST WHOM IT LIES, AND IN WHAT CASES.

1. A surviving Factor may be compelled to account, not only for himself, but likewise for his Co-factor, although it was admitted that the Executrix of the dead Factor was compellable, and that among Merchants *Jus accrescendi* hath no Place. *Pasc.* 21 Car. 2 [1669]. *Holstcomb* and *Rivers* coram Lord Keeper. *Watinsford* and *Wylb.* Justices. 1 Chan. Ca. 127 [S. C. Nels. 139].

(By the Common Law none could be charged in Account, but as Guardian in Socage, Bailiff, or Receiver, except in Favour of Merchants, and for the Advancement of Trade, where by the Law of Merchants, one naming himself Merchant, might have an Account against another, naming him Merchant, and charge him as his Receiver. 1 Inst. 372, a; 11 Co. 89. Remedies for or against the Executors or Administrators of Guardians, Bailiffs, and Receivers, or for or against Jointenants, Tenants in Common, their Executors or Administrators, were usually had in Chancery. And though now by the Statutes 3 & 4 Ann. cap. 16, actions of Account may be brought against the Executors and Administrators of every Guardian, Bailiff, and Receiver, and by one Jointenant and Tenant in Common, his Executors and Administrators, against the other, as Bailiff, for receiving more than his Share, and against their Executors and Administrators; yet still are Matters of Account thought more properly cognizable in Equity than at Law, as the Party can have a Discovery of Books, Papers, and the Benefit of the Defendant's Oath; and especially if there are mutual and Variety of Demands, in which Cases the Parties may more easily have an equal Measure of Justice, by balancing or discounting them before a Master; and as this will give a Court of Equity Jurisdiction, so will it likewise, if there are different Parties concerned in Interest; but if any Doubt arises about a particular Demand, it may be directed to be ascertained by an Issue and Verdict at Law.)

[6] 2. If a Merchant employs his Apprentice as a Factor beyond Seas, who dies, the Merchant shall have an Account against the Administrator of the Apprentice. *Lee and Bowler*, Mich. 26 Car. 2 [1674], *Rep. Temp. Finch* 125.

3. It was held by the Court, that an Infant was not compellable to account as Factor, though it was urged, that by the Custom of Merchants he may, but an Infant may be Executor, and shall be charged; because the Law enables him: So he may be charged in Trover, because a Tort, but not on Contract, nor as Bailiff, or for Goods to carry on a Trade; and therefore when Infants are Factors, their Friends should give Security for their Accounting. *Trin.* 1700, *Smally* and *Smally*.

4. A Trustee made a Letter of Attorney to J. S. to manage and receive the Rents and Profits of the Trust Estate, who did so, and accounted to the Trustee, and now

being sued by the *Cestuy que Trust*, insisted that the Trustee, and not he, was to account, and that he having already accounted, he might be quiet as to the Plaintiff; but he was decreed to account to the Plaintiff. *Trin.* 34 *Car.* 2 [1682]. *Pollard and Downes*, 2 *Chan. Ca.* 121. The Reporter adds; *Note*, That the Trustee was dead, but that was not yielded as the Reason.

5. The Assignee of Commissioners of Bankrupts brought a Bill to have a Discovery and Account of Money received by the Defendant on Behalf of the Bankrupt: The Defendant pleaded, he received it only as a menial Servant to the Bankrupt, and had accounted for it to him already; and that the Commissioners had already examined him upon Interrogatories; but the Plea was over-ruled. *Mich.* 1682, *Wagstaffe and Bedford*, 1 *Vern.* 95; 2 *Vent.* 358, S. C. *But quære, whether there were not Circumstances of Fraud in this Case, or a Combination between the Bankrupt and Servant.*

6. For if a Man by Answer swears, that what he received he received as a menial Servant, and hath paid it over to his Master, he shall not be put to account again, but he ought to disclose this Matter in his Answer. *Hil.* 1682, *Anon.* 1 *Vern.* 136.

7. So on Exceptions to a Master's Report, which had reported the Defendant's Answer insufficient; *Ld. K.* declared, That it was sufficient for a Servant or Apprentice, in Answer to a Bill for an Account, to say in general, that whatever he received, was by him received and laid out again by his Master's Orders. *Mich.* 1683, *Potts and Potts*, 1 *Vern.* 208.

8. The Plaintiff, who was Administratrix to her Brother, a Captain in Colonel *Churchill's* Regiment of Marines, having prayed an Account of his personal Pay, and the Pay of his Servants, and also the Pay of the Company; it was insisted, on Behalf of the Defendants, that she was only intitled to an Account of the Captain's personal Pay, and Pay of his Men, and not for the Pay of the Company, although they seemed to admit that a Captain for Land-Service was to recruit his Company, but would have it there was a Difference when he was a Captain of Marines; or if the Captain may be intitled, yet his Administrator was not; but *Ld. K.* decreed an Account of the Whole. *Hil.* 1711, *Bellasis and Churchill*, 2 *Vern.* 682.

9. A. had a Title to some Houses, by a Settlement made of them on him and his Wife, but being obliged to go beyond Sea, he left the Deed of Settlement with his Brother, who being afterwards [7] committed a Prisoner, the Defendant entred and enjoyed the Houses several Years; and it was decreed, that he should account for the Rents and Profits to A. 29 *Car.* 2 [1676-77], *Lister and Lister*, *Rep. Temp. Finch* 285.

10. If a Man, during a Person's Infancy, receives the Profits of an Estate to which the Infant is intitled, and continues to do so for several Years after the Infant comes of Age, before any Entry is made upon him, yet he shall account for the Profits throughout, and not during the Infancy only. *Pasch.* 1699, *Yallop and Holworthy*, that an Infant shall have an Account of Profits against an Intruder; *vide Newburgh v. Bickerstaffe*, 1 *Vern.* 295, but if there be a Verdict against his Title, he must recover at Law first.

11. But if there is no Trust nor Infant in the Case, nor any Entry made by him who is intitled to the mean Profits, Equity will not decree any Account of the Rents and Profits. Resolved *per Ld. Chan.* in the Case of *Hutton and Simpson & Ux'*, *&c* *contra*, *Mich.* 1716, 2 *Vern.* 722.

12. If there are three Part-Owners of a Ship, and one of them refuses to navigate the Ship, and the other two do it against his Consent, and the Ship is lost in the Voyage; yet he who refused shall contribute to the Loss in Proportion, as he was intitled to have an Account of Profits, had there been any. *Strelly and Winson*, 1 *Vern.* 297. (S. C. *post. cap. li. D.* 1 [1 *Eq. Ca. ABR.* 372]).

13. Two Persons agreed for the Purchase of an Estate in Moieties between them, which Estate was subject to several Incumbrances, which were to be discharged out of the Purchase-Money; one of them had Abatements made to him by some of the Incumbrancers of several Sums due for Interest, and otherwise, which they, in Consideration of Services and Friendship, agreed should be to his own Use; yet on a Bill brought for an Account of the Rents and Profits, the Court would not allow him the Benefit of these Abatements, exclusive of the other; but held, that he must account for them, the Purchase being made for their equal Benefit, and on a mutual Trust between them. *Trin.* 1728, at the *Rolls*, *Carter and Horne*.

(B) MATTERS TO BE BROUGHT INTO THE ACCOUNT, WHAT SHALL BE ALLOWED OR DISCOUNTED, WHERE AN ACCOUNTANT MAY CHARGE OR DISCHARGE HIMSELF, AND HOW THE PARTICULARS ARE TO BE ASCERTAINED.

1. If a Mortgagee or Trustee manage the Estate himself, there is no Allowance to be made him for his Care and Pains; but if he employ a skilful Bailiff, and give him £20 *per Annum*, that must be allowed, for a Man is not bound to be his own Bailiff. *Per Cur'*, *Easter 1685, Bonithon and Hockmore*, 1 *Vern.* 316.

2. One deviseth £250 to his Son, and makes his Wife Executrix, who marries another Husband; in a Bill brought against them for the Legacy by the Son, the Defendants would have discounted Maintenance and Education, which the Court would not permit; for it was said that the Mother ought to maintain the Child; but a Sum of Money paid for the Binding of him Apprentice was allowed to be discounted. *Mich.* 33 *Car.* 2 [1681], *Anon.* 2 *Vent.* 353.

[8] 3. The Plaintiff came as a Guest to the Defendant's House, at her Invitation and the Defendant insisted on £5 a Week for Diet and Lodging, alledging, that she being a Person of Quality, and courted by several Noblemen, much was spent in Entertainments, and prayed it may be allowed her in Account; but *Ld. Chan.* said, It was no honourable Demand, and decreed an Account without any such Allowance, it appearing that she came at her Invitation. *Arundell and Roll*, *Mich.* 1681, 1 *Vern.* 19. (Note: *Plaintiff was Defendant's aunt.*)

4. A Marriage Settlement was to all the Sons of the Marriage in Tail Male successively, and for want of such Issue, to the Daughters, till the Person next in Remainder should pay them £3000. On Failure of Issue Male, the Possession came to the Daughters, who insisted that they should hold the Lands until the Remainder-Man thought proper to determine their Estate by one intire Payment; but on a Bill brought by the Judgment-Creditors, who insisted to be let into a Satisfaction subject to this charge, and in Exoneration thereof, to have an Account of the Rents and Profits, it was decreed at the Rolls, that they should account for the Profits, and that the Rent should be applied, first to pay the Interest, and then to sink the Principal, as in Case of a common Mortgage; which Decree was affirmed by *Ld. Chan.* with this Variation, that the Principal should not be sunk by small Payments; but when a third Part was raised beyond the Interest then due, it should go to sink the Principal; and so again when another third Part was raised, &c. *Mich.* 1706, *Blagrove and Clunn*, 2 *Vern.* 523. (*Vide* 2 *Vern.* 576.)

5. It was insisted upon (and not denied) to be a Custom between Merchant and Merchant, that all Accounts should be evened on either Side, by way of Estoppel, especially when the Business is of the same Employment. [*Fashion v. Atwood*, 1679], 2 *Chan. Ca.* 7.

6. The Defendant had a Bond from the Plaintiff for £50 in 1684, and in 1685 the Defendant lodged and dieted with the Plaintiff, and in 1699 the Defendant brought an Action at Law on the Bond, against the Plaintiff, who brought this Bill to have a Discount for the Diet and Lodging; and though there was no Agreement for that Purpose, and such Length of Time passed, yet the Master of the Rolls decreed it to an Account, and said, That so, if the Defendant had been a Bankrupt, the Plaintiff should have had a Discount against the Commissioners or Assignees (that there may be a Discount against the Commissioners or Assignees of a Bankrupt, *Vide* 2 *Vern.* 428, the Case of *Peters v. Soume*, *post. cap.* viii. A. 3), and that a Discount was natural Justice in all Cases. *Hil.* 1699, *Arnold and Richardson*.

7. So where two Persons had mutual Dealings, but before their Accounts settled one of them died, and the Survivor brought a Bill against his Executors, to have an Account; and that the Plaintiff might discount what he was to pay out of what the Executors were to pay him; and it was decreed accordingly, although it was objected, it may make a *Devastavit* in the Executors. *Mich.* 1701, *Botnamont and Greener*.

8. The Plaintiffs were Assignees under a Commission of Bankruptcy awarded against Sir *Justus Beck*, and brought this Bill against the Defendants, to compel them to assign and transfer to the Plaintiffs several Shares in their Stock, to which Sir *Justice Beck* was intitled, and which in the Year 1720 cost him between £1000 and £1200. The Defendants by Answer insisted, that Sir *Justice Beck* was one of [9] the Directors of their Company, and that in the Year 1720, after his Purchase of the before-

mentioned Stock, the Company lent him about £12,000, and insisted, that they ought not to be obliged to let the Plaintiffs transfer or dispose of the interest which Sir *Justus* had in their Stock, without Payment of the £12,000 borrowed, and that by virtue of the Act 5 *Geo.* 1, one Account ought to be set off against the other ; and for that Purpose they had come in as Creditors under the Commission of Bankruptcy, and had proved their Debt : there was no Pretence that the Money was lent on the Security of the Stock ; but it was insisted, that on the Credit of the Great Parcel of Stock, which Sir *Justus* had in their Company at that Time, that they lent him this Money, and therefore would now stop his Stock till Payment thereof, or as far as the Value of the Stock would extend, which now by the great Fall of Stocks would by no Means satisfy their Debt ; but it was decreed at the Rolls, and that Decree on an Appeal affirmed by the Lord Chancellor, that the Defenders ought to permit the Plaintiffs, the Assignees, to transfer and dispose of the Stock for the most they could make of it, and that they could not stop or retain the Stock for their Satisfaction, either before or by Virtue of the Statute 5 *Geo.* 1. And it was resembled to the Case of the Lord of a Manor and his Copyholders, that the Lord could not refuse to admit a Person to whom one of the Copyholders had sold his Estate, on Account of any Debt due to the Lord by that Copyholder ; that as the Lord of the Manor in that Case, though he had the Freehold of all the Copyhold Estates in him, yet had no Right to any of the Copyholder's private Copyhold ; so here, though the Company had the whole Stock of the Company in them in their corporate Capacity, yet the Stock of each Proprietor was distinct, and vested only in himself, wherewith the Company had nothing to do further than they were invested therewith by the Charter, or Act of Parliament whereby they were incorporated and impowered, or ordered to transfer each one's Stock by Transfers to be made in the Books of the Company ; which otherwise every Proprietor might by Deed, or otherwise, have transferred as he thought fit. And it was held, that this Case differed from that of the *Hudson's Bay Company*, decreed *per* Lord Chancellor, assisted by *Raymond C. J.* and Mr. Justice *Price*, where there was an express By Law to subject the Stock of each Member to satisfy the Debts they should owe to the Company. And it was said, that this was not like the Case of *Demandray* and *Metcalf*, where a Banker lent £200 on a Pledge of Jewels, and afterwards lent the same Person a further Sum of Money on his bare Note ; yet he was not admitted to redeem the Jewels without Payment of the Note likewise ; for there it was between two private Persons. And it was held not to be within the Statute of 5 *Geo.* 1, which speaks only of mutual Dealings and Accounts, which is not this Case, as Sir *Justus* had a fixt permanent Interest in the Stock, and the Money was borrowed without Regard thereto. And the Court held this was not like the Case of Partnership, where if any of the Partners borrowed any of the Partnership's Money, his own Share should be answerable for it, and he should not be permitted to come into a Court of Equity, and pray an Account of his Share of the Partnership, Stock, and Effects, without making Satisfaction for the Debt he owed to the Partnership ; for this was a Transaction between them as private Persons, and on a mutual [10] Credit and Trust ; but the Loan of the £12,000 in the present Case to Sir *Justus*, was not in their corporate Capacity, wherein only he stood related to them, and held his Stock, but was a Loan by them as private Persons, for which they could not stop his Stock, which he held as a Member of the Company in their corporate Capacity. *Trin.* 1728, *Meliorucchi* and *Royal Exchange Assurance Company*.

9. Colonel *Russel* married the Widow of Lord *North and Grey*, who was Executrix of her Husband, and kept a Book of Accounts relating to his Estate, and after she married *Russell*, the same Book was kept and continued on. Afterwards he went over Governor to *Barbadoes*, and his Wife went with him, as did the Servant that made and kept the Book of Account : And there was Proof in the Cause, that the Book was made up from Vouchers, and that great Part of the Monies was paid : And the Witnesses believed all the other Monies were paid, and the Plaintiff charged the Defendant only by the Book ; and upon Exceptions taken to the Master's Report, the Question was, whether the Master ought not to have allowed the Book as a Discharge as well as a Charge ; and after long Debate, my Lord Keeper adjudged it should be allowed as a Discharge ; and the rather in this Case, because Colonel *Russell*, his Lady, and the Servant, were dead in *Barbadoes*, which amounted to Length of Time, which was always held a good Reason for allowing of it, and so took it to be a good Rule, and fit to be established, that where a Man was charged only by an Oath, or a Book, the

same should be his Discharge ; and the Case of *Mellish and Turner*, lately adjudged, was cited, where Books had been lost in the Earthquake at *Smeyna*, so that the Plaintiff could only charge the Defendant *Turner* by his own Books, the same Books were admitted to be his Discharge. *Mich.* 1701, *Darston and Earl of Oxford & al' Executors of Colonel Russel* [Pre. Ch. 188].

10. The Defendant was a House-keeper, and her Aunt, who was a very old infirm Woman, lived with her, and she from Time to Time received the Aunt's Money for her, as any was paid ; the Aunt died intestate, and the Plaintiff being intitled to a distributive Part of her Estate, brought a Bill against the Defendant, to discover what Sums of the Intestate's Money she had received for the Intestate. She by her answer sets out several Sums she had received for the Intestate whilst she lived with her, and at what Time, and that the Intestate had immediately put them out again at Interest, to such and such particular Persons, and set forth other sums which she had received and paid over to the Intestate. The Cause being heard without Proof on either Side, and an Account decreed, which was referred to a Master, he by his Report charged the Defendant with the Sums confessed by her Answer to be received, and submitted to the Court, whether she was not likewise to be discharged by the same Answer. The Master of the Rolls said, That though he looked on the Defendant in this Case to have acted only in the Nature of a Servant, who by the Justice of this Court may, on a Bill brought against him by his Master's Executors, discharge as well as charge himself by his Answer ; yet as the Defendant might in this Case have proved her Answer, as appears by the Answer itself, and had not so done, he referred it back to the Master, and each Side to make what Proofs they could ; and he declared that if the Answer was disproved, as to the Sums put out at Interest, he should give no [11] Credit to it as to other Particulars, else inclined it should be a Discharge too, as well as a Charge. *Trin.* 1702, *Bayly and Hill*.

11. An Account being of twenty Years standing, it was ordered that the Defendant may prove on Oath what he cannot prove by Books and cancelled Bonds, it being of so long a standing. *Peyton and Green*, 1 *Chan. Rep.* 146. An Account of fourteen Years standing admitted to be proved by Oath. 1 *Chan. Ca.* 127.

12. The Court will not allow any Thing to be placed to Account under the Head of *General Expences* (nor under the Head of *Sundries*. *Semb. Brerell v. Brerell*, 2 *Bro. Cas. in Chan.* 62), but the Party must name the Particulars. *Nel. Chan. Rep.* 117.

13. The Defendant, on Account, shall be discharged by his Oath of Sums under forty Shillings, but a Party shall not, by Way of Charge, charge another Person so. 2 *Chan. Ca.* 249, *Everard and Warren*, *Hil.* 30 & 31 *Car.* 2 [1679]. 1 *Vern.* 283, *Mick* 1684, in an anonymous Case, S. P. where it said, that he must mention to whom paid, for what, and when : *vide* 1 *Vern.* 470, where it is said, that the Court being informed, that the Course of the Court was, that an Accountant was to be allowed, on his own Oath, all Sums not exceeding forty Shillings each, so as the whole was not £100, declared that Rule seemed unreasonable, and would consider how to rectify it. *Temp.* 1687, *Whicherly and Whicherly*, 1 *Vern.* 470.

14. In an Account between Plaintiff, a Gardner, and Defendant, a Seedsman, the Defendant shall be allowed Sums under forty Shillings, by Way of Discharge, upon his Oath ; but the Plaintiff shall not be allowed any Thing on his Oath. *Marsfield and Weston*, 2 *Vern.* 176. *This is now the established Practice in Chancery.*

(C) WHAT SHALL BE A GOOD BAR TO A DEMAND OF AN ACCOUNT, AND WHERE AN ACCOUNT ONCE STATED SHALL BE CONCLUSIVE.

1. A. Prays to have an Account of the Sale of Goods taken in Execution at an Undervalue ; the Defendant pleads, that before he bought the Goods of the Sheriff, and afterwards, they were offered to the Plaintiff for the same Price he gave for them ; and the Plea was allowed good. *Hil.* 25 *Car.* 2 [1673], *Dean and Gard' & al'. Rep. Temp. Finch.* 111.

2. An account was decreed between the Plaintiff and Defendant ; and it being proved, that the Defendant had altered a Bundle of Papers ; and it being likewise reported by the Master, that he had suppressed the Evidence ; the Ld. Chan. disallowed the Defendant's whole Demand, though he swore he had produced all the

Papers ; and his Lordship declared he was satisfied, that all the Papers were produced (*Mar. He that hath committed Iniquity, shall not have Equity*). *Wardour and Berisford, Pasc. 1687, 1 Vern. 452.*

3. The Bill was to call the Defendant, the Plaintiff's Steward, to an Account ; the Defendant by Way of Plea insisted, that the Plaintiff had sued here, and also at Law, for the same Matter, and having her Election, she chose to have her Bill dismissed here, and not meeting with Success at Law, she now resorts back again to this Court ; that the Plaintiff had seized in violent and undue Manner all his Writings and Evidences, and likewise imprisoned his Person : The Court held, that a Dismission upon an Election was no more peremptory than a Nonsuit at Law ; and that as to the taking of the Papers, tho' Detinue of Charters is a good Plea at Law to an Account ; yet to say that the Plaintiff did once seize his Writings, is not good ; [12] for it is the *Detainer* that makes the Plea good ; and as to the Imprisonment, he may bring his Action ; and therefore ruled, that the Defendant should answer ; but ordered, that whereas there was a considerable Sum of Money in the Trunk, that the Money as well as Writings should be restored ; for though the Defendant may be greatly in the Plaintiff's Debt, yet she must not levy her own Debt after that Maner. *The Countess of Plymouth and Bladon, 2 Vern. 32.*

4. Though an Account be stated under Hand and Seal, yet if there appears any Mistake in it, the Court will order the Parties to go to a new Account. *3 Chan. Rep. 18, Proud and Combes, 15 Nov. 16 Car. 2 [1664].*

An Account settled ten Years before Bill filed, shall not be opened, though containing gross Errors ; but the Plaintiff shall be at Liberty to surcharge and falsify. Brownell v. Brownell, 2 Bro. Chan. Cas. 62.

5. The Defendant's Testator stated an Account with the Plaintiff, which was signed and sealed by the Parties ; but the Plaintiff afterwards finding that his Servant had paid £200 for which he had no Credit given him, prayed a new Account against the Executor, who pleaded the former Account stated, and that he was but an Executor, and knew not how to account : The Plea was over-ruled, but ordered to proceed no further than Answer without Leave of the Court. *27 Car. 2 [1675], Wright and Coron, 1 Chan. Ca. 262. Rep. Temp. Finch 431, S. P. in Chandler and Dorsett, 31 Car. 2 [1679]. 2 Chan. Ca. 157, S. P. in Osborne and Chapman, 35 Car. 2 [1683].*

6. A. makes a Jointure of an Equity of Redemption, and afterwards becomes a Bankrupt ; the Commissioners assign this Equity of Redemption, and the Assignees state an Account. The Jointress brings her Bill to be relieved, alledging Combination between the Assignees and the Mortgagee, and that they had allowed more Money than was due on the Mortgage. *Ld. K. The Assignees stand in the Place of the Husband, and the Account stated by them ought to be as conclusive, as if stated by the Husband ; and the Bill is not right in charging a general Fraud in the stating of the Account, but Plaintiff ought to have assigned particular Errors in the Account ; however the Plaintiff had Leave to amend her Bill. Knight and Bumpfelf, 1 Vern. 179.*

7. Mortgagee and Mortgagee settle an Account before a Master ; and now a subsequent Mortgagee sues for a new Account, supposing the former Account to be false, and made by Consent, but did not insist upon any Particulars ; and *Ld. Chan. declared, That the Account should bind the second Mortgagee, if the Fraud and Collusion were answered. Trin. 29 Car. 2 [1677], Needler and Deeble, 1 Chan. Ca. 299.*

A specific Devisee of a Mortgage is not bound by an Account settled between the Representative of the Mortgagor, and the Executor of the Mortgagee. Semb. Langley v. Oxford, Amb. 17.

But if the Mortgage had been devised in general to pay Debts and Legacies, it would have been otherwise. Ibid.

8. A. is a Tenant for Life of a Trust, Remainder to his Sons, A. before a Son born brings a Bill against the Trustees, and an Account is decreed, and afterwards taken ; this Account shall bind the Sons, for all Persons that could be made Parties were Parties to the Suit. *Leonard and Com. Sussex, Mich. 1705, 2 Vern. 525.*

9. An Account taken, and a Distribution decreed in the Spiritual Court, of a Personal Estate ; yet a new Account decreed by Lord Chan. *Bissell & Ux' and Axtell & al', Easter 1688, 2 Vern. 47.*

10. The Plaintiff's Husband and the Defendant had Dealings together as Merchants ; the Bill was for an Account ; and although it was agreed that Length of Time was no Bar, yet the Plaintiff's Husband living many Years after the Trade and Dealings

between them ceased. [13] and acquiescing to the Time of his Death, the Court dismissed the Bill, and left the Plaintiff to recover at Law, if she could. *Sherman and Sherman, Mich. 1692, 2 Vern. 276.*

A Bill to open an Account of Monies paid must state specific Errors, else every Transaction might produce a Chancery Suit; per Sir Lloyd Kenyon, Master of the Rolls, *Taylor v. Haylin, 2 Bro. Chan. Ca. 310.*

11. Among Merchants it is looked upon as an Allowance of an Account current, if the Merchant who receives it does not object against it in a second or third Post. *Per Hutchins, Ld. Commiss. in the case of Sherman and Sherman, Mich. 1692, 2 Vern. 276.*

CAP. III.

AFFIDAVITS.

(A) Where an Affidavit is necessary, & *e cont.*

(B) Where an Affidavit may be said to be full and sufficient, and what shall be allowed thereon.

(A) WHERE AN AFFIDAVIT IS NECESSARY, & *e cont.*

1. If a Bill be exhibited, grounded on the Loss of a Bond; per Ld. K. As it is the Loss which intitles the Court to Jurisdiction of the Cause, Affidavit must be made of it. *Trin. 26 Car. 2 [1674], Anon. 1 Chan. Ca. 231.*

2. But if a Person comes only for a bare Discovery of a Deed, he need not make Oath of the Loss of it, as he must do when he comes for Relief; for he cannot translate the Jurisdiction without Oath made of the Loss of the Deed. *Per Ld. K. Trin. 1684, Godfrey and Turner, 1 Vern. 247.*

3. So where a Bill was brought for a bare Discovery of a Deed, and the Defendant demurred, because the Plaintiff had not made Oath, according to the Course of the Court, that he had not the Deed; upon which this Distinction was taken and allowed of by the Court, *viz.* That where a Person comes for a Discovery, and prays Relief, there it is necessary for him to make Affidavit of the Want of the Deed; but when he seeks but a bare Discovery, or to have it produced at a Trial, it is not necessary; for it is not to be presumed, [14] that the Plaintiff in either of the later Cases would do so absurd a Thing, as exhibit a Bill, if he had the Deed. [Anonymous, 1663] 1 Chan. Ca. 11. [Anonymous, 1683] 1 Vern. 180, S. P. But *vide* [Anonymous, 1682] 1 Vern. 59, where the Distinction is taken quite contrary, *but seems to be the Mistake of the Reporter.*

4. The Plaintiff had purchased the Manor of *Leyborn* in the County of *Kent*, and the Defendant was Tenant of Part thereof by a Lease for Years, which was now expired, at the Rent of £80 *per annum*; and the Plaintiff by his Bill set forth, that the Court-Rolls, Title-Deeds, and Writings belonging to this Manor, were kept in a Closet in such a Room at the chief Mansion-House, and that after his Purchase, the House being repairing, and Workmen in the House, the Defendant took that Opportunity, and got into the Closet, and took away all the Writings, and (amongst others) the Counterpart of the Defendant's Lease, and charged that the Defendant had broke several of the Covenants in his Lease; but that for Want of the Counterpart the Plaintiff could not ascertain his Damages in an Action at Law to be brought concerning the same; and therefore prayed a Discovery of this Counterpart, and general Relief. To this Bill the Defendant demurred to the Relief only, for that the Plaintiff had not annexed to his Bill the usual Affidavit, that he had not the Counterpart in his Custody, and gave a full Answer, by Way of Discovery, to the whole Bill; but the Demurrer was overruled, for that the Bill was only for a Discovery, and therefore though he charged that several of the Covenants were broken, yet he did not pray any Recompence or Satisfaction for such Breach, but only complained, that for Want of the Counterpart he could not ascertain his Damages at Law, so that he had wholly an Eye to Law for his Satisfaction; and though he prayed Relief generally, that was only to be applied to the Particular Relief he had before prayed, which was a Discovery of the Counterpart of the Lease. *Trin. 1729, Whitworth and Goulberg (2 Will. Rep. 541, S. C.) S. P.* As to the general Relief being applied to a Discovery, resolved the same Day between *King and King.*

5. A Plea of Privilege of an University need not be upon Oath; but it is sufficient to aver, that the Party is a Scholar resident, &c., 26 *Car.* 2 [1674]. *Prat* and *Taylor*, 1 *Chan. Ca.* 237, [Anonymous, 1673] 1 *Chan. Ca.* 258, S. P.

6. A Plea of Outlawry need not be upon Oath, [Prat v. Taylor, 1674] 1 *Chan. Ca.* 237, [Anonymous, 1673] 1 *Chan. Ca.* 258, S. P. But *Quære*.

7. For where the Defendant pleaded the Privilege of the Exchequer, being the Foreign Opposer, the Plea was over-ruled, because it was not put in upon Oath. *Per* Ld. Chan. *Mich.* 1688, *Gibson* and *Whiteacre*, 2 *Vern.* 83. So a Plea of Outlawry was disallowed, because it was not put in upon Oath. *Hil.* 1688, *Parrot* and *Bowden*, 2 *Vern.* 37.

8. There was a Reference to the Six Clerk, whether a Plea of Outlawry, with an Averment of the same Person, ought to be upon Oath; and it was urged, that it had been so ruled in Lord *North's* Time, because it might come from the other Side, to aver that he was not the same Person; and the Court allowed the Plea to be good, being only the common Averment, but gave Leave to amend on Payment of 20s. Cost. *Mich.* 1690, *Took* and *Took*, 2 *Vern.* 198.

9. A Plea of a former Suit depending for the same Matter, need not be upon Oath. *Trin.* 1685, *Urlin* and ———, 1 *Vern.* 332.

[15] 10. Where a Person is arrested upon an Attachment, the Contempt shall hold good, though no Affidavit be filed at the Time of taking forth the Attachment, if it be filed before the Return of it. By Ld. K. *Trin.* 1683 [Anonymous], 1 *Vern.* 172.

(B) WHERE AN AFFIDAVIT MAY BE SAID TO BE FULL AND SUFFICIENT, AND WHAT SHALL BE ALLOWED THEREON.

1. Declared by *Jefferies*, C. that a general Affidavit of having material Witnesses beyond Sea should not be sufficient, but the Witnesses must be named in the Affidavit, and the Point mentioned to which they can materially depose. *Mich.* 1685 [Anonymous], 1 *Vern.* 334.

2. Some Bailiffs, who had served an Execution in Breach of an Injunction, find Money hid in the House, and carry it away, and the Party, at whose Suit the Execution was taken out, was ordered to make Satisfaction, who complained of this Order as unjust, saying, That the Parties should be admitted to purge themselves by Oath; and that the Plaintiff should not be admitted to be Judge of his own Damages; but Ld. K. confirmed the Order, and said, That a Man who had stolen, would not stick to forswear it; and that therefore, in *Odium Spoliatoris*, the Oath of the Party injured should be a good Charge on him who did the Wrong. *Childrens* and *Saxby*, 35 *Car.* 2 [1683], 1 *Vern.* 207.

3. An Accountant shall be allowed Sums under forty Shillings on his own Affidavit. *Mich.* 1684. *Anon.* 1 *Vern.* 283. But for this vide Title Account (B), Pl. 13 & 14 [1 Eq. Ca. Abr. 11].

[16] CAP. IV.

AGREEMENTS, ARTICLES, AND COVENANTS.

- (A) Agreements and Covenants which ought to be performed in Specie, & *e cont'*.
- (B) Parol Agreements, or such as are within the Statute of Frauds and Perjuries, & *e cont'*.
- (C) Voluntary Agreements, in what Cases to be performed.
- (D) Agreements, by whom to be performed.
- (E) Concerning the Manner and Time of performing Agreements.
- (F) Where the Person or Estate will be made liable to a Covenant or Agreement.
- (G) Where there may be Relief when the Agreement is not strictly performed.

(A) AGREEMENTS AND COVENANTS WHICH OUGHT TO BE PERFORMED IN SPECIE, AND *e cont'*.

1. If an Uncle covenants, in Consideration of natural Love, and in order to gain a Reconciliation between his Nephew and his Father (whom the Nephew had disobliged),

to settle his Estate on his Nephew : Such Covenant shall be executed *in Specie* : though it be objected, that a Court of Equity cannot decree the Execution of a Covenant or Agreement *in Specie*, when the Party has a Remedy for Damages at Law. *Wiseman* and [17] *Roper*, 21 Car. 1 [1645-46], 1 *Chan. Rep.* 158. An Agreement decreed *in Specie*, 19 *Elliz.* [1576-77], *Circa* 84, and the like Objection made.

(Prohibitions have formerly been granted to inferior Courts of Equity, for defeating the Performance of Agreements *in Specie* ; as where a Man promised to make a Lease, and refusing, the Court of Marches of Wales decreed a Performance ; and a Prohibition was granted. 1 *Roll. Abr.* 280 ; *Lat.* 172 ; 1 *Roll. Rep.* 368. But now the Power of Chancery, and other Courts of Equity, in enforcing the Execution of Articles and Agreements, is so well established, that in many Cases, Money agreed to be laid out in Lands shall be considered as Lands, and Lands as Money ; *vide* 1 *Chan. Ca.* 39, and though a losing Bargain will sometimes be decreed, as well as a beneficial one, 2 *Vern.* 423, yet it must ever be observed, that Articles or Agreements, out of which an Equity can be raised *in Specie*, ought to be obtained with all imaginable Fairness, and without any Mixture tending to Surprize or Circumvention ; and that they be not extremely unreasonable in any Respect ; otherwise a Court of Equity will according to the Circumstance of the Case, either set the Agreement quite aside, send the Party to Law or direct a Trial in a *Quantum damnificat*.)

2. A. having a Lease from the Dean and Chapter of ——— sells it to B. and it was agreed, that upon A's abating Part of the Money, B. should, upon the King and the Dean and Chapter's Restoration, reconvey it to A. and though it was objected, that this was in Nature of a Wager, and so more proper for a Common Law Court ; yet a specifick Performance of the Agreement was decreed. By Master of the Rolls, 14 Car. 2 [1663], *Parker* and *Palmer*, 1 *Chan. Ca.* 42. (Upon an Appeal to this Decree it was affirmed by Ld. Chan. and *Bridgeman*, *ibid.*)

3. J. S. upon a Treaty of Marriage, offered to settle £500 *per Annum* as a Jointure on his intended Wife, and was intrusted with the Drawing of the Settlement, which the Wife never read, and the Jointure settled was but £400 *per Annum*, and he taking Notice during the Marriage, that the Jointure settled was not so much, and talking of making it up, but dying before, his Heir was decreed to make it up, although there was no Covenant or Agreement proved, by which he bound himself to make a jointure of that Value. *Mich.* 1681, *Benson* and *Bellasis*, 1 *Vern.* 15, 17.

(There needs no great Exactness in the Words which make a Covenant ; for where it appears to be the Intent of Two to do, or not to do a Thing, it will be construed a Covenant, and the rather in Equity, where a Covenant is only considered as an Evidence of an Agreement, as a Bond may be. *Vide* 1 *Chan. Ca.* 294.)

4. A female sole, being Tenant in Possession, agrees with the Heir at Law, who pretended a Title, that in case he did not disturb her, she would leave him the Land after her Death, if she died without Issue of her Body, or £500 in Money ; the Feme married, and devised to her Husband ; and though it was urged, that this was all the Portion the Husband had with her, and that he was therefore *quasi* a Purchaser, and that she being Tenant in Tail, might have docked the Remainder ; notwithstanding Ld. Chan. decreed a Performance of the Agreement. *Pasc.* 1682, *Godmer* and *Battison*, 1 *Vern.* 48.

5. If A. upon the Marriage of his Brother, executes a Writing, by which he promises, if the Wife be worth £160 and if he dies without Issue, he will give his Lands to his Brother and his Heirs, and the Wife is worth £160. And A. himself afterwards marries and settles the Lands in Jointure upon his Wife, and dies without Issue, having devised the Lands to his Wife in Fee, though this is urged to be a Limitation to take Effect after a Dying without Issue, and so subject to be destroyed by the Tenant in Tail, yet as the Marriage was proved to be in Expectation of the Performance of this Agreement, it will be good against the Devisee of the Wife. Decreed 33 *Car.* 2 [1681], *Goylmer* and *Paddiston*, 2 *Vent.* 353, 354.

(*Maxim.* Equity regards not the Circumstance, but the Substance of the Act. See note, an Agreement in Equity is better than a Conveyance at Law. *Max. of Eq.* 53, 54.)

6. The Plaintiff assigned some Shares of the Excise to the Defendant, who thereupon covenanted to save him harmless, and to stand in his place touching all Payments to the King ; the Plaintiff being sued by the King brought his Bill to have the Agreement performed *in Specie*, and although it was insisted that the Plaintiff might recover [18] Damages at Law ; and that this was not a Covenant for any

Thing certain ; and that by this Means a Master in Chancery was to tax Damages instead of a Jury ; yet it was decreed, that the Defendant should perform his Covenants ; and it was directed to a Master, that as often as any Breach should happen, he should report it specially, that the Court, if Occasion should be, might direct a Trial in a *Quantum damnificat*. Mich. 35 Car. 2 [1683]. *Lord Ranelagh and Hayes*, 1 Vern. 189. 2 Chan. Ca. 146, S. C.

(Breach of Covenants triable at Law ; for Equity will not settle damages. *Stafford and Mayor of London*, 17 March 1719, *In Dom' Proc*.)

7. If *J. S.* a Jointress, brings her Bill to have an Account of the Real and Personal Estate of her late Husband, and to have Satisfaction thereout for a Defect of Value of her Jointure-Lands, which he had covenanted to be and to continue of such Value ; and the Defendant insists, that this is a Covenant which founds only in Damages, and properly determinable at Law ; tho' it be admitted, that a Court of Equity cannot regularly assess Damages ; yet in this Case a Master in Chancery may properly inquire into the Value and Defect of the Lands, and report it to the Court, which may decree such Defect to be made good, or send it to be tried at Law upon a *Quantum damnificat*. Mich. 1699, *Hedges and Everard*.

8. The Condition of a Bond was to settle certain Lands in such a Manor by such a Day ; the Obligor dies before the Day, so the Bond was saved at Law ; and the Question was, Whether this Court would decree an Execution *in Specie* : Per Ld. Chan. the Lands must be settled, and so it has often been done. *Pasc.* 1697, *Holtham and Ryland*. S. C. *Nels. Ch. Cas.* 205.

C. Contracted to sell his Estate to M. for £200, and an Annuity of £50 a Year for C's Life. Two days afterwards he died. Per Ld. Chan. Such a Contract (the Terms being fair), shall be specifically performed by the Heir of C. To decree otherwise would be to lay down a Rule, that where a Bargain depends on a contingent Event, which Chance both Parties know, if the Event turns out against one of the Parties, he must be discharged from his Contract. Mortimer v. Capper, [1] Bro. Chan. Cas. 156.

9. By a Marriage-agreement, which was reduced into Writing, but not sealed, the Son's intended Wife was to have more than would have been left for the Father (indebted), his Wife, and two Daughters unpreferred ; and the Court would not decree it, principally by Reason of the Extremity of it, but left the Party to his Remedy at Law. (Here the Agreement was not fraudulent, or gained by Surprise, and therefore not to be set aside ; the Court not being willing to decree the Whole, and not being able to decree Part (for a Court of Equity cannot assess Damages), it must necessarily go to Law. *Max. of Eq.* p. 6 in the Note.) 31 Car. 2 [1679], *anon.* [2] Chan. Ca. 17.

W. Contracted for the Purchase of A's Estate, on very high Terms, on a Speculation. During the Treaty, he had desired that the Contract might be Conditional, on the Success of his Expectations. This A. refused, insisting on an unconditional Contract, which was at length made. W. failed in his Speculation, and now A. filed his Bill for a specific Performance, which was accordingly decreed. Adams v. Weare, [1] Bro. Chan. Cas. 567.

10. If *A.* articles for the Purchase of *B.*'s Estate, pretending he bought it for one whom *B.* was willing to oblige, and thereby gets it somewhat the cheaper, when in Truth he bought it for another, Equity will not decree an Execution of this Agreement. *Hil.* 1682, *Philips and The Duke of Bucks*, 1 Vern. 227.

If an Agreement be made for the Purchase of an Estate, and it appears that during the Treaty the Vendor concealed an Out-going, he shall not have a specific Performance decreed to him. Shirley v. Stratton, [1] Bro. Chan. Cas. 440.

11. *A.* on the Marriage of his Daughter to *B.* covenants that *B.* shall have his Lands called *C.* at his Death, cheaper by £1500 than any other Person, and lives twenty Years after, and devises to *B.* £1000, and to his Daughter, *B.*'s Wife, £500 and devises the Lands to his Grandson ; the Court refused to decree an Execution of the Agreement, because of the Uncertainty of it ; and it not being mutual, *B.* not being bound to take it at any Price. *Hil.* 1700, *Bromley and Jefferies*, 2 Vern. 415. *Proc. in Chan.* 138, S. C. See also 2 *Freem.* 245.

12. An agreement for a Purchase being obtained by an Attorney from an old Woman of Ninety, and several suspicious Circumstances appearing, Ld. Chan. would neither decree it to be carried into Execution against the Heir at Law, nor to be delivered up upon a Cross Bill exhibited for that purpose. *Hil.* 1708, *Green and Wood*, 2 Vern. 632.

No Specific Performance shall be decreed of an Agreement to renew a Lease, in consideration of Money previously laid out by the Tenant. Such a Promise is Nudum Pactum. Nor will the Case be carried by Money having been expended by the Tenant after such Promise. But if, previous to the Promise, the Tenant had expended for Intention to lay out Money, and on that Consideration the Promise had been made, a specific Performance should be decreed. Robertson v. St. John, 2 Bro. Chan. Cas. 140.

[19] (B) PAROL AGREEMENTS, OR SUCH AS ARE WITHIN THE STATUTE OF FRAUDS AND PERJURIES, & c. *cont'*.

A Bill was brought to have the Execution of a Parol Agreement for a Lease of a House, setting forth, that the Plaintiff, in Confidence of this Agreement, had expended large Sums of Money in Repairs, &c., to which the Defendant pleaded the Statute of *Frauds and Perjuries*, and the Plea was allowed. But Ld. K. was of Opinion, that if it had been laid in the Bill to be Part of the Agreement, that it should be put into Writing, it might have altered the Case, and possibly require an Answer. *H 2* 1682, *Hollis and Whiteing*, 1 *Vern.* 151.

Note: *Hollis v. Whiting* was never decided; and Ld. Aylesford's Case *Str.* 783, is directly contrary. *Per* Ld. Thurlow, 2 *Bro. Chan. Cas.* 564.

(a) By the 29 *Car.* 2, c. 3, All Estates, Interests of Freehold, or Terms for Years, or any uncertain Interest in or out of Lands, &c., not put in Writing, and signed by the Parties making them, or their Agents authorized by Writing, shall have no greater Effect than as Estates at Will, except Leases not exceeding three Years, from the Making whereof the Rent reserved shall be two Thirds of the full Value of the Thing demised.

Any Acts, pleaded to be done in part Performance, must be such as could not be done with any other View or Design than to perform the Agreement. Gunter v. Halsey, Ambler 586.

So no Act merely Introductory or Ancillary to the Agreement, though attended with Expense, shall be held a Part-Performance, Bro. Chan. Cas. 412.

As the sending an Appraiser to value the Thing agreed for. Whithurst v. Brockhurst, et al. Bro. Chan. Cas. 404. *Whitchurch v. Bevis*, 2 *Bro. Chan. Cas.* 559.

2. Bills were to have an Execution of Parol Agreements touching Leases of Houses, setting forth, that in Confidence of these Agreements Plaintiffs had expended great Sums about the Premises; and it was alleged, that it was agreed, that the Agreements should be reduced into Writing. Defendant pleaded the Statute of *Frauds*. Ld. K. said, That the Difficulty was, that the Act makes void the Estate, but does not say, that the Agreement itself shall be void; and therefore, he thought, that if that subsisted, so as to intitle the Party to Damages at Law, it might be decreed in Equity, and directed that Point to be tried; and that afterwards he would consider farther of it; but as to the Improvements made, his Lordship was clear of Opinion, that for such as were for Use and Necessity, and not merely for Humour and Fancy, the party was to have Satisfaction. *Easter* 1683, *Hollis and Edwards & al. Deane and Izard*, 1 *Vern.* 159.

(As the Statute of *Frauds and Perjuries* was made with a Design to prevent, either in Marriage, or any other Treaties, Incertainty, Perjury, or Contrariety of Evidence, several Cases not liable to these Inconveniences have been determined to be out of the Statute, upon the following Distinctions, which seem the more necessary to be mentioned, as many of the printed Cases on this Subject take no Notice of them; and by not giving us all the Circumstances of the Case, frequently contradict each other; it may likewise be proper to insert the Cases themselves, which support these Distinctions.)

3. 1st. *That tho' the Agreement be by Parol, and in no part executed, yet if there is no Incertainty, the Court will decree it:* As if a Bill be brought for a Specific Performance of an Agreement, and the Substance of the Agreement is set forth in the Bill, and confessed by the Defendant's Answer, the Court will decree Execution of it; for in this Case there is no Danger of Perjury, which was the only Thing the Statute intended to prevent. *Mich.* 1702, *Croyston and Bates*. (*Proc. in Chan.* 208, *S. C. Vol.* *Ambler* 586; *Gunter v. Halsey*. *See, qu. Whether in these Cases Defendant insist on the Statute, Vide Eyre v. Ivison, Trin.* 1785 *ed.* 2 *Bro. Chan. Cas.* 563, and *Stewart*

v. *Careless* cit. 2 Bro. Chan. Cas. 564, 565. And in the principal Case (*Whitchurch v. Beris*) Ld. Thurlow allowed a Plea of the Statute of Frauds, though a Parol Agreement was confessed by the Answer. 2 Bro. Chan. Cas. 559.) Mich. 1713, S. P. *Simondson and Tweed* [Pre. Ch. 374].

4. 2dly, That tho' the Agreement be by Parol, yet if it be agreed to be reduced into Writing, and Part of the Agreement is executed, but the reducing of it is prevented by Fraud, it may be good. As if upon a Marriage-Treaty, Instructions are given by the Husband to draw a Settlement, and by him privately countermanded, and afterwards he draws in the Woman, by Persuasions and Assurances of such Settlement, to marry him, this shall be executed. Mich. 1719, *Sir George Maxwell and Lady Montacute's Case*. Prec. in Chan. 526, and 1 Will. Rep. 618, S. C.

[20] 5. So where a Parol Agreement was concerning the Lending of Money on a Mortgage, and the Conveyance proposed was an absolute Deed from the Mortgagor, and a Deed of Defeasance from the Mortgagee; and after the Mortgagee had got the Deed of Conveyance, he refused to execute the Defeasance; yet it was decreed against him on the Fraud, by Lord Nottingham, soon after the making the Statute, a Case quoted and agreed to, in *Sir George Maxwell's Case*, Mich. 1719.

6. 3dly, When the Agreement is signed but by one Party, yet it may be decreed on the Circumstances of Fraud; as where the Defendant, on a Treaty of Marriage for his Daughter with the Plaintiff, signed a Writing comprizing the Terms of the Agreement; and afterwards designing to elude the Force therefore, and get loose from his Agreement, ordered his Daughter to put on a good Humour, and get the Plaintiff to deliver up that Writing, and then marry him, which she accordingly did; and the Defendant stood by at a Corner of a Street to see them go by to be married; and the Plaintiff was relieved by the Master of the Rolls upon the Point of Fraud, which was proved. Cited to be adjudged by Ld. Chan. in the Case of *Bawdes and Amhurst*, Pasc. 1715 [Pre. Ch. 402]. *Mallet and Halfpenny*, Hil. 1699, 2 Vern. 373, S. C. reported by the Name of *Halfpenny and Ballet*; but no Mention made of any Fraud, but that the Father having permitted Plaintiff to court his Daughter, and the Marriage being afterwards had, and he not declaring his Dislike till asked for Payment of the Portion, and permitting the young Couple to live with him; the Master of the Rolls decreed the Agreement, and Payment of the Portion.

7. The Defendant's Son made his Addresses to the Plaintiff's Daughter, and the Plaintiff desiring to know what the Father could settle on him, he told him, that his Father had an Estate of £60 *per Ann.* that he was in a good Trade, and would take him in Partner; and said he would satisfy him more particularly by going to his Father, who lived at some Distance off, and accordingly went, and on his Return told him, that he would settle the Estate on him, and take him in Partner; upon which the Plaintiff agreed to settle a Leasehold Estate on him of 2 or £300 *per Ann.* but desired the Son to acquaint his Father of it by Letter, who did, and the Father, in his Answer, expressed his Good-liking of the Match, and said he would comply with every Thing he told his Son. On the Marriage-Day the Woman fell sick of the Small-Pox, and the same Day the Son went to his Father's, where he fell sick likewise of the Small-Pox, but in his Sickness was prevailed on to make a Will, and devise the Leasehold Estate to his Father, and died: The Wife recovering, her Father and she pray a Reconveyance of the Leasehold Estate, or that the Agreement might be performed *in Specie*, and a Discovery of the Letter wrote by the Son, and insisted, that the Letter and Answer brought the Agreement out of the Statute of *Frauds*; but the Defendant denying that he knew the contents of the Letter, though he owned he received such a one, and that he had burnt it as Waste-Paper, Ld. Chan. (though he said it was a case of great Compassion) doubted whether he could relieve the Plaintiffs, saying, It was executed only according to the Statute by one Party, and what the Defendant told his Son might be very uncertain, who perhaps might have magnified Matters, in order to enhance his Father-in-Law's good Esteem of him; but he gave the Parties Time to see if they could agree the Matter. Hil. 1710, *Hall and Butler*.

[21] 8. On a Marriage-Treaty, the Lady's Father proposed to give £4500 Portion, and the Husband was to settle 4 or £500 *per Ann.* for a Jointure; the Father and intended Husband went to Mr. *Minshall's* Chambers, who hearing the Proposals on both Sides, took down Minutes or Heads thereof in Writing; and the same day gave them to his Clerk, to draw a Settlement according to the Terms of the Agreement; the next Day the Father fell sick suddenly, and died in two Hours after, and the next Morning the

Marriage was consummated ; and on a Bill brought to have a specifick Performance of the Agreement, Ld. Chan. decreed it to be within the Statute of *Frauds*, and said, he knew no Case where an Agreement, though wrote by the Party himself, should bind, if not signed, or in Part executed by him ; and that those preparatory Heads might have received several Alterations or Additions, or the Agreement might have intirely broke off upon some further Inquiry of the Party's Circumstances ; and this Decree was thought very just by the Bar, who all agreed with my Lord Chancellor. That if the Marriage had been had upon the Foot of this Writing, and the Father had been privy and consenting to it, he should afterwards have been obliged to execute his Part thereof. *Pasc. 1715, Bowdes and Amhurst* [Pre. Ch. 402].

If there be general Instructions for an Agreement, consisting of material Circumstances, to be hereafter extended more at large, and to be put into the Form of an Instrument, with a View to be signed by the Parties, and no Fraud, but the Party take Advantage of the locus Penitentiae, he shall not be compelled to perform such Agreement, if he insist on the Statute of Frauds. Per Lord Thurlow, Hil. 1789, Whitechurch v. Bevis, 2 Bro. Chan. Ca. 559. Vide Mitford on the Pleadings in Chan. 2 Ed. p. 210, S. C.

9. If A. agrees to sell the Lands in Question to B. and a short Note is drawn of the Agreement, (but not signed by either Party) purporting, among other Things, that B. should have the Lands from *Lady-day* next, and that he should then pay the Purchase-Money, and Possession is delivered B. who thereupon puts in his Cattle, and makes Incroachments on A's other Lands, by which some Differences arose, which to remove, A. desires B. to repeal the Bargain, which he refused ; upon which A. sells the Lands to C. who had Notice ; B. having tendered the Money and Conveyances the 26th of March following, he will be decreed the Lands, this Agreement being in Part executed, and therefore not within the Statute. *Hil. 1685, Butcher and Stapely, 1 Vern. 363. 2 Vern. 455, S. C. cited in a Case where an Agreement, though not signed, yet being in Part executed, was decreed. Pyke and Williams* [2 Vern. 455].

Note : C. had no express notice, but Ld. Chan. held, that, inasmuch as possession was delivered according to the Agreement, that should be taken to be Notice. *Vide* [Butcher v. Stapely, 1 Vern. 365].

Plaintiff pursuant to a Parol Agreement for a Building Lease of Wildhouse, had proceeded to pull down part, and build part. Before any Lease executed the owner of the Soil died. The Defendants his Representatives knew nothing of the matter, and insisted on the Statute of Frauds. Ld. Keeper dismissed the Bill ; but on an Appeal to the Lords in Parliament his dismissal was reversed and a Building Lease decreed. *Foxcroft v. Lister, Cit. 2 Vern. 456.*

10. A. sold houses to B. for £2000, a Note was made by A. of the Agreement, and signed by B. only ; and it was objected, that this was within the Statute, and that the Note binds not him who did not sign it ; and that they must be both or neither bound in Equity ; but it was decreed that they were both bound. *36 Car. 2* [1684], *Hutton and Gray, 2 Chan. Ca. 164.*

If the Party to be charged have Signed, it is enough. Cotton v. Lee, cit. 2 Bro. Chan. Cas. 564.

11. A. agreed by Parol with B. for a Lease, which was drawn, perused, and corrected by A's Counsel, and afterwards engrossed ; B. signed the Lease, A. having pleaded the Statute : The Court ordered him to answer, but saved the Benefit of the Plea till the Hearing. *Hil. 1683, Lowther and Carril, 1 Vern. 221. (Vide the Book.)*

12. An Administratrix, and her two Children, being entitled to a Lease of a House, they all agree to make a Lease to J. S. for ten Years, and the Administratrix alone, with the Privy of the other Two, executes the Lease ; and it was held, that this was out of the Statute, and the Lease good. *Mich. 1683, Heighter and Sterman, 1 Vern. 210.*

[22] 13. A. and B. being Joint-Lessees of a Building Lease, A. by Parol agrees to sell his Interest to B. for four Guineas, and accepts a Pair of Compasses in Hand to bind the Bargain ; A. having pleaded the Statute of *Frauds*, Ld. Chan. ordered him to answer, the Agreement being in Part executed, but saved the Benefit of the Plea to the Hearing. *Mich. 1687, Alsopp and Patten, 1 Vern. 472, 473.*

14. But where A. and B. being severally in Treaty to purchase House and Tott of Ground of J. S. agree by Parol, that A. shall desist, and that B. shall purchase, and let A. have part of the Ground, which he wanted, at a proportionable Price ; and B. purchased but refused to perform the Agreement ; it was held by the Master of the Rolls, that this was out of the Statute, being in Part executed by A's desisting ; but upon an

Appeal Ld. Chan. held it within the Provision of the Act, and reversed the Decree. *Mich.* 1708, *Lamas and Bayly*, 2 *Vern.* 627.

15. The single Point of a Case was, Whether an Agreement in Writing could be discharged by Parol; and Ld. K. *North* held it might, and dismissed the Bill, which was brought to have it executed *in Specie*. *Pasc.* 1684, *Gorman and Salisbury*, 1 *Vern.* 240.

16. A. wrote a Letter signifying his Assent to the Marriage of his Daughter with J. S. and that he would give her £1500, and afterwards, by another Letter, upon a further Treaty concerning the Marriage, he went back from the Proposals of his first Letter; but in some Time after declared, that he would agree to what was proposed in his first Letter: This Letter was held a sufficient Promise in Writing, and not within the Statute of *Frauds and Perjuries*, 35 *Car.* 2 (a), *Bird and Blosse*, 2 *Vent.* 361, and that the last Declaration had set up the Terms of the first Letter again; *vide* 1 *Vern.* 110, *Mich.* 1682, in *Moore and Hart*, where a Letter wrote by a Father, promising a Portion, and he consenting, held out of the Statute.

(a) By the 29 *Car.* 2, c. 3, No action shall be brought to charge any Person on any Agreement or Consideration of a Marriage, unless the Agreement, upon which such Action shall be brought, or some Memorandum or Note thereof, shall be in Writing, signed by the Party to be charged therewith, or some other Person authorised by him.

17. On a Bill for a Marriage-Portion, the chief Evidence to support it was a Letter proved to have been written by the Father's Direction, wherein it was said he would give £1500 Portion with his Daughter, and that he was afterwards privy to the Marriage, and seemed to approve of it; and the Portion was decreed the Husband, who had taken out Administration to his Wife; and this Decree affirmed in the House of Lords. *Mich.* 1694, *Wankford and Fotherby*, 2 *Vern.* 322. (2 *Freem.* 201, S. C. and Decree under the Name of *Wankford and Fotherley*; and this Reporter says, that Lord Keeper cited two Cases, one of *Hart and More*, where a Portion was decreed upon a Letter writ, and another of *Masquill, &c.*, where Writings were prepared and agreed, but being blotted, were ordered to be writ fair, and were so; but before they were sealed the Party died, and Equity charged the Executor with the Portion agreed to be paid. *Ibid.* 202.)

18. On a Treaty of Marriage between the Plaintiff and the Defendant's Daughter, a Meeting was appointed, and an Agreement drawn up in Writing, but signed by neither Party; and the Defendant swore, that though it was drawn up in Writing, yet upon some Disputes and Difficulties arising afterwards, it broke off; but one Witness swore, that after it was writ, it was read to the Parties, and approved of by them; afterwards the Plaintiff married the Defendant's Daughter, with his Consent and Privy, who seemed so well pleased, that he helped to set them forward in the Morning, and entertained them at his House; and he was decreed to perform the Agreement. *Hil.* 1690, *Cookes and Mascall*, 2 *Vern.* [34] 200, 201.

[23] 19. But where A. by Letter under his Hand promised £1000 to his Niece, but in the same Letter dissuaded her from marrying the Plaintiff, but afterwards was present at, and gave her in Marriage; yet the Court would not decree the Payment of the £1000, but left the Plaintiff to his Action at Law. *Hil.* 1690, *Douglas and Vincent*, 2 *Vern.* 202.

20. A. and B. agree, that B. shall assign a Term for Years in his House and Plate, and certain Vessels of Beer, for 200 Guineas, whereof one was paid in Hand as Earnest of the Bargain, and three Days after 19 Guineas more; and Part of the Agreement was, that it should be executed by Writing at a certain Time: Upon a Bill for a specific Performance of the Agreement, B. pleaded the Statute of *Frauds*, (a) and insisted, that no Part of the Things being delivered, there was no Execution, and that the 20 Guineas were delivered for the Lease; but Ld. K. over-ruled the Plea. *Hil.* 34 & 35 *Car.* 2 [1583], *Leak and Morrice*, 2 *Chan. Ca.* 135 [S. C. *Dick.* 14].

(a) By the 29 *Car.* 2, c. 3, no Contract for the Sale of Goods, for ten Pounds or upwards, shall be good, except the Buyer actually receives Part of the Goods sold, or gives something in earnest to bind the Bargain, or in Part of Payment, or some Note thereof in Writing be made and signed by the Party to be charged with the Contract, or their Agents thereunto lawfully authorised; and no Action is to be brought upon any Agreement, that is not to be performed within the Space of a Year from the making the said Agreement, unless the Agreement upon which such Action shall be brought, shall be put in Writing, and signed by the Party to be charged therewith.

(C) VOLUNTARY AGREEMENTS, IN WHAT CASES TO BE PERFORMED.

1. If there are two (*b*) voluntary deeds or Conveyances of the same Estate, the first shall prevail. *Goodwin and Goodwin*, 1658, 1 *Chan. Rep.* 173.

(*b*) Tho' voluntary Agreements and Conveyances are regularly good, so as to bind the Parties themselves, if they are not attended with Badges of Fraud or Circumvention; yet it has been always held discretionary in Courts of Equity, whether they would interpose, either in aiding or setting them aside; but if they affect Creditors, Purchasers, or even younger Children, a Court of Equity will interpose.

2. If A. makes a voluntary Settlement of his Estate, without any Power of Revocation, and afterwards devises it, the Devisee, being a Volunteer, shall have no Aid against the Settlement; for to relieve in such a Case, would be to establish it as a Maxim, *That no man can make any voluntary Disposition of his Estate, but by his Will only*, which would be absurd. *Per* Ld. Chan. *Mich.* 1682, *Villars and Beaumont*, 1 *Vern.* 100, 101.

3. So where A. conveyed his Lands to the Use of himself for Life, Remainder, as to a third Part, to his Wife for a Jointure, Remainder of the Whole to his Infant Heir in Tail, and two Days afterwards makes his Will, and devises the same Estate with other Things, to his Infant Heir in Tail, but subject to the Payment of Debts, in case his personal Estate should not be sufficient, and also a Legacy of £250. The personal Estate proving deficient, on a Bill brought to have the Debts paid out of the Lands, that the Legacy may be charged on the personal Estate, it was held by the Court, that the Settlement, though voluntary, yet was not revocable, and therefore the Testator was disabled to charge the Lands by his Will. *Trin.* 1687, *Bale and Newton*, 1 *Vern.* 464.

[24] 4. A. seised in Tail of Freehold Lands, and in Fee of Copyhold Lands, devised the Copyhold Lands to the Defendant, who was intitled to the Remainder of the Freehold Lands, and devised the Freehold Lands to the Plaintiff: the Defendant, apprehending there had been a Recovery suffered by the Testator, agreed with the Plaintiff, without any Consideration, that each of them should enjoy the Lands according to the Will; but, discovering afterwards that there had been no Recovery suffered, he brought his Action to recover his Freehold Lands; and the Plaintiff brought a Bill to establish the Agreement; which was decreed accordingly. *Frank and Frank*, 1 *Chan. Ca.* 84 [1667].

If a Man agree to convey Lands, the Court will decree Performance, though he were not apprised what Estate he had in the Lands. *Gerrard v. Vaux*, 1 *Vern.* 121.

J. S. seised in Tail of Lands, devised them in Fee to L. who, aware that the Testatrix had not barred the Entail, went to E. her eldest Brother, on whom, as he supposed, the Lands had descended, and, (representing to him the Devise, and that he was in Treaty for the Sale of the Lands, but that the Purchaser would not complete the Purchase, without E. joined as Heir at Law in the Conveyance) procured him, for £200, to enter into an Article to join in the Conveyance. Before Payment of the Money, L. discovered, that the Lands, being Gavel Kind, had descended to the two Brothers of J. S. and called on the Elder to procure the Younger to join in the Conveyance, which he did, and the £200 was equally divided between them. It appeared that the Brothers did not know that the Devise was void, nor the Value of the Estate, (£70 per Annum,) but that E. acted under a Persuasion that it was his Duty to affirm the Devise of his Sister. But now having discovered the Value of the Estate, and that the Devise was void, they filed this Bill to set aside the Conveyance. And per Sir Lloyd Kenyon, Master of the Rolls, (after observing, that, no Case having been cited, the one before the Court must stand on its own Circumstances) here is not, I think, a Proof of Fraud and Imposition, but as the Offer was suddenly accepted, without farther Enquiry or Information, the Conveyance must be set aside as improvidently entered into. *Evans v. Llewellyn*, 2 *Bro. Cha. Ca.* 150.

5. If a Man makes a voluntary Conveyance, and there be a Defect in it, so as it cannot operate at Law, Equity will not decree an Execution thereof; but in some Cases it will be decreed, if intended as a Provision for younger Children. In a Note at the End of *Bonham and Newcomb*, 2 *Vent.* 365, 2 *Vern.* 40, S. P.

6. A Father makes a voluntary Settlement on his eldest Son and his Heirs, without any Power of Revocation; afterwards he makes a Settlement on his second Son for Life, with Remainder to his first and other Sons in Tail, and dies; the first Deed came

to the Hands of the eldest Son's Heir, and the other to the second Son, who brought a Bill to set aside the first; but both Sons having been otherwise provided for, it was held by Ld. Chan. that though both Deeds were voluntary, yet the Consideration of being a younger Child was not sufficient to set aside the first. *Clavering and Clavering*, *Hil.* 1704, [Pre. Ch. 235:] *Vab* 2 *Vern.* 475, S. C. differently stated, and several Cases there put to this Purpose.

A. by Settlement after Marriage conveyed to Trustees to Family Uses, reserving a Power to sell, but covenanting that the Purchase money should be paid to the Trustees, to the same Uses. Afterwards, he sold to B. who, though he had Notice of the Covenant, paid his Money to A. And now, A. being dead insolvent, his Children file their Bill against the Representatives of B. for an Application of the Purchase-money. For the Defendant it was contended, that the Conveyance being voluntary, was fraudulent as against a Purchaser: and per Lord Thurlow, Though it would have been as well at first, if the voluntary Covenant had not been thought so little of, yet the Rule is such, and so many Estates stand upon it, that it cannot be shaken. Bill dismissed. *Evelyn v. Templar*, 2 *Bro. Cha. Ca.* 148.

7. If an Annuity is granted by one to his Housekeeper, with a Bond for Payment of it, and the Bond is lost, Equity will decree Payment of the Annuity, for Service is a Consideration, and no *turpis Contractus* shall be presumed, unless proved. *Lighbone and Weeden*, *Hil.* 1700.

(D) AGREEMENTS, BY WHOM TO BE PERFORMED.

1. If A. by Writing, agrees with B. and C. to pave the Streets in a Parish, and they, in Behalf of the Parish, agree to pay him for it, and this Writing is lodged in the Hands of B. if A. paves the Streets, he must have Relief against the Undertakers, especially in this Case: the written Agreement which is his Evidence, being in the Hands of one of them; and the Undertakers must take their Remedy against the rest of the Parish. *Mich.* 13 *Car.* 2 [1661], *Meriel and Wymondsall*, *Hard.* 205.

If the Committee of a Club enter into an Agreement with J. S. he may compel them to perform it, without making the other Members of the Club Parties to his Bill. *Cullen v. Duke of Queensberry*, [1] *Bro. Cha. Ca.* 101.

So if Commissioners of a Navigation enter into an Agreement with an Engineer, all the acting Commissioners are personally liable. *Horsley v. Bell*, *Ambler* 770, S. C. *cit.* [1] *Bro. Cha. Ca.* 101, *in not.*

2. If fifteen of the Tenants of a Manor agree to inclose a Common, and it appears that there are eighteen who have Right of Commonage; yet an Inclosure will be decreed, though opposed by three, for it shall not be in the Power of two or three wilful Persons to oppose a public Good. *Anon.* 6 *Nor.* 15 *Car.* 2 [1663], per Ld. Chan. and Master of the Rolls; 3 *Chan. Rep.* 13, 14.

3. So if the Agreement be to stint a Common, it shall be decreed, though opposed by two or three humoursome Tenants. *Trin.* 1689, *Delabeere and Beddingfield*, 2 *Vern.* 103, where it is said, that a Stint is more to be favoured than an Inclosure. By Lds. Commiss.

[25] 4. If Tenant in Tail, for valuable Consideration, agrees to convey, he may be compelled in Equity to execute the Agreement; but if he dies, his Issue is not bound thereby, unless he doth some Act whereby he consents to and confirms the Agreement. *Trin.* 22 *Car.* 2 [1670], *Ross and Ross*, 1 *Chan. Ca.* 171. 1 *Lev.* 239, S. P. Though there was a Decree, and the Father stood out all the Processes of Contempt. *Powell and Powell*, *Hil.* 1708 [Pre. Ch. 278]. So though the Father died in Prison, and in Contempt for not performing the Decree, yet the Issue was not bound. *For and Crane & al.*, *Mich.* 1693, 2 *Vern.* 304, 306. But for this *rule* by what Acts of the Ancestor the Heir shall be bound, *Title Heir.* [1 *Eq. Ca. ABR.* 264, *et seq.*]

5. If a Copyholder for Life, where by the Custom there is a Widow's Estate, agrees to sell his Estate, and dies: his Widow is no more bound by the Agreement, than one Jointenant is by an Agreement to sell by the other. Bill dismissed with Costs. (For if such Contracts for Copyholds should be decreed, all Lords would be defrauded of their Fines, &c. *Ibid.*) *Pasc.* 1688, *Musgrave and Dashwood*, 2 *Vern.* 63.

6. If a Feme Covert by Agreement made with her Husband, is to surrender or levy a Fine, though the Husband die before it be done, the Court will compel the Woman to perform the Agreement. *Baker and Child*, 2 *Vern.* 61.

7. The Plaintiff's Father applied himself to the Defendant *H.* a Scrivener, to borrow £200, who accordingly procured the Money, and the Plaintiff and his Father entered into Bonds for the Payment of it to *B.* and *C.* the Plaintiff's Father became afterwards insolvent, and he himself also, by reason of the Debts for which he stood engaged for his Father : The Father having compounded with his other Creditors for seven Shillings in the Pound, the Plaintiff and his Father applied themselves to the Defendant, to know where *B.* and *C.* lived, who, instead of informing them, told them that they would stand to any Thing he did : upon which they compounded with him for 10s. in the Pound, £70 to be paid immediately, which was done, and £30 at a Day afterwards, which was tendered : and now the Plaintiff prays that the Bonds may be cancelled, and that he may be indemnified : and it was decreed that the Plaintiff should pay *B.* and *C.* their whole Money, they not being privy to the Agreement, and that *H.* though he acted as an Agent, should repay him, and indemnify him, according to the Agreement. *Hil.* 1690, *Parrot and Wells*, 2 *Vern.* 127.

8. If *A.* articles on Behalf of *B.* to purchase four Houses in *Jamaica*, and to pay £800 for the same, and pending a Suit to compel the Seller to make out a good Title, the Houses are swallowed up by an Earthquake, yet *A.* shall pay the £800 though he has not sufficient Effects of *B.*'s in his Hands. Decreed, and afterwards affirmed in the House of Lords. *Cass and Rudell*, 2 *Vern.* 280.

Note : *It seems the Report in Vernon is not correct, and this Abridgement of it is still less so. It appears, by the printed Cases in the House of Lords, that Cass made a Title in Jan. 1691, by Conveyance executed, and the Earthquake did not happen till July 1692, and that the Decree was founded on a good Title to the Premises having been conveyed to the Defendant Rudell. See the Note to 1 Bro. Cha. Cas. 157. Mortimer v. Capper.*

(E) CONCERNING THE MANNER AND TIME OF PERFORMING AGREEMENTS.

1. If an Agreement be to quit the Possession of Lands, the Court will not decree a Conveyance of the Lands themselves : but if the Agreement was to convey Lands, the Court would have decreed the Agreement, though the Party was not apprized what Estate he had in the Lands. *Per* Ld. K. *Hil.* 1682, *Gerard and Vaux*, 1 *Vern.* 121.

[26] 2. If a Bill be brought to have a Covenant decreed *in Specie*, whereby the Plaintiff was to have a Pit in the Defendant's Ground for digging of black Stone, and when the old one failed, he might sink a new Pit : and with a farther Covenant that there should be no other Pit there ; and it appears in the Cause, that the Defendant, and those under whom he claims, had been in possession of a Pit there, and had used the same for above Sixty Years past : the Court, instead of decreeing the Covenant *in Specie*, will dismiss the Bill. *Hil.* 1690, *Scofield and Whitehead*, 2 *Vern.* 127.

3. If *A.* articles to sell Lands to *B.* (who was his Agent, and greatly intrusted by him in the Management of his Estate) for £15,000, the whole Money to be paid, or so much Land returned as would make up what he paid short of the £15,000, and *A.* conveys part of the Lands to *B.* and by his Persuasion values that Part at an Under-value, alledging it was not material to mention the very Sum, in regard he was to make up the whole £15,000, and then *B.* sells this Part to *C.* and then would have returned so much of the rest as would make up the £15,000, tho' the Sale to *C.* shall stand, yet the Articles shall be set aside as unreasonable ; and the rather, because *B.* had not paid the Money, or returned the Value in Lands according to the Time prefixed. Decreed, and affirmed in the House of Lords. *Mich.* 1690, *Brown Whorwood and Simpson*, 2 *Vern.* 186.

4. If one is bound to transfer £300 *East-India* Stock before such a Time, which he neglects to do, and the Stock is much risen, he shall be decreed to transfer the Stock *in Specie*, and to account for all Dividends from the Time that it ought to have been transferred. *Mich.* 1700, *Gardner and Pullen*, 2 *Vern.* 394.

5. If *A.* covenants on his Marriage to purchase Lands of £200 a Year, and settle them for the Jointure of his Wife, and to the first, &c. Sons of the Marriage : and he purchases Lands of that Value, but makes no Settlement : and on his Death the Lands descend on his eldest Son ; if the Son brings a Bill for a specific Performance of the Agreement, the Lands descended will be decreed a Satisfaction of the Covenant. *Trin.* 1706, *Wilcocks and Wilcocks*, 2 *Vern.* 558.

J. S. covenanted on his Marriage to settle on his Wife and Issue Lands of the clear

yearly Value of £500. Afterwards he purchased Lands at M. worth £180 per Annum, and by Will directed them to be applied in part Satisfaction of the Covenant. And now, the Value of these Lands having fallen to £150 per Annum, the Question was, at what Value they should be taken. Per Ld. Hardwicke, Let the Master enquire the Value at the Time of the Testator's Death, and let them be a Satisfaction pro tanto. And by him, If they had been purchased at the Time of the Marriage Articles, the Value should have been taken as at the Time of the Purchase. *Pinnell v. Hallett*, Ambl. 106.

(Vide *Tyrconnel v. Ancaster*, Ambl. 237. *Londonderry v. Wayne*, Ambl. 424.)

The Moiety of a House is not applicable in part Performance of a Covenant in Marriage Articles, to settle Lands of Inheritance; for it is not the Kind of Estate intended by the Articles. *Pinnell v. Hallett*, Ambl. 106.

Nor Borough English Lands of a Covenant to settle on First and other Sons. *Pinnell v. Hallett*, Ambl. 106.

Nor a Copyhold Estate, where the settled Lands are to be held without Impediment of Waste. *Pinnell v. Hallett*, Ambl. 106.

Where the Contract is to settle a particular Estate, and not generally to purchase and settle Lands, a Breach of the Contract will sound in Damages, and an Issue shall be directed, to try what the Damages are. *Wade v. Paget*, [1] Bro. Ch. Ca. 363 [1 Cox, 74].

(F) WHERE THE PERSON OR ESTATE SHALL BE MADE LIABLE TO A COVENANT OR AGREEMENT.

1. If a Man hath Lands subject to the Payment of a Rent-Charge, and grants Part of the Lands to B. and covenants that that Part should be discharged of the Rent; yet this is not such a real Covenant, that shall run with the Land, and charge the other Lands with the Whole; but it is only a personal Covenant, which must charge the Heir only in respect of Assets. *Mich. 1656, Cook and Arundel, Hard. 87, decreed in Scaccario.*

1 *Chan. Ca. 212, C.P. decreed 1671, conf' in the Case of Lord and Lady Cornbury and Middleton & al', Trin. 23 Car. 2, by Ld. Keeper, Wyld, J., and B. Windham.*

2. A Purchaser of the Crown-Lands, in the Time of the late Wars, sells Part to the Plaintiff, and covenants to make further Assurance, and he on the King's Restoration had a Lease for Years made to him under the King's Title; and he was decreed to assign his Term in the Part he sold. *Hil. 27 Car. 2 [1676], Taylor and Debar, 1 Chan. Ca. 274, 2 Chan. Ca. 212, S. C. in totidem Verbis.*

[27] 3. If a Man covenants to settle Land, or an Annuity out of Land, and he afterwards purchases Land, having no Land before, and devises it, and dies, this purchased Land shall, notwithstanding, be liable to the Covenant. *Pasc. 1689, Tooke and Hastings, 2 Vern. 97.*

If a Man covenant to Pay Money to Trustees, to be laid out in the Purchase of a Freehold Estate, and do not pay the Money, but purchases a Freehold Estate; this Freehold Estate shall be subject to the Uses of the Trust; for where a Man, who is under an Obligation to perform an Act, enables himself to perform such Act, he shall be taken so to have done, with the View of performing his Obligation. Per Sir Lloyd Kenyon, Master of the Rolls, *Sowden v. Sowden*. [1] Bro. Chan. Ca. 582 [1 Cox, 165].

A Man, intending to trick a Young Woman, whom he had debauched, settled on her an Annuity, out of an Estate, with which he had nothing to do. He was decreed to make it good, out of an Estate of his own. Vide post [1 Eq. Ca. Abr.] 31, Pl. 4, 87, Pl. 6.

[27] 4. A. and K. his Wife, being seised in Right of the said K. of two Pieces of Ground, by Indenture, 25 January 1622, did grant a Watercourse to one J. H. and his Heirs, through the said two Pieces of Ground; and by the Deed did covenant for them, their Heirs and Assigns, from Time to Time, to cleanse the same, and that all Fines and Recoveries levied and suffered, or to be levied or suffered, of the said Grounds, should be and enure to the strengthening and confirming the said Watercourse, according to the said Grant; and afterwards a Recovery was had, and a Deed executed, declaring the Uses to be as aforesaid; the Watercourse by mesne Assignments came to the Plaintiff, and the said two Pieces of Ground to the Defendant, who built on the same, and much heightened the Ground which lay over the said Watercourse, and made it much more chargeable and inconvenient to repair; and as it was alledged (and in Part proved) the Building had much obstructed the said Watercourse; so the Bill was for establishing the Enjoyment of the said Watercourse, and that the Defendant, and all

claiming under him, might from Time to Time cleanse the same, according to the Covenant: It was objected, that the said Covenant being a personal Covenant, was not at all strengthened by the Recovery, and that the Plaintiff, and those under whom he claimed, being sensible of it, had for forty years cleansed the same at their own Charges: But the Court was of Opinion, that this was a Covenant which run with the Land, and made good by the Recovery; and that though the Plaintiff had cleansed the same at his own Charge, whilst it was easy to be done, and of little Charge; yet since the Right was plain upon the Deed, and the Cleansing made chargeable by the Building, it was reasonable the Defendant should do it; and decreed accordingly, and gave the Plaintiff his Costs. *Hil. 1691. Holmes and Buckley* [Pre. Ch. 39].

(G) WHERE THERE MAY BE RELIEF WHEN THE AGREEMENT IS NOT STRICTLY PERFORMED.

1. *J. S.* having purchased Church-Lands in Fee, under the Title of the Usurper, sold the same to the Defendant's Testator, and covenanted that he was lawfully seised, &c. the Church being restored, and the Estate made void, *J. S.* was relieved against this Covenant; there being some Proof, that at the Time of Sealing, the Plaintiff, *J. S.* declared he undertook for his own Act only. *Ld. Chan. and Master of the Rolls, Mich. 14 Car. 2* [1662], *Dr. Caldecot and Hill*, 1 *Chan. Ca.* 15, and a like Case of *Farrer and Farrer*, said to have been decreed about six Months before.

2. *A.* sells to *B.* with Covenants only against *A.* and all claiming by, from or under him; *B.* secured the Purchase-Money; but before the Payment the Land was evicted, but not by any Title under *A.* but by a Title paramount; *B.* sued to be relieved, that he might not be forced to pay, seeing the Land was lost, and was relieved. By *Ld. Chan. Anon. 31 Car. 2* [1679. 2], *Chan. Ca.* 19, reported *ex relatione Churchill*.

[28] 3. If a Creditor agrees with his Debtor to take less than his Debt, so that it be paid precisely at such a Day, and the Debtor fails of Payment, he cannot be relieved; for *per Ld. K. Cujus est dare ejus est disponere. Mich. 1683, Sewel and Masson*, 1 *Vern.* 210. 1 *Chan. Ca.* 110, *S. P. arguendo*.

4. If Money be lent on a Mortgage at 5 *per Cent.* and the Mortgagor covenants to pay 6 *per Cent.* if he made Default for the Space of Sixty Days after the time of Payment; if he makes Default, the Court will not relieve, this being the Agreement of the Parties. *Hil. 1690, Lord Hallifax and Higgins*, 2 *Vern.* 134.

5. If a Lessee for a long Term of Years, covenants to lay out £200 upon the Premises within the first ten Years, and lays out but £30, and after thirty Years of the Lease are expired, the Lessor brings an Action of Covenant, and recovers £150 Damages, Equity will neither relieve against the Damage, nor decree the Money to be now laid out in Improvements; for *per Ld. Chan.* though the Damages seem excessive, yet the Jury were proper Judges; and to decree it to be laid out now the Lease is almost expired, is not proper, for it is probable the Lessee would not be so careful in laying it out in lasting Improvements, as he would be, were it laid out at first. *Pasc. 1685, Barker and Holder*, 1 *Vent.* 316, 317.

6. If *A.* agrees with *B.* the Lord of the Manor, to purchase a Copyhold for two Lives, and pays £200 in Part, and is to pay the Remainder in three Months, and then to name his Lives, and take up his Copy; a Court is held, and the three Months expire, and *B.* dies suddenly, and the Manor comes to one who is not bound by the Agreement; the Executor of *B.* will be decreed to repay the Money, although it is insisted, that it was *A.*'s own Laches, that he did not take up his Copy. Decreed *Mich. 1687, Aubry and Keen*, 1 *Vern.* 472.

7. *A.* Intrusted by *B.* to receive Interest on Tallies, receives the Principal, and tails, and afterwards compounds with his creditors, but *B.* would not come in without having a greater Composition, which *A.* agrees to give: *A.* brings a Bill to be relieved against this underhand Agreement; but he having been guilty of a great Fraud and Breach of Trust, and he by the said Agreement having promised to make some Satisfaction, it was held, that he was not intitled to any Relief. *Hil. 1707, Small and Brachley*, 2 *Vern.* 602.

A Man covenanted, that his Estate was free from Incumbrances, except an Estate for Life; the Tenant for Life dying left a Widow, who by the Custom of the Manor, was entitled to hold during her Widowhood. This was adjudged not to be a Breach of the Agreement. Twiford v. Wareup, cit. 2 Vern. 45, Vide Finch, C. R. 310, 2 C. R. 106.

[29] CAP V.

AMENDMENT.

(A) IN WHAT CASES TO BE ALLOWED.

1. A Bill may be amended where there are not proper Parties made Defendants to the Suit [*Offley v. Jenner*, 1647], 3 *Chan. Rep.* 92.

(If there be any Oversight or Mistake in the Bill, which requires Amendment before the Defendant's Appearance, it may be amended upon Motion, without paying Costs; but if it be amended after Appearance, Costs must be paid: The Costs upon a Demurrer, put in for a Slip or Mistake, are twenty Shillings, which being paid, the Party may amend without Motion; but if any new Matters arise after the Cause is at Issue, which is necessary for the Plaintiff to set forth, this is regularly done by filing a supplemental Bill, which the Court will admit upon Motion and Affidavit of such new Matter.)

Though the Plaintiff had amended his Bill with very large Amendments Three several Times before, an Application that on the Fourth Amendment he should pay Taxed Costs, was refused. Per Ld. Thurlow. *And by him, there must be a General Rule on this Subject, and that General Rule allows but 40s. Costs. The mere Statement of the Number of Sheets in the several amended Bills is not a sufficient Ground to break through the General Rule. The Defendant must state a Case of particular Oppression. Masserene v. Lyndon*, 2 Bro. Chan. Ca. 291.

2. So where some Tenants of a Manor brought a Bill against the Lord, to establish certain Customs; and he demurred, because all the Tenants were not made Parties, either as Plaintiffs or Defendants; and the Court gave them Leave to amend their Bill, and to add as many more Plaintiffs as would give them Letters of Attorney so to do, and as to the rest, to make them Defendants. *Hil. 25 Car. 2* [1674], *Hudson & al' and Fletcher, Rep. in Chan. temp. Finch*, 114.

3. The Plaintiff set forth a Conveyance in his Bill, without Date, Day, Month, or Year; and upon Demurrer the Court gave him Leave to amend. *Trin. 28 Car. 2* [1676], *Bushell and Newby & al', Ibid.* 260.

4. The Defendant moved to amend her Answer, upon Affidavit, that the Matters untruly set forth were added in the Margin of the Draught after she had perused it; and so she was thereby surprised; and it being alledged, that no Replication was filed *prout* Certificate and Affidavit of Notice of this Motion being read, and the Plaintiff making no Defence, it was ordered that she amend (a) her Answer in the said Matters mistaken. Ld. Chan. and Master of the Rolls, *Chute and Lady Dacre, Mich. 15 Car. 2* [1663], 1 *Chan. Ca.* 29. And the like Liberty said to be given in Lord *Coventry's* Time, in the Case of *Chettle and Chettle*. (2 *Freem.* 173, S. C. and says the S.P. was determined *inter Chettle and Chettle*. *This Case of Chettle v. Chettle is mentioned in Tothil, pa. 13, but the only Point there laid down is that an Answer shall not be amended after Issue joined.*)

(a) The Defendant may, without Notice, move to amend his Answer in a small Matter; but if it be in a material Point, he must give Notice of the Motion for such Amendment to the Plaintiff's Clerk or Solicitor; and though it be in a material Point, and after Issue joined, yet the Court will, on Affidavit of Surprise, and Payment of Costs, allow of an Amendment.

5. The Defendant, by her Answer, having consented that an Award made by her Father might be confirmed, desired Leave to amend her Answer in that Particular, having made Oath that she [30] never read the Award, and that such Answer was prepared by her Father, who had wronged her in the Award; but the Court refused to give her Leave to Amend her Answer. *Easter 1702, Harcourt versus Lady Anderson*, 2 *Vern.* 434. One Reason seems to be, because the Father was an Arbitrator of her own chusing. Note: *This does not appear from the Book.*

6. A Recognizance, entered into to abide such Order as should be made upon the Hearing of the Cause, being put in Suit against A. who was one of the Sureties; it fell out, that in the Title of the Order for confirming the Report, the Words *Et Ux'* were omitted; the Defendant at Law took Advantage thereof, and pleaded there was no such Order made in the Cause; and the Plaintiff perceiving the Mistake,

obtained an Order from the Master of the Rolls to amend the Title of the Order, by adding the Words *Et Ux.*, which was afterwards confirmed by Ld. K. although it was to charge a Surety. *Trin.* 1700, *Spearing and Lynn*, 2 *Vern.* 376. *3 Proc. in Chan.* 115, S. C.)

7. But in a Cause where the Defendant had answered, and the Witnesses were examined, it happened, that in the Title of the Interrogatories the Plaintiff was called *Thomas* instead of *John*, and the Court would not allow the Depositions to be read, nor the Title to be amended, although most of the Witnesses were, since their Examination, gone to Sea. *Easter* 1702, *White and Taylor*, 2 *Vern.* 435. But quere, for this seems only a Mistake of the Clerk, whose Errors are frequently amended, the better to carry on the Justice of the Court.

The Court will permit an Answer to be amended by striking out the Admission of a Point or Conclusion of Law, but will not suffer the Admission of a Fact to be struck out. *Vide Pearce v. Grove*, *Ambl.* 65.

To a Bill, claiming the Remainder in Fee after an Entail spent, Defendant had put in an Answer, insisting that a Fine had been levied by one of the Remainder Men in Tail, and claiming under him; but now, before Replication filed, he petitioned for leave to take the Answer off the File, and to put in a new Answer, insisting that the Person under whom he claimed was a Purchaser for valuable Consideration without Notice; and, to support his Petition, he made an Affidavit, that this new Title was not discovered, till after he had put in his Answer. And per Ld. Hardwicke, I cannot suffer a new Answer to be substituted in place of the one already put in, for that might be to take from the Plaintiff the Advantage of Admissions made in the first Answer. Let the Answer be taken off the File, and this new Matter be added by way of Addition, on Payment of the costs of this Application, and of the Amendment. *Patterson v. Slaughter*, *Ambl.* 292.

An Answer shall not be amended after an Indictment for Perjury preferred or threatened. *Verney v. Macnamara*, cor. Ld. Thurlow, [1] *Bro. Chan. Ca.* 419.

Yet, perhaps, if it had been clearly shown to the Court, that the Matter prayed to be amended were a Mistake, it might be otherwise. *Vaux v. Waltham*, cor. Ld. Thurlow, cit. [1] *Bro. Chan. Ca.* 419, in not.

[31] CAP. VI.

ANNUITY AND RENT-CHARGE.

- (A) What shall be construed a good Annuity or Rent Charge, and whose Persons and Estates made liable.
- (B) How far a Court of Equity will assist, and give a Remedy for recovering an Annuity or Rent-Charge, when there is none at Law; and here of Apportionment and Extinguishment.

(A) WHAT SHALL BE CONSTRUED A GOOD ANNUITY OR RENT-CHARGE, AND WHOSE PERSONS AND ESTATES MADE LIABLE.

1. A man devises all his lands for the Payment of his Debts, and devises an Annuity out of a certain Town, which the Trustees sell; and it was decreed, that the Annuity should issue out of the other Lands unsold, there being sufficient to pay the debts. *Mich.* 28 *Car.* 2, *Lord Kennoile and Earl of Bedford & al.*, 1 *Chan. Ca.* 225 [1576].

2. An Annuity of £20 *per Annum* was devised out of a Rectory, and the Glebe being but of 40s. *per Ann.* Value, and the Tithes not liable to a Distress by Law, (a) the Master of the Rolls decreed the whole Rectory to be liable to pay the Annuity. *Hil.* 18 & 19 *Car.* 2, *Thorndike and Collington*, 1 *Chan. Ca.* 79 [1667].

Max. Equity suffers not a Right to be without a Remedy. — But note the Rights here intended are those which the Law acknowledges to be such, and never gives Judgment against them, though it cannot give a Remedy for them; and not equitable Rights, for which Equity gives a Remedy in the very Creation of them.

(a) Of things which lie in Grant, and not in Tenure, no Rent can be reserved

which will be liable to a Distress, as Advowsons, Tithes, Fairs, Franchises, &c. 1 *Iust.* 44.

3. If a Man covenants to settle Lands of such a Value, or an Annuity out of Land, and he has no Land at the Time, but purchases Land afterwards, which he voluntarily devises, yet the Lands shall be liable to the Annuity in the Hands of the Devisee. *Tooke and Hastings*, 2 *Vern.* 97

4. A Man having debauched a young Woman, and intending afterwards to put a Trick upon her, settled an Annuity upon her of £30 *per Ann.* for Life, out of an Estate which he had nothing to do with; yet the Court of Exchequer decreed him to make it good out of an Estate which he had of his own; and this Decree was afterwards affirmed on Appeal to the House of Peers. Cited in the *Marchioness of Annandale versus Harris* (*Vide* Title Bonds and Obligations, *pl.* 6, *p.* 87). *Trin.* 1727 [2 *Will. Rep.* 432], and said to have been adjudged about a Year before.

[32] 5. A. is Tenant in Tail, subject to a Rent-Charge to B. for Life; B. and A. died, the Rent-Charge being in Arrear; and the Question was, whether the Issue in Tail is liable to the Executor of B. within the Statute of 32 *H.* 8. to pay the Arrears incurred in the Life-time of his Ancestor; and *Ld. Chan.* seemed to be of Opinion, that the Heir was not liable, he not claiming under the Tenant in Tail, tho' if the Rent-Charge had continued, he would be liable to be distrained for the whole Arrear, which was *summum Jus*; and tho' this Case should be within the Statute, yet he said the proper Remedy against the Issue in Tail was at Law. *Trin.* 1708, *Lord Fairfax and Lord Derby*, 2 *Vern.* 612.

A man possessed of a Term for Years, determinable on Lives, devised £20 *per Ann.* to J. S. to be paid Half Yearly, if the *Cestuy que Vies* should so long live. J. S. died during the life of the *Cestuy que Vies*, and it was decreed that the Rent should not be determined by his Death, but should go to his Executor, and be paid him during the Term. *Gosley v. Gifford*, 2 *Vern.* 35, *Vide* 1 *Ro. Abr.* 831, where it was held, that, if a man possessed of a Term, grant a Rent generally, without limiting any Estate, the Rent shall continue during the whole Term.

A Man devised to his Executors and their Heirs £50 *per Ann.* during the Life of B. to be for the separate Use of the Wife of R. The Wife of R. died in the life-time of B. and it was decreed that the £50 *per Ann.* should be paid to her Executors, during the Life of B. *Rawlinson v. Montague*, 2 *Vern.* 667.

Dyer, by Will, gave to Savery, during the natural Life of A. B. his Executor, an Annuity of £50 to be paid him by his Executor. Savery died in the life-time of the Executor. And by *Ld. Hardwicke*, the Annuity is not determined, but shall go to Savery's Executors during the Life of A. B. *Savery v. Dyer*, *Ambl.* 139.

(B) HOW FAR A COURT OF EQUITY WILL ASSIST, AND GIVE A REMEDY FOR RECOVERING AN ANNUITY OR RENT-CHARGE, WHEN THERE IS NONE AT LAW; AND HERE OF APPORTIONMENT AND EXTINGUISHMENT.

1. A Rent of £1, 14s. *per Annum* was granted by King *H.* 6 to *Eaton College*, issuing out of certain Lands: the Bill suggests, that the College did not know where the Lands lay, so as to enable them to distrain, and therefore pray that the Executor of the Tertenant may be answerable for the Arrears, which the Master of the Rolls thought reasonable, in respect that the Personal Estate was increased thereby, and decreed it accordingly. *Eaton College and Beauchamp*, *Hil.* 20 *Car.* 2 [1669], 1 *Chan. Ca.* 121.

2. The Bill was for securing the Payment of £5 *per Annum* Rent, and likewise the Arrears thereof, suggesting that the Deeds by which it was granted were lost; and there being Proof that it was constantly paid before the twelve last Years, the Master of the Rolls decreed the Arrears and growing Rent, saying, It was reasonable, because it did not appear what kind of Rent it was, and so no Remedy at Law. *Collet and Jaques*, *Hil.* 20 & 21 *Car.* 2 [1669], 1 *Chan. Ca.* 120.

3. So where a Bill was brought, suggesting that the Plaintiff did not know the Nature of the Rent, nor the Boundaries of the Land, so as to be able to declare with Exactness; and the Court said they would decree it, but at the Importunity of the Defendant directed a Trial, whether there was any such Grant, or not. *Cox and Foley*, 1 *Vern.* 359.

4. The Plaintiff suggests, that he having the Grant of a Rent-Charge issuing out

of certain Lands, the Defendant, to hinder him from a Distress, converted the Premises into Tillage; and Id. Chan. directed to have it tried, whether there was any Fraud used to prevent the Plaintiff from distraining, and declared, if there was, he would grant Relief. *Dary and Dary, Mich. 2 Car. 2* [1650], 1 *Chan. Ca.* 144. But if there be a Remedy at Law, Equity will rarely grant any, or change the Nature of the Rent. *Vide* [Palmer v. Whettenhal] 1 *Chan. Ca.* 185.

[33] 5. If a man grants a Rent-Charge out of all his Lands, and afterwards selleth the Lands by Parcels to divers Persons, the Grantee of the Rent charge shall be restrained from levying the whole Rent on one of the Purchasers. *Cary, 3.*

6. A. on his Marriage settled a Rent Charge on his Wife for her Jointure, and afterwards devised to the Wife Part of the Land on which the Rent was charged; and it was held, that there should be no Apportionment, (a) for the Devise was intended her as an Advantage; and it was not declared to be in Satisfaction of her Dower, and therefore she may distrain for the Rent on any Part of the Land. *Knight and Calthorp, Mich. 1668, 1 Vern. 347.* (Even though the Bill stated that the produce of the Lands, not devised to the Wife, was insufficient to pay the Rent-Charge.)

(a) Regularly at Law there can be no Apportionment of a Rent-Charge, because it is an intire Thing. 1 *Roll. Abr.* 234. As if the Grantee purchase Part of the Land, he cannot bring a Writ of Annuity, because he must declare on the whole Deed. *Co. Lit.* 148. Likewise if Part of the Land, out of which the Annuity issues, is evicted by a Prior Title, there can be no Apportionment; but then the rent of the Land is chargeable, or the Party may bring a Writ of Annuity. 1 *Inst.* 148. But by the Act of God it may be apportioned; as if Part of the Land out of which the Rent issues descend on the Grantee. 1 *Roll. Abr.* 236.

7. If A. hath a Rent-Charge issuing out of certain Lands, and B. having Notice of this Rent, purchases those Lands amongst others; and after B. sells the other Lands, and also some few Acres of the Land charged by general Words, and desires A. and her Husband to join in a Fine to the Purchaser, assuring her it would not prejudice her, which was accordingly done; though the Rent by A.'s Act was extinguished; yet, because there was no Consideration given for, or Agreement to extinguish the Rent, she shall be relieved. — and *Hawkes, Hil. 27 & 28 Car. 2* [1676], 1 *Chan. Ca.* 273.

8. A. seised in Fee of a little Messuage of £8 *per Annum*, and possessed of a Personal Estate of £250 Value, devised several Legacies, and gave his eldest Son B. the Plaintiff, £5 a-Year for forty Years, if he should so long live, and devised to his second Son C. the said Messuage in Tail, and made him his Executor and Residuary Legatee. C. during his Life, paid the Annuity, but being now dead, his Wife and Executrix insists, that there being no Charge on the Lands by the Words of the Will, and that she not having Assets, is not obliged to pay the Annuity; and further alledges, that her Husband having docked the Intail, and conveyed the Premises to J. S. in Trust for the Plaintiff, for the securing the Payment of £50 which he borrowed of him, his Right, if he had any, is by the said Mortgage extinguished; but notwithstanding, the Court decreed the Annuity, together with the Arrears, to be paid, and an Account of the Profits of the Estate to be taken for that Purpose, and said, that the Executor being Devisee of the Land, made the Land liable; and as to the Objection of his having extinguished (b) his Right by Acceptance of the Mortgage, it had no Foundation in a Court of Equity. *Elliot and Hancock, Trin. 1690, 2 Vern. 143.*

Note: This Money having been repaid, the Plaintiff had recovered the Estate, upon which the Defendant relied, as one Ground of Extinguishment.

(b) If the Grantee of a Rent Charge purchases Part of the Land out of which the Rent issues, he shall never afterwards have a Writ of Annuity, for his Remedy is extinguished by his own Folly. *Poph. 86; Co. Lit.* 148.

Vide Title Rent (A) [1 *Eq. Ca. Abr.* 364].

[34] CAP. VII.

ANSWERS, PLEAS, DEMURRERS, &C.

(A) What shall be a full and sufficient Answer.

(B) Where the Party may conclude, charge, or discharge himself by his Answer.

(C) What shall be a good Plea, and well pleaded.

(D) What shall be a good Cause of Demurrer.

(E) Answering, Pleading, and Demurring to the same Bill.

(F) Concerning the Replication.

As to the Manner of compelling a Defendant to answer, at what Time, and answering upon Interrogatories, *vide* Title Process.

(A) WHAT SHALL BE A FULL AND SUFFICIENT ANSWER.

1. Where in a joint and several Answer by A. and B. A. for himself answers, and B. says that he hath perused the Answer of A. and believes it to be true, supposing B. charged with nothing of his own Knowledge, such a relative Answer is sufficient; but it is otherwise, where the Defendants answer severally. *Hil.* 1659, *Walker and Norton, Hard.* 165, in *Scaccario*.

(An Answer to a Matter charged as a Defendant's own Fact, must regularly be without saying, To his Remembrance, or, As he believeth; if it be laid to be done, within seven Years before, unless the Court upon Exceptions taken, shall find special Cause to dispense with so positive an Answer; and if the Defendant deny the Fact, he must traverse or deny it (as the Cause requires) directly, and not by way of Negative pregnant; as if he be charged with the Receipt of a Sum of Money, he must deny or traverse, that he hath received that Sum, or any Part thereof, or else set forth what part he hath received; and if a Fact be laid to be done, with divers Circumstances, the Defendant must not deny, or traverse it literally, as it is laid in the Bill, but must answer the Point of Substance positively and certainly. *Clarendon's Orders*, 18 *Car.* 2.)

[35] 2. In a Bill for Tithes of Conies by Custom, the Defendants by Answer deny the Custom, but do not discover how many Conies they killed, nor the Value of them; yet it was resolved well enough (the rather, because the Demand was against Common Right) for there being a full Answer given to the Thing in Demand, till that be tried, the Defendants are not bound to discover; and if it should be otherwise, the Defendant, by a feigned Suggestion, might be forced to discover any Thing; but if in such Case the Matter be found against the Defendant, he shall after be examined upon Interrogatories. *Pasc.* 13 *Car.* 2 [1661], *Randall and Head, Hard.* 188.

3. But where there is no such great Inconvenience, as upon a Bill against an Executor to discover Assets, he must answer, though he denies the Debt, because it concerns the Act of another. *Ibid.*

Where a Plaintiff's Right is not apparent, but remains in Doubt, an Executor is not bound to discover Assets, except in the Case of a Creditor or Legatee. *Per* Lord Hardwicke, *Gethin v. Gale*, cit. *Ambl.* 351 (*Vide post*, p. 41, *Blondell v. Pannett*).

Where the Plaintiff's Right lies in the Knowledge of the Executor, and he denies it, he shall not be compelled to discover Assets. But where the Right does not lie in his Knowledge, though he deny it, yet he must set out an Account of Assets. *Sweet v. Young, Ambl.* 353. Note: To this Case, the Reporter makes a Quære.

4. A Bill was brought against Three for a Joint-Demand, and one of them by Answer said, he believed and hoped to prove the Debt paid; the Plaintiff replied to the other two Defendants, but had the Cause heard on Bill and Answer, as against this third; and it was held, that he could not have a Decree; for though the Defendant does not directly swear that the Money is paid, yet his Answer must be taken to be true, because the Plaintiff, by not replying to him, has excluded him of the Benefit of his Proof; and the rather, because it appears a Piece of Cunning in the Plaintiff to proceed against those, who were most ignorant of the Matter. The Plaintiff was ordered to pay Costs; and left at Liberty to reply to the other Defendant. *Hil.* 1682, *Barber and Wood, 1 Vern.* 140.

5. On Exceptions to an Answer, the Defendant having sworn he received no more than the Sum of ——— to his Remembrance, it was allowed to be a good Answer. *Hall and Bodily, 1 Vern.* 470.

6. If the Plaintiff excepts to the Answer, and the Exceptions are referred, and the Master certifies the Answer insufficient in the Points excepted to, and then the Defendants fully answer the Charge of the Bill; but in Truth the Exceptions are longer than the Bill; and the Master, upon a Reference of the second Answer, reports the Answer insufficient in the Points excepted unto, and the Defendants except unto the Report, and insist, that they had answered well, having answered all the Matters of the Bill; yet they shall answer all the Matters of the Exceptions as well as of the Bill, they not having excepted to the first Report. *Crisp and Nevil, 1 Chan. Ca. 60.*

7. If there are two Defendants to a Bill, and one of them puts in an insufficient Answer, which is so reported, and on Exceptions to the Master's Report, his Report is confirmed by Ld. Chan. and afterwards the other Defendant puts in just such another Answer, and insists on the same Matter; the Court, for avoiding of Delay, will judge of the Insufficiency of this second Answer without sending it to a Master. *Mich. 1682. West and Lord Delaware & al', 1 Vern. 74.*

The Practice of making a mere Witness a Party to a Bill is extremely wrong, and Pleas and Demurrers to such Bills are to be encouraged; but when such a Party has submitted to Answer, he shall be compelled to answer fully. Per Ld. Thurlow, *Cookson v. Ellison, 2 Bro. Cha. Ca. 252.*

A Bill was filed against several by the Plaintiffs who had employed one Mee, since become a Bankrupt, as a Factor del credere, for the Sale of Linens; and it stated, that the Defendants, one of whom had been Mee's Clerk, were, for a considerable Time before the Bankruptcy, Creditors of Mee, and being desirous to obtain Security for their Demands, had consulted together, and agreed, that they should procure from the Persons, to whom Mee had sold Goods belonging to the Plaintiffs, as much as they could, either in Money or Notes; and that accordingly they had procured from them several large Sums of Money and Acceptances of Notes. The Clerk, by his Answer, said, that Mee was not, for a considerable or any Length of Time before his Bankruptcy, indebted to him in any Sum of Money whatever, except a small Sum for his Salary; which, at the Time of the Bankruptcy, amounted to about nine Pounds; and denied that he was desirous that his Debts should be paid out of the Money paid to Mee as Factor to the Plaintiffs, or that he had any Consultations with Mee or the other Defendants respecting the Manner in which Mee should discharge his Debt, or that Mee indorsed any Bill to him, or by any Means let him have the Benefit of any Sums of Money or Bills charged in the Plaintiffs' Bill; and he disclaimed all Interest in the Sums of Money, Bills, &c., acquired after by the Plaintiffs' Bill. To this Answer, the Plaintiffs took Exceptions: and now, it was insisted on their Behalf, that the Defendant's Denial, that he had received any of the Money, was not sufficient, but that, being charged as Party to a fraudulent Transaction, he was bound to answer to the Circumstances of the Fraud. It was also urged, that, being charged in the Bill as Clerk, he was, in that Capacity, compelled to answer. But per Sir Lloyd Kenyon, Master of the Rolls, *The Defendant having sworn that he is not a Creditor, and that he has not received any of the Money, has done away all his Interest, and reduced himself to the Case of a mere Witness.* Now it is a Principle that a mere Witness shall not be made a Party to a Bill. If they can prove him to have received any of the Goods or Money he cannot hold them, having disclaimed all Title to them. The Exceptions must be disallowed. *Neuman v. Godfrey, & al', 2 Bro. Ch. Ca. 332.*

Where Sums are specifically and circumstantially charged in the Bill to have been received by the Defendant, he must answer specifically to them; and it is not sufficient to say generally that he has in his Schedule set forth an Account of all Sums received by him. *Hepburn v. Durand, [1] Bro. Ch. Cas. 503; Mitford on the Pleadings in Ch. 2d Ed. p. 247, S. C.* (As to what shall be held a compliance with an order for time to answer, &c. vide post, p. 41.)

[36] (B) WHERE THE PARTY MAY CONCLUDE, CHARGE, OR DISCHARGE HIMSELF BY HIS ANSWER.

1. The Plaintiff brought a Bill against the Defendant to redeem, or be foreclosed; the Defendant, in his Answer, offered to pay the Plaintiff what was due on his Mortgage; but finding afterwards that there was a Mortgage prior to the Plaintiff's and that the Mortgagor had made a Deed of Trust of these Lands for the Payment of his Debts, and that the Creditors had obtained a Decree, that they should be paid in Proportion

with the Plaintiff, he would willingly retract ; but though it appeared that the Circumstances of the Case where thus varied, yet the Master of the Rolls held the Defendant to the Offer in his Answer. *Pasc.* 1687, *Holford and Burnell*, 1 *Vern.* 448.

2. But where a Person having sworn in his Answer, to avoid a Sequestration, that he was satisfied a Debt owing to him ; in a Bill now brought by him for the said Debt, the Master of the Rolls would not suffer that Answer to be read against him. *Mich.* 1669, *Jones and Lenthall*, 1 *Chan. Ca.* 154.

3. Where the Defendant pleaded himself a Purchaser for a valuable Consideration, without Notice, *as by the Deed, &c. ready to be produced, may appear* ; and upon arguing the Plea, it was ordered to stand for an Answer ; and it being moved, that the Defendant might leave the Deed with his Clerk in Court, that the Plaintiff might have the Sight and Perusal of it, pursuant to the Offer in his Answer, and though the Bar (being asked by the Court how the Course was) agreed, that by his Offer the Defendant had made the Deed Part of his Answer ; and therefore it had been the Course to order it to be produced ; yet *Ld. Chan.* said, He would not bind the Defendant, being a Purchaser, by the improvident Offer in his Answer. *Mich.* 1698, *Watkins and Hatchet*.

4. It was said *per Cur'*, *Mich.* 1690, That the Case of *Howard and Brown* was the first Case in this Court, where, because a Man had charged himself by Answer, that this Answer should be allowed as a good Discharge, and that it ought to be the last [*Awdley v. Awdley*]. 2 *Vern.* 194. Where an Accountant may charge or discharge himself by Answer, vide Title Account, Letter (B) [1 *Eq. Ca. Abr.* 7].

5. If the Plaintiff conveys an Estate absolutely to the Defendant, and he afterwards brings a Bill to redeem, and the Defendant insists, that the Conveyance was absolute ; but confesses, that after the Money paid, with Interest, it was to be in Trust for the Plaintiff's Wife and Children ; and the Plaintiff replies to the Answer ; the Trust will be decreed for the Benefit of the Wife and Children, though no other Proof of the Trust ; for it appears by the Defendant's own Confession, that he was not to have the Estate absolutely. *Pasc.* 1693, *Hampton and Spencer*, 2 *Vern.* 288.

[37] (C) WHAT SHALL BE A GOOD PLEA, AND WELL PLEADED.

1. The Bill to be relieved touching a Debt due to the Plaintiff as Executor ; the Defendant pleaded an Outlawry of the Plaintiff in Bar, but the Plea was over-ruled, the Plaintiff suing in *auter droit* as Executor. *Killigrew and Killigrew*, 1 *Vern.* 184. (Note : *It is said by Hutchins Ld. Commissioner, in Took v. Took*, 2 *Vern.* 198, 199, *That to avoid Pleas of Outlawry the Plaintiff may make all, who have Outlawries against him, Defendants.*)

(Pleas in Equity are of three Kinds ; &c. 1st, A Plea to the Jurisdiction ; 2dly, A Plea to the Person ; 3dly, A Plea in Bar. A Plea to the Jurisdiction must shew, that the Lands lie, that the Matters were transacted, or that the Party lives out of the power of the Court, and Reach of its Process, as out of the Kingdom, or in a County Palatine, &c., but for this *vide* Title Courts and their Jurisdiction [1 *Eq. Ca. Abr.* 127]. A Plea to the Person must shew, that the Party is disabled by Outlawry, Excommunication, &c. A Plea in Bar, as it goes more to the Merits, and often causes a perpetual Dismissal of the Bill, the Court will sometimes order to stand for an Answer. Pleas of this Kind are various, as Acts of Parliament, Fines and Recoveries, Releases, &c. Purchasing without Notice ; but Notice must be denied. 1 *Vern.* 179 ; 2 *Vent.* 361. S.P. by way of Answer and not by way of Plea, 1 *Chan. Ca.* 161. And note, that if there be any Fraud alledged in the Bill, it must be denied by way of Answer, and not by way of Plea. 1 *Vern.* 185.)

So Outlawry of a Person named in the Bill as the next Friend of an Infant Plaintiff, or in an Information of the Relator, is an insufficient Plea. Vide Mitford on the Pleadings in Chan. 2d. Ed. p. 186.

Excommunication is a sufficient Plea, even to a Plaintiff suing as Executor or Administrator, but not to the next Friend of an Infant. Ibid.

A Plea put in to a Bill filed by an alien Infidel, and supported on the ground that the Plaintiff could not upon a Cross Bill be examined upon Oath, was over-ruled without Argument. [Ramkissenseat v. Barker, 1737, 1] Atk. 51, cit. Ibid.

A Plea, of Outlawry or of Excommunication, upon the Removal of the Disability, ceases to be a Bar. The Plaintiff therefore, upon Payment of Costs, may sue out fresh Process against the Defendant, and compel him to answer the Bill. Vide Mitford on the Pleadings in Chan. 186, 187.

2. A former Bill depending was pleaded in Bar of a second; but though both Bills were of the same Nature and Effect, yet as the latter had some new Matter, ordered, that being the Plea was good, the Plaintiff should pay the usual Costs of a Plea allowed, but the Defendant to answer the second Bill, and the former Bill dismissed with twenty Shillings Costs. *Crofts and Wortley, Mich. 26 Car. 1* [1674], 1 *Chan. Ca.* 241.

3. The Bill being to have an Account of a Trust, the Defendant pleaded he was intrusted for three Children, *viz.* for the Plaintiff and his two Brothers, and that the other two not being made Parties, he was not bound to answer; for otherwise he might be thrice called to an Account for the same Matter, and the Plea was allowed. *Hanne and Stevens, 1 Vern. 110.* Who are to be Parties to the Suit, *vide* Title Bill, Letter (B) [1 Eq. Ca. Abr. 72].

4. The Plaintiff intitles himself as Administrator; the Defendant pleads the Plaintiff is not Administrator: it was objected, this was a negative Plea: *Per Cur.* Allow the Plea, it is a good Plea in Abatement at Law. *Win and Fletcher, 1 Vern. 473.*

5. The Bill was, that the Plaintiff's Father, by Settlement on his first Marriage was only Tenant for Life, or else Tenant in special Tail, and the Plaintiff was the eldest Son of that Marriage, and that the Defendant claimed by a subsequent Settlement, having Notice of the first: the Defendant pleaded a Fine levied by the Father, and set forth her Title under the second Settlement, and insisted she was a Purchaser; but did not plead she had no notice of the first Settlement. *Ld. K.* The Bill being in the Disjunctive, the Defendant might take it either Way; and having pleaded a Fine, which is a Bar, supposing the Father to be Tenant in Tail, allowed the Plea. *Cresset and Kettleby, Hil. 1683, 1 Vern. 219.*

6. Two of the Defendants, being the Officers of the Exchequer, plead the Privilege of the Exchequer; but the Plea was over-ruled, because there was a third Defendant, who had no Right of Privilege. [38] *Fanshaw and Fanshaw, Trin. 1684, 1 Vern. 246.* *Vide* Title Privilege [1 Eq. Ca. Abr. 349].

7. If a Bill be brought for an Account of the Profit of Mines, and the Defendant pleads a special Act of Parliament, which gives an exclusive jurisdiction of all Matters arising within the Mines to the Courts of A., but does not aver there is a Court of Equity there, the Plea will be over-ruled. By *Ld. Chan. Trin. 1682, Strole and Little, 1 Vern. 58.*

8. If a Bill is brought to be relieved upon a Trust, and charges the Defendant with Notice of the Trust; before the taking of his Conveyance the Defendant, by way of Answer, may deny the Notice, and plead he is a Purchaser for valuable Consideration, without shewing what the Consideration was; though it was objected, that 5s. is a valuable, though not an equitable Consideration; but where the Bill charges Notice before the Defendant took his Conveyance, and the Defendant, by way of Answer, denies the Notice at the Time of his Purchase or Contract, and pleads he is a Purchaser, *etc.*, this Plea is naught, being founded upon the Answer, which denies only Notice at the Time of the Purchase; which may be understood of the Contract, and not of the Execution of the Conveyances. By *Ld. Chan. and Turrol, J., Mich. 10 Nov. 15 Car. 2* [1663], *More and Maybow, 1 Chan. Ca. 34.* (S. C. 2 *Freem.* 175.)

9. The Plaintiffs being Mortgagees, the Bill was to discover Settlements, and what Estate the Mortgagor had in him; to this Bill the Defendants pleaded two several Settlements, whereby the Mortgagor was only Tenant for Life; but the Plea was over-ruled, because the Defendants did not offer, by way of Answer, to admit the Tenant for Life to be dead, that so the Plaintiff might try the Validity of those Settlements at Law; for if they should expect till the Tenant for Life was dead, their Witnesses that could prove the Fraud might be likewise dead; besides, the Defendants pleaded those Settlements to be made after Marriage, in Pursuance of Promises and Agreements made before Marriage, and did not set forth what those Promises and Agreements were. *Hil. 1682, Lord Keeper & al' versus Wyld & al', 1 Vern. 139.*

10. A Plea of a Purchaser for a valuable Consideration over-ruled, because the Defendant did not alledge Seisin and Possession in the Person from whom he bought. *Trin. 1684, Trevanian and Mosse, 1 Vern. 246.*

11. The Bill was, to be relieved touching certain Lands, which the Plaintiff claimed Title to as Heir on the Part of his Father; the Defendant pleaded, that the Mother was the Purchaser of those Lands, and that the Defendant was Heir on the Part of the Mother; but it being not pleaded that the Defendant was Heir of the Whole Blood to the Mother (and in Fact he was only of the Half Blood to the Mother), for that Reason the Plea was over-ruled. *Hil. 1686, Addison and Hindmarsh, 1 Vern. 442.*

12. The Defendant pleads, that the Plaintiff brought a former Suit for the same Matters, which Suit is still depending for ought he knows to the contrary ; for the Plaintiff it was insisted, that this Plea was not good, because he does not positively aver, that the former Suit is still depending ; and no Issue can be taken upon his Knowledge to the contrary ; but the Master of the Rolls allowed the Plea, because the Defendant ought not to have set it down to be argued, [39] for by that he admits, that the former Suit for the same Matter is depending ; but the Plea ought to have been referred to a Master, to examine whether there was a former Suit depending for the same Matter, or not ; and said, there needs no positive Averment, that the former Suit is still depending, for that is examinable by the Master ; and the Defendant never swears a Plea of a former Suit depending, but it is always put in without Oath. *Trin.* 1685, *Urlin* and ———, 1 *Vern.* 332. *Vide Hard.* 160, where a Plea was held naught for want of an Averment in the Conclusion.

* 13. A Plea was held ill, because it went as to any Fraud suggested, &c., and also because it did not aver, that the Accounts which were pleaded were just and true Accounts. *Mich.* 1727, *Hastings* and *Draper*.

* 14. One *Pordant* had brought a Bill in this Court against the Defendants, for several shares in their Stock, and after sold a sixth Part of what he was intitled to from the Defendants to the Plaintiff, who now brought his Bill for his sixth Part ; the Defendants pleaded, that *Pordant* had before brought his Bill for several Shares, of which the Plaintiff's now Demand was Part, and that the former Suit was still depending ; but because the Defendants had not averred, that they had appeared to the former Suit, or put in their Answer, or that they were so much as served with Process to appear, the Plea was disallowed ; for it is no Suit depending till the Parties have appeared, or been served to appear, but only a Piece of Parchment thrown into the Office, which may lie there for ever, and never come to a Suit ; but if the former Suit depending had been well pleaded, the Court was clear of Opinion it would have been a good Plea, though the Bill was brought by another Person, and not by the now Plaintiff ; for else the Plaintiff in the other Suit, after his Bill brought, might assign his Shares to twenty several Persons, who might each of them bring several Bills, and so harrass the Defendants, for what the first Suit was sufficient. *Trin.* 1729, *Moor* and *Welsh Copper Company*.

(D) WHAT SHALL BE A GOOD CAUSE OF DEMURRER.

1. If in a Bill brought against *B. C. D.* and *E.* the Plaintiff sets forth that he is Keeper of *G.* Castle, and prays *B.* may discover what Title he hath to a certain Meadow which belongs to the said Office, and that the Defendants, as Brewers of the City of *G.* by Custom ought to pay to the said Keeper a certain annual Sum, &c., this Bill is naught, because it concerns Things of distinct Natures, and is brought against several Persons, which will occasion several Answers and Examinations ; and if suffered to be put all in one Bill, each Party would be obliged to take Copies of what no Way concerned his own Cause, whereby his Charge would be increased to no Purpose. Resolved upon Demurrer, 15 *Car.* 2 [1663-64], *Berk* and *Harris*, *Hard.* 337.

2. But where the Defendant demurred, because the Plaintiff's Bill was brought against several Defendants for several distinct Matters, yet the Demurrer was overruled : because the Plaintiff, by his Bill, had charged the Defendant with Combination, which the Defendant had not denied by Answer. *Mich.* 1686, *Powell* and *Arderne*, 1 *Vern.* 416.

[40] 3. Where a Man demurs, for that the Bill contains several Matters not relating one to the other, and in some whereof the Defendant is not concerned, if by Answer the Defendant doth more than barely deny Combination and Confederacy, he overrules his Demurrer. *Trin.* 1687, *Hester* and *Weston*, 1 *Vern.* 463.

4. A Bill was exhibited against the Defendant, to have her discover, whether she was married since the Death of her Husband ; to which she demurred, and assigned for Cause, that several Goods and Chattels were devised to her by her Husband, which she was to enjoy during her Widowhood only, and that a Discovery might amount to a Forfeiture of her Interest in them ; and the Court allowed the Demurrer. 24 *Car.* 2 [1672-73], *Munnings* versus *Munnings*, 2 *Chan. Rep.* 68. *Vide Bills of Discovery*, Title Bills [1 Eq. Ca. ABR. 75].

5. The Bill was to establish an Agreement for a separate Maintenance for the Defendant's Wife, and (amongst other Things) prayed a Discovery of several Unkindnesses and Hardships, which the Defendant, as it was pretended, had used towards his Wife, to make her recede from this Agreement; to which Discovery the Defendant demurred, for that it was not a Matter properly examinable or relievable in this Court; and the Demurrer was allowed. *Moh.* 1683, *Hicks and Nibhorpe*, 1 *Vern.* 204.

6. A Bill being exhibited to be relieved against a Bond of the Testator's, suggesting that it was entered into without any Consideration, it being only for that the Testator had unlawfully kept Company with the Defendant, and had a Bastard by her; a Demurrer to that Part of the Bill was allowed; although it seems by the Case to be admitted, that a Demurrer was not the proper Way to be relieved for Scandal, but that the Bill ought to be referred, and the Scandal expunged. *Mich.* 1682, *Pope and Neale*, 1 *Vern.* 107. *See the Book.*

7. If an Infant is intitled to the Trust of Lands in Fee, which were devised to her by her Uncle, and she marries without her Father's Consent, and the Father brings a Bill against the Husband and Wife, and her Trustees, to the Intent a Provision might be made for her and her Children, out of these Lands, &c., and the Husband and Wife demur, this Demurrer will be allowed; for it appears by the Plaintiff's own shewing, that he hath no Right either in Law or Equity to the Lands in Question. *Pasc.* 34 *Car.* 2, *Micoe and Powell*, 1 *Vern.* 39. But where a Husband is obliged to make a suitable Settlement on his Wife, *vide* Title Baron and Feme [1 Eq. Ca. Abr. 57].

8. In a Bill to be relieved against an Award made by some of the Members of the Company, touching the *Quantum* of Freight due to the Plaintiff from the Company; the Arbitrators and some of the particular Members being made Defendants, they demurred to the whole Bill, because the Plaintiff could have no Decree against them, and their Answers would be no Evidence against the Company; and the Plaintiff might examine them as Witnesses; and the Demurrer was allowed, without putting them to answer as to Matters of Fraud and Contrivance. *Trin.* 1700, *Dr. Steward versus East-India Company*, 2 *Vern.* 380. (*Vide Ante* [1 Eq. Ca. Abr.], p. 35, *Neuman v. Godfrey*.)

9. A Bill was brought by the Obligee in a Bond against the Heir of the Obligor, alledging, that he having Assets by Descent, ought to satisfy this Bond, to which the Defendant demurred, because [41] the Plaintiff had not expressly alledged in the Bill, that the Heir was bound in the Bond; and though it was alledged, that the Heir ought to pay the Debt, yet that was held insufficient, and the Demurrer was allowed. *Crossing and Honor*, 1 *Vern.* 180.

10. A Bill, being exhibited to discover a personal Estate and Will; the Defendants demurred, because it appeared on the Plaintiffs' own shewing, that they were neither Creditors or Legatees; and the Demurrer was allowed. *Hil.* 25 *Car.* 2 [1674], *Blondell & Ux'* and *Pannett, et al'*, *Finch*, 88. (*Vide ante*, p. 35, *Gethin v. Gale*.)

11. A Bill being exhibited to prove a Will, and perpetuate the Testimony of the Witnesses; the Defendant, upon Cross Examination of one of the Witnesses, exhibited an Interrogatory to him to discover what Deeds or Settlements he knew the Testator had made; to which the Witnesses demurred, as not pertinent to the Matter in Issue; and Ld. K. over-ruled the Demurrer, because he would not introduce such a Precedent as for a Witness to demur; for it did not concern the Witness to examine what was the Point in Issue. *Ashton and Ashton*, 1 *Vern.* 165.

12. There can be no Demurrer to a *Subpoena* in Nature of a *Scire Facias*, for the *Subpoena* is no Record, nor any where filed. *Easter* 16 *Car.* 2, *Wan and Lake*, 1 *Chan. Ca.* 50 (2 *Freem.* 180, *Ward and Lake*, S. C. 3 *Chan. Rep.* 15). Neither can there be a Demurrer to an Answer. *Trin.* 16 *Car.* 2, *Williams and Owen & al'*, 1 *Chan. Ca.* 56 (2 *Freem.* 181, S. C. says, it was a Demurrer to an Answer to a Bill of Review, and that the Demurrer was, because it would tend to Perjury and Infiniteness to examine Things examined and decreed, and that the Court was of that Opinion; but that there could be no Demurrer to an Answer in Equity. Ruled, that there should be no Examination of that which had been examined before. *Guth. Eq. Rep.* 234, S. C. cited by Ld. C. B. *Gilbert*). But *vide* the Case of *Wakelin and Walther*, *Moh.* 31 *Car.* 2, 2 *Chan. Ca.* 8, *cont'*.

There shall not be two Demurrers to the same Bill, but though a Demurrer to the original Bill have been over-ruled there may be a Demurrer to the Answer to the Bill. But

Sir Lloyd Kenyon, Master of the Rolls, *Bancroft v. Wardour*, 2 Bro. Chan. Ca. 66. *Vide Durdant v. Redman*, post, [1 Eq. Ca. Abr.] 42.

To a Bill for Discovery and Relief, in a Case where the Plaintiff was entitled to a Discovery only, the Defendant demurred generally. It was contended that since the Plaintiff was entitled to a Discovery the Demurrer should have been to the Relief only. But *Ld. Thurlow* allowed the Demurrer, saying that it was incumbent on the Plaintiff to adapt his Bill to what he had a Right to pray. *Price v. James*, 2 Bro. Chan. Ca. 319, and *vide Fry v. Penn*, 2 Bro. Chan. Ca. 280.

(E) ANSWERING, PLEADING, AND DEMURRING TO THE SAME BILL.

(*Vide* title Account (C) [1 Eq. Ca. Abr. 11].)

1. The Defendant had pleaded a former Decree in Bar to the Plaintiff's Bill, but the Plea was not suffered to be opened, for that it came in after a Proclamation returned; and also came in by a general Commission, which was to take the Answer only, and not plead, answer, or demur. *Mich.* 1684, *Loyd and Gunter*, 1 *Vern.* 275.

The Defendant having obtained three Orders for Time to Answer (not to plead answer or demur), on the Expiration of the last Order put in a Plea. The Plaintiff moved that the Plea should be suppressed as irregularly put in, but *Ld. Thurlow* refused the Motion, holding the Plea a sufficient Compliance with the Order. *Roberts v. Hartley*, [1] Bro. Chan. Ca. 56.

Under an Order for Time to plead, answer, or demur, but not to demur alone, the Defendant demurred, and by way of Answer only denied Combination. Upon Motion *Sir Thomas Sewell* Master of the Rolls ordered the Demurrer to be discharged and taken off the File with Costs, on the Ground that the Defendant had not complied with the Terms of the order for Time. *Lee v. Pascoe*, [1] Bro. Chan. Ca. 78.

Under an Order for Time to Answer the Defendant put in an answer as to Part and a Demurrer as to Part. The Master on a Reference had reported the Demurrer to be regular. But by *Ld. Thurlow*, when you take Time to answer you consent to answer. If you had applied on particular Grounds for Leave to demur, I might have granted the Motion, but not to demur alone, but where the Application is to answer, the Party himself cannot dispense with the Order, but must answer. *Kenrick v. Clayton*, 2 Bro. Chan. Ca. 214.

2. Where the Defendant answers to Part, and pleads to all other Matters not answered unto, the Plaintiff cannot put in Exceptions to the Answer, till he has first argued the Plea, or obtained an Order, that the Plea shall stand for an Answer, with Liberty to except to the Matters not pleaded unto. *Mich.* 1685, *Darnell and Reyney*, 1 *Vern.* 344.

* 3. The Plaintiff brought his Bill to be relieved against a Fraud in the Defendant, in causing a Ship to be sunk, upon which he had made several Insurances, and the Plaintiff had subscribed several of the Policies. Defendant, as to Part, pleads Pendency of a former Suit, and then answers to Part, and denies all the Fraud charged on him by the Bill: Plaintiff replies generally to the Answer, without taking Notice of the Plea; and Witnesses were examined on both Sides, and the Cause heard, and a Trial at Law directed, which went against the Defendant, who petitions for a Rehearing; and on the Rehearing the Defendant insisted, that the Plaintiff had been utterly irregular in his Proceedings, for not setting down the Plea to be argued and disposed of by the Court before he replied; for the Plaintiff himself cannot take upon him to over-rule it, be it what it will, but must bring it for Judgment before the Court, and for want of that, all was irregular, and ought to be set aside; but my Lord Keeper and Master of the Rolls were both of Opinion, that the Defendant by these Proceedings had waived his Plea, and [42] therefore the Proceedings were regular; so the Cause went on, and the former Decree was affirmed. *Mich.* 1701, *Lucas and Holder*.

4. Where a Defendant has demurred he may assign another Cause of Demurrer at the Bar, paying Costs; and if such Cause of Demurrer is over-ruled he ought to pay double Costs; but where a Defendant has pleaded, and there is no Demurrer in Court, he cannot demur at the Bar, though he would pay Costs. *Mich.* 1682, *Durdant and Redman*, 1 *Vern.* 78. *Sed vide Bancroft v. Wardour*, ante [1 Eq. Ca. Abr.], p. 41.

* 5. The Plaintiff's Bill was to establish a voluntary Surrender made by him and his Wife of her Lands, to the Use of him and his Heirs, against the Defendant, who

was the only Daughter and Heir of the Plaintiff's Wife, by a former Husband ; and the Wife was now dead ; this Surrender was made in pursuance of a Power reserved by a former Surrender to the Wife, to surrender it to such Uses as she by Writing, or Last Will, in the Presence of three Witnesses, should direct or appoint ; and the present Surrender, under which the Plaintiff claims, was made in the Presence of two Witnesses only, who subscribed their Names ; but the Deputy Steward, who took the Surrender had set his Name to it, and so might be considered as a third Witness, on which the Bill was brought to establish this as a good Surrender, pursuant to the Power ; the Defendant pleaded, and claimed Title under a Will made by the Wife in pursuance of her Power executed in the Presence of three Witnesses, antecedent to the Surrender to the Use of the Plaintiff, and likewise demurs ; for that if the Plaintiff had any Title, it was a Title merely at Law, and he might bring his Ejectment, if he thought fit ; and it was objected, that this Plea and Demurrer were for one and the same Thing, and therefore inconsistent and contradictory in themselves ; for the Plaintiff may reply to the Plea, and go on upon that in this Court ; but the Demurrer says he has nothing to do in this Court, but must go to Law ; so that the one is to keep him here, and the other to send him to Law ; and though it is frequent to plead to one Part of a Bill, and demur to another Part ; yet it was never known, that the Defendant pleaded and demurred to one and the same Part of the Bill, by reason of the Inconsistency. On the Plea being first, it was insisted That gave this Court Jurisdiction, and then the Demurrer afterwards, to send the Plaintiff to Law, came too late ; or at least it was urged, that the Demurrer had over-ruled the Plea, and that both could not stand. *Ld. Chan.* seemed to think the Plea was good, as a Plea of the Defendant's Title, and the Demurrer good likewise, as it was a Demurrer to the Plaintiff's Title ; but at last he over-ruled the Plea, and allowed the Demurrer. *Trin.* 1728, *Cotter and Layer* [Mosely, 227].

[43] (F) CONCERNING THE REPLICATION.

1. If there is a Plea and Answer to the same Bill, and the Plaintiff replies to the Plea only, it will be irregular ; for the Replication must be to the Answer, as well as the Plea. The Cause put off for that Irregularity. *Nicol and Wiseman*, 2 *Vern.* 46. (*See the Book.*)

2. If the Plaintiff replies to an answer, and without Rejoinder, and giving Rules for Publication, brings the Cause to a Hearing, the Answer shall be taken wholly true, as if there had been no Replication ; for the Opportunity which the Defendant had to prove his Answer was taken from him. *Per Ld. Chan.* 3 *Mar.* 1679. *Grosvenor and Cartwright*, 2 *Chan. Ca.* 21.

3. If after a Plea or Demurrer to a special Replication allowed, the Plaintiff may be admitted to put in a general Replication, *Q. & vide Nosworthy and Basset*, *Mich.* 1685, 1 *Vern.* 351, where it was urged by Counsel that he may ; but the Court refused to give any Opinion.

* 4. The Plaintiff set down this Cause to be heard on a Bill and Answer, and had a Decree against the Defendant by Default ; and when the Defendant came to shew Cause against the Decree, it was altered in his Favour ; the Plaintiff petitioned to rehear the Cause, and at the Rehearing prayed Leave to reply to the Defendant's Answer, and had it, paying costs. *Mich.* 1699. *Lord Donnegall and Warr*.

Vide Mitford on the Pleadings in Chan. 255 *et seq.*

[44] CAP. VIII.

ASSIGNMENT AND PRIVITY.

(A) What Things or Interest may be assigned in Equity.

(B) The Privity of Contract of Estate being destroyed, what Remedy Grantees or Assignees shall have against each other in Equity.

(A) WHAT THINGS OR INTEREST MAY BE ASSIGNED IN EQUITY.

1. If a Man indebted to several Persons sells his Lands, and takes Bonds for the Money from the Purchaser, and assigns these Bonds to one of his Creditors, such assignment is good in Equity. *Rep. Temp. Finch*, 299.

(Possibility, Right of Entry, or Thing in Action, or Cause of Suit, or Title for a Condition broken, cannot be granted or assigned over by Law. 1 *Inst.* 214. And it has been adjudged in B. R. that an Assignee of a Covenant could not sue in Equity to have the Benefit of the Covenant, it being against Law to assign a Covenant; and a Prohibition was granted to the Court of Requests for such a Suit there. 1 *Rol. Abr.* 376. But though a Bond cannot be assigned over, so as to enable the Assignee to sue in his own Name; yet he has by the Assignment such a Title to the Paper and Wax, that he may keep or cancel it. 1 *Inst.* 232.)

2. A Chose in Action is assignable in Equity upon a Consideration paid. *Per Cur'* [Bristol v. Hungerford], 2 *Vern.* 525. But there must be a Consideration. [Suffolk v. Greenville,] 3 *Chan. Rep.* 90.

3. If A. assigns Bonds to B. to indemnify him from a Debt for which he was bound for A. and afterwards A. becomes a Bankrupt, the Assignees of A. the Bankrupt can have no better Right to these Bonds than the Bankrupt himself; and he being bound by the Assignment, they are bound likewise. *Hil.* 1701, *Peters & al'* and *Soame & al'*, 2 *Vern.* 428.

4. In the Case of an Assignment of a Bond, the Assignee alone becomes entitled to receive the Money; and Payment to the Oblige after the Notice of the Assignment, is not good. *Per Ld. K.* in the Case of *Baldwin and Billingsley*, 26 *Feb.* 1705, 2 *Vern.* 539, 540. But payment to the Oblige without Notice of the Assignment, is good. 15 *July* 26 *Car.* 2 [1674]. *Ashcomb's Case*, 1 *Chan. Ca.* 232. An Assignee must take it, subject to the same Equity that it is in the Hands of the Oblige, *vide* [Coles v. Jones, 1715] 2 *Vern.* 692.

[45] 5. As if on a Treaty of Marriage between A. and the Daughter of B. the Mother of A. surrenders Part of her Jointure to enable her Son to make a Settlement, and B. agrees to give his Daughter £3000 Portion, and A. without the Privy of his Mother, gives a Bond to B. to pay back £1000 at the End of seven Years, and B. assigns this Bond to his Creditors; yet it shall be delivered up as obtained in Fraud of the Marriage-Agreement; for although a Bond is assignable in Equity, yet it still remains liable to the same Equity that it was in the Hands of the Oblige. *Mich.* 1718, *Turton and Benson*, 2 *Vern.* 764.

6. A Seaman assigns his Wages for securing the Payment of a Debt due by simple Contract; and he dying soon afterwards intestate, and leaving Bond-Debts, it was decreed that the Assignee should be paid only in a Course of Administration. *Mich.* 1700, *Mitchel and Edes*, 2 *Vern.* 391. *Prec. in Chan.* 125, S. C. Note: The Reason hinted at is, because the Agreement to Assign amounted to no more than a Letter of Attorney to receive them, which was revoked by his Death.

7. For where a Seaman assigned his Wages as a security for Money, and died indebted to other Persons, it was held that this Assignment specifically bound the Wages. *Mich.* 1707, *Crouch and Martin*, 2 *Vern.* 595.

8. An Administrator *de bonis non* of the Conusee of a Statute, had agreed with the Conusor to assign it in consideration of a Sum of Money which upon the said Agreement, the Conusor had covenanted to pay him, his Executors or Administrators, and then the Administrator died; and the Court decreed the Money to be paid to the Executor of the Administrator, and not to the Administrator *de bonis non*, although before the Extent it could not be assigned at Law. [Anonymous] 2 *Vent.* 362. The Reporter adds a Note, That there were no Debts appearing of the first Intestate's: If there had been Debts, it would have belonged to the Administrator *de bonis non*. 1 *Rol. Abr.* 380.

9. A Man by his Will gives a Legacy of £300 to a Feme Covert, without creating any separate Trust of it for her Benefit, and this Legacy was made payable out of a Reversion of Lands expectant on an Estate for Life; the Husband some Time after makes an Assignment of this Legacy to Trustees, in Trust for the Benefit of his Children; and after by his Will takes Notice again of the same Legacy, and devises it in like Manner for the Benefit of his Children, and makes his Wife Executrix, and dies; the Estate for Life drops, and the Widow applies to the Executor of the first Testator for her £300 Legacy; and thereupon she and the Executor come to an Agreement, that she should accept £200 only, in full of her said Legacy, and accordingly the £200 was paid, and she gave a Release for the whole Legacy; and it appearing in the Cause, that she had Notice both of the Will and Assignment, and that she gave no Manner of Notice of it to the Executor; the Court decreed, that as the Husband had made good Assignment of it in Equity (though as a Chose in Action it was not assignable by Law) that

she should be answerable to the Children for the £200 she had received; but as to the £100 which the Executor had drawn her in to release, he himself [46] should be chargeable, he being thereby no ways injured, since he ought at first to have paid the whole Legacy; and though this Legacy was charged on a Reversion, which was not an immediate Fund for the raising of it; yet being given to the Wife *in present*, when the Fund comes in, it shall carry Interest from the Testator's Death, which must likewise go to Children. *Mich.* 1714, *Atkins and Daubeny* [Gilb. Eq. Rep. 88]. But of what things of the Wife's may the Husband dispose, and when, *vide* Title Baron and Feme [1 Eq. Ca. Abr. 57 *et seq.*].

10. A. possessed of a Term, settles it in Trust to the Use of himself and his Wife for Life, Remainder to the Use of such Issue of the Husband and Wife, as he should by Will appoint; he by Will settles it on B. his Son, who in the Life-time of his Mother assigns and releases it to C. to whom the Trustees likewise assign their Interest; and it was held by the Court, with the Advice of the Judges, that though a Grant of a future Possibility is not good in Law, yet a Possibility of a Trust in Equity may be good; and that it was the rather so in this Case, because the Trustees joined in it. 4 Car. 1 [1628-29], *Warmestry and Tanfield*, 1 Chan. Rep. 29.

If there be a Devise of a Term to A. for Life, Remainder to B. B. cannot in the Life-time of A. assign his Interest, because but a Possibility. *Lampet's Case*, 10 Co. 47; 1 Sid. 188, S. P.

11. Where any Person has the Trust of a Possibility in Remainder of a Term, he has power to declare, and make a Disposition of the Trust of such Possibility, agreed by Counsel. [*Goring v. Bickerstaff*, 1661,] 1 Chan. Ca. 8.

12. *Cestuy que Trust* of a Term, upon his Wife's joining with him in a Sale of Part of her Jointure, directs, that after his and his Wife's Death, his Trustees should assign the rest of the Term to his Wife's Daughter, when she shall attain the Age of twenty-one, or be married; the Daughter marries, and she and her Husband assign their Interest in the Term, in the Life-time of *Cestuy que Trust* and his Wife; and the Question was, whether such a Possibility could be assigned; and *per* Ld. K. It is a Notion that has obtained at Law, that a Possibility cannot be assigned; yet if it were *res integra*, there is no Reason for it; yet the Rule of Law must be the Rule here, for *Æquitas sequitur Legem*; and he dismissed the Plaintiff's Bill which sought the Benefit of this Assignment, but without Costs. *Freeman and Thomas*, *Mich.* 1706, 2 Vern. 563.

Yet a Possibility may be released; for the Law holds it unreasonable, that there should be an Incumbrance on a Man's Estate, which cannot in any way be discharged. Ibid.

(B) THE PRIVACY OF CONTRACT OR ESTATE BEING DESTROYED, WHAT REMEDY GRANTIES OR ASSIGNEES SHALL HAVE AGAINST EACH OTHER IN EQUITY.

1. If A. leases to B. a Wine-Licence for Years, rendering Rent, and B. assigns to C. and C. for valuable consideration assigns to D. who had no Notice of the Rent, A. shall charge D. with the Rent, for the Contract was Personal, as in Case of a Lease of a Fair, &c. and *Æquitas sequitur Legem*, especially when the Assignee is a Purchaser for valuable Consideration, without Notice. [47] *Mich.* 1656, *James and Blank*, *Hard.* 88. But if he had been a Purchaser, with Notice, he would have been liable in Equity during his Enjoyment, though there was no Privacy. [*City of London v. Richmond*, 1701,] *Vide* 2 Vern. 423. (*See the Book.*)

2. The Plaintiff demands, by his Bill, six Years Rent Arrear, due from the Defendant, and incurred during the Time that he, the Plaintiff, was Bishop of *Exon*; the Defendant pleads, that whilst he was Bishop of *Exon*, he tendered him the Rent, which he refused, having a mind to impeach his Lease, and that he being now translated, is not intitled to the Rent, either in Law or Equity. Ld. Chan. was clear of Opinion, that the Plaintiff had no Remedy at Law (but *quære* whether an Action of Debt might not be brought for the Rent at Law); and with the Advice of the Judges decreed, that he should have none in Equity. 23 Car. 2 [1671-72], *Bishop of Sarum and Nosworthy*, 2 Chan. Rep. 60.

3. If an Assignee of a Lease assigns it over, Equity will compel him to pay the Rent which became due during his Enjoyment, though the Privacy of Estate was destroyed in Law. It being urged, that there were twenty Precedents of the Kind;

Ld. Chan. said, That if there were not one, he would not have doubted to have made a Precedent in this Case. *Pasc.* 1683, *Treackle and Coke*, 1 *Vern.* 165. Note: *In this Case the Defendant pleaded a Judgment on a Demurrer at Law.*

(An Assignee cannot, by assigning his Interest, discharge himself of the Rent without tendering the Arrears, and giving Notice of the Assignment: for till then he is liable in an Action of Debt. 1 *Lec.* 215. He is likewise liable in an Action of Covenant for the Rent due before the Assignment. 1 *Salk.* 81. But for Rent which became due after the Assignment, he is not liable, though he does not give Notice of the Assignment. 1 *Salk.* 81, 2 *Vent.* 228.)

4. If a Lessee of a College makes an Under-Lease, and covenants with his Lessee, that he would renew his Lease, and add a further Term of three Years to his Lease, and he renews the Lease, but, instead of adding the three Years, assigns it to *J. S.* *J. S.* having Notice of the Covenant, will be obliged to add the three Years. Decreed *Easter* 27 *Car.* 2 [1675]. *Finch and Earl of Salisbury*, *Rep. Temp. Finch.* 212.

5. So if *A.* makes a Lease for three Years, and in consideration of the Lessee's laying out £100 in Improvements, covenants to grant a new Lease at the End of the Term, at the same Rent: the Purchaser of the Inheritance shall make good this Covenant. *Mich.* 1703, *Richardson and Sydenham* 2 *Vern.* 447.

Note: *Here the Consideration was*, a Covenant from the Lessee that he would lay out £100 *which distinguishes this Case from Robertson v. St. John, ante, p. 18.*

6. If a Lessee for Years, with Covenants to repair, assigns his Lease to *J. S.* by way of Mortgage, and *J. S.* never enters, Equity will not compel him to repair, though he had the whole Interest in him; and though it was his own Folly to take an Assignment of the whole Term, when he should have taken a derivative Lease, by which Means he would not be liable at Law. *Trin.* 1692, *Sparkes and Smith*, 2 *Vern.* 275. But *vide Pilkington v. Shaller et al'*, 2 *Vern.* 374, where such an Assignee though he never entered, and had lost his Mortgage-Money, was by Law compelled to pay the Rent; and having sued in Equity, could have no Relief.

Note: *There is no inconsistency between these two Cases. The determination in Sparkes v. Smith, was no more than this, that, all the hard Circumstances of the Case considered, Equity would not assist the Plaintiff to charge the Defendant, but would leave him to recover at Law as well as he could.*

7. If a Lessee for Years, who is bound by Covenant to repair, makes an Under-Lease in Trust for *J. S.* and the Lessee is dead and the Premises out of Repair; yet the Lessor shall not compel *J. S.* in Equity to repair, unless the Executors of the first Lessee are insolvent; for though the Privy of Estate is destroyed in Law, yet he shall not have Recourse to this Remedy, whilst he has any left against the Executors of the first Lessee. *Mich.* 1682, *Goddard and Keate*, 1 *Vern.* 87. (*See the Book.*)

[48] CAP. IX.

AWARD AND ARBITRAMENT.

- (A) Concerning the Submission.
- (B) The Parties to the Submission.
- (C) The Arbitrators or Umpire, and herein of the Commencement, Determination, and Revocation of their Authority.
- (D) The Award for what Causes set aside.
- (E) Concerning Submissions and Awards made pursuant to a Rule of Court.

(A) CONCERNING THE SUBMISSION.

1. If two submit themselves to the Arbitrament of *J. S.* of all Controversies, *ita quod, &c., de premissis*, and *J. S.* makes an Award of Part only, so that the Award is void in Law; this shall not be made good in a Court of Equity. *Robinson and Biss*, adjudged 7 *Jac. in B. R.* [1609-10] and a Prohibition granted to the Council of *Fork.* 1 *Rob. Abr.* 377.

2. So if the Award differs from the Submission, it shall be as well void in Equity as

at Law. [Hide v. Petit,] 1 Chan. Ca. 186. [Warren v. Green,] Rep. Temp. Finch, 141, S. P.

3. If the Submission to an Award be * conditional *ita quod* an Award be made *de & super præmissis*, &c., there, if the Award be not of the Whole, it is void; but if the Submission be not conditional as aforesaid, then though the Award be but of Part of the Matter referred, it is good for so much as it settles, though it leaves other Things at large. *Per Lord Maynard*, 2 Vern. 109.

[49] (B) THE PARTIES TO THE SUBMISSION.

1. All the Parties to the Suit consent to refer the Matter to *J. M.* and *J. S.* one of the Parties, signifies his Consent by signing a Paper to that Purpose, so that the Award be made at a certain Day therein limited, and no Award is then made; but afterwards the Court, in the Presence of all the Parties (except *J. S.* who was absent, but whose Solicitor consented on his Behalf), refer it back to *J. M.* but not finally to determine, who made an Award; and it was resolved, that the Solicitor's Consent should not bind his Client; though it was objected and admitted, that an Attorney's Assent(a) to a Reference on Behalf of his Client should bind him at Law. *Colwall and Child*, 1 Chan. Ca. 86 (1 Chan. Rep. 195; *Colwall and Child*, 12 Car. 2, S. C. 2 *Freem.* 154).

(a) *Vid.* 1 Salk. 70. And who are bound by their own and others Submissions, *vide* 1 Rol. Abr. 268, March. 111, *Stile*, 351, 3 Lev. 17. If one Partner, on Behalf of himself and the other Partner, submits, &c., though the Partner that did not submit is not bound, yet he who submitted shall perform the Award. 2 Mod. 227.

2. If *A.* and *B.* Executors of *J. S.* on the one Part, and *C.* his Widow, on the other Part, submit to Arbitration, the Arbitrators may make an Award, not only of Matters in Difference between *A.* and *B.* jointly, or *A.* and *B.* separately, and *C.* but also of Matters between *A.* and *B.* provided they have Knowledge of the whole Fact, and all the Parties interested are before them. *Carter and Carter*, 1 Vern. 259. (*See the Book.*)

(C) THE ARBITRATORS OR UMPIRE; AND HEREIN OF THE COMMENCEMENT, DETERMINATION AND REVOCATION OF THEIR AUTHORITY.

1. If the Submission to an Award be, so as the Arbitrators make their Award at or upon the 27th of *March* then next; and if the Arbitrators make no Award, then if the Umpire make his Umpirage on the same Day; the Umpire cannot make his Umpirage on the same Day, though the Arbitrators disagree, for they have all that Day to make their Award. [Anonymous,] 2 Vern. 100.

(If there be a Submission to Two, so as they make their Award before *Midsummer*; and if they cannot agree, then to such Umpire as they chuse, so as he makes his Umpirage before *Midsummer*; and an Umpire is chosen accordingly, this is good, and so will his Umpirage be, if made; because the Arbitrators had determined their Power before by chusing an Umpire; but if the Umpire be named in the Submission, he cannot make his Umpirage before the Time given to the Arbitrators to make their

* The Distinction which has obtained with respect to conditional Submissions, is where the Submission does in general set forth all the Matters in Controversy, with a special Conclusion requiring, or so that the Award be made of all the said Matters; in which Case it has been held necessary to make a final Determination of all the Particulars enumerated. *Uro. Eliz.* 838. But if there be no such Enumeration, nor special Conclusion, then the Award may be good though it make an End of Part of the Matters only. 1 Rol. Abr. 257, s *Co.* 97, b. And since the Courts of law and Equity have of late been less nice in the Construction of Awards; it is now agreed to be a stated Rule in Awards that are conditional, or said to be *de & super præmissis*, that if the Words used in them be in their own Nature more comprehensive, and so extensive to Things not within the Submission; yet it shall be intended, that there was no other Matter between the Parties for them to lay hold on, but what was submitted, if the contrary be not shown; so *converso*. If the Words are more narrow and less comprehensive than to take in all the Matter of Submission; yet it shall be intended, that no more was in Controversy than what the Words naturally comprehend, if the contrary be not likewise shewn. 6 Mod. 232.

Award in be expired. *Per Holt, C. J.*, 1 *Salk.* 71, 72. — But for this *vide Cro. Car.* 263, *Raym.* 206, 1 *Lutw.* 541, 2 *Mod.* 169, 2 *Vent.* 116, 1 *Salk.* 70.)

2. If by the Submission the Arbitrators have Power to chuse an Umpire, and they not agreeing, throw Cross and Pile which of them should name the Person; and the Umpire thus chosen makes his Umpirage; the Court will set it aside. [*Harris v. Mitchell*,] 2 *Vern.* 485.

3. If the Parties in Court sign an Order, by Consent to refer their Matters to Arbitrators finally to determine, and their Award to be final, and stand ratified by Decree, without any Appeal: yet one of [50] the Parties may revoke this Submission; but in such Case the Court will grant an Attachment against him. *Hide and Petit*, 1 *Chan. Ca.* 185.

(A Submission to an Award by Bond may be countermanded by Deed, such Authorities in their own Nature being revokable, as a Letter of Attorney, &c., though made irrevokable by express Words; but in such Case the Bond is forfeited; but if it had been without obligation, one might revoke and forfeit nothing: *Ex nuda Submissione non oritur Actio.* 8 *Co.* 82.)

(D) THE AWARD, FOR WHAT CAUSES SET ASIDE.

1. Upon a Submission, by Consent and Order of Court, an Award was made, that a Bond should be given by the Guardian, that the Infant at his full Age should convey the Lands in Question; and *Nottingham L. C.* held, That when the Parties themselves chuse their own Judges, this Court will not relieve against the Award, unless it be in Case of Corruption, Exceeding Authority, and the like; but when there is a Reference by Order of this Court, and the Award appears unequitable, the Court will not decree it; and in this Case it was unreasonable that the Guardian should give such a Bond, for the Infant may die, or if he live to Age, may refuse to convey, and therefore he would not decree it; and he said further, that he would never decree an Award to bind an Infant. *Trin.* 28 *Car.* 2 [1676], *Cavendish* and —, 1 *Chan. Ca.* 279.

2. If the Arbitrators award a Thing impossible, or repugnant, to be done, the Award shall be set aside. [*Colwel v. Child*] *Vide* 1 *Chan. Ca.* 87.

3. The Plaintiff called the Defendant, who was a Butcher, *Bankrupt Knave*, which being submitted to Reference, the Arbitrators gave him £495 to repair his Honour (as they called it in the Award), and the Court thought the Damage too excessive, and set aside the Award, but directed a Trial at Law; and the Jury gave him £10. *Butcher of Croydon's Case*, 3 *Chan. Rep.* 76, 2 *Vern.* 251, *S. C.* cited; where it is said, that the Court, did not set aside the Award barely for excessive Damages, but because it appeared that one of the Referees was the Butcher's Cousin.

4. If Tenant for Life commits Waste to the Value of £380, and his Estate is but £70 *per Ann.* and an Action of Waste is brought against him by him in Remainder, and it is submitted to a Reference by Rule of Court; but before an Award made, the Tenant for Life repairs the Places wasted to 40s. and forbids the Arbitrators, and likewise the Umpire to proceed in making any Award; but notwithstanding the Umpire awards the Party £380, yet the Court will not set aside the Award, there appearing no Fraud or Collusion in the Matter. *Pasc.* 1683, *Brown and Brown*, 1 *Vern.* 157. Although it was objected, that £380 was near the Value of an Estate for Life of £70 *per Ann.* (*See the Book.*)

5. If the Arbitrators appear to have an Interest in the Cargo touching which the Award is made, and therefore put too great a Value thereon; and in five Days after the Award made the Money awarded is attached by the Arbitrators for Debts owing to them; the Court will set aside the Award. *Hil.* 1691, *Earle and Stockers*, 2 *Vern.* 251.

The Arbitrators promised to hear Witnesses, but making the Award before they had so done, the Award was set aside. *Pitt v. Dawkra*, *Cit. Ibid.*

6. If a Submission is to three Arbitrators, or any of them, and two of them by Fraud or Force will exclude the other, that [51] alone is sufficient to vitiate the Award; or if they have private Meetings, and admit one of the Parties, but give no Notice to the other, and suffer the Party's Attorney, whom they admitted, to draw up the Award, such Award shall be set aside for Partiality and Unfairness. *Mich.* 1705, *Burton and Knight*, 2 *Vern.* 514.

7. If it appears that the Arbitrators went upon a plain Mistake, either as to the Law,

or in a Matter of Fact, the same is an Error appearing in the Body of the Award, and sufficient to set it aside. *Corneforth v. Geer*, 2 Vern. 705. But the Plaintiff failing to make out his Case by Proof, his Bill was dismissed.

8. The Plaintiff and Defendant had submitted to an Arbitrament by Bond; and an Award was made, not binding by form of Law, by which the Plaintiff was to pay the Defendant £900, and to seal a Release to the Defendant; and the Defendant was to assign several Securities he had from the Plaintiff. The Plaintiff sold some Lands to raise the £900, expecting the Defendant would receive it, as he gave him Intimation he would; and tendered him the £900 and a Release executed by the Plaintiff; and though there was no other Execution on the Plaintiff's Part of the Award; and though the Award was extrajudicial, and not good in Strictness of Law; yet Ld. Chan. decreed it should be performed *in Specie*. *Pasc.* 1687, *Norton and Mascall*, 2 Vern. 24.

* 9. But where a Bill was exhibited to have an Execution of an Award, which was performed by neither Party; and the Defendant demurred, because there was no Precedent that a Court of Equity had ever carried such Awards into Execution; the Demurrer was allowed. *Mich.* 1704, at the Rolls, *Bishop and Webster*.

In Case of a Bill to set aside an Award, without more, the Court will not let the Party go into any legal Objections, except for Partiality and Corruption; but if the Bill is for an Account, and prays to set aside an Award, in order to let in such Account, there the Plaintiff may make legal Objections. Per Sir Thomas Clark, Master of the Rolls, *Champion v. Wenham*, Ambl. 245.

By the Award there was a Balance due to the Defendant, but the Arbitrators and the Defendant himself confessed two Mistakes, the Correction of which left a Balance to the Plaintiff; yet it was held that the Award should not therefore be set aside in toto. *Ibid.*

(E) CONCERNING SUBMISSIONS AND AWARDS MADE PURSUANT TO A RULE OF COURT.

1. If an Award is made a Rule of Court, according to a Submission for that Purpose, and an Attachment is taken out for not obeying the Award, and then the Party dies against whom the Attachment issues; the Act of Parliament directing (a) it to be carried on by Attachment, as is done in other Courts, for disobeying a Rule of Court; by the Death of the Party the Attachment is gone, and the Remedy lost. *Mich.* 1703, *Webster and Bishop*, 2 Vern. 444.

(a) By the 9 & 10 W. 3, *cap.* 15. The Parties may agree, that their Submission to the Award, or Umpirage of any Person or Persons, shall be made a Rule of any of his Majesty's Courts of Record, and may insert such their Agreement in the Condition of their Bond, &c., and a Rule of Court shall thereupon be made, that the Parties shall be concluded by such Arbitrament or Umpirage; and in case of Disobedience thereto, the Party neglecting or refusing shall be subject to all the Penalties of contemning a Rule of Court, unless it appears on Oath, that such Award was corruptly and unduly procured; in which Case it shall be set aside by any Court of Law or Equity, &c. *Provided* that this Statute shall extend only to such Matters for which there is no Remedy, but by Personal Action or Suit in Equity.

2. If an Award is made pursuant to an Order of Court, the Party ought first to move the Court to confirm the Award, as is done upon a Master's Report, and either Side is at Liberty to except to it. *Cressley v. Carrington*, 1 Vern. 469. (*Vide Cressley v. Carrington*, 2 Vern. 79.)

3. If there be a Submission to a Reference by Order of Court, and the Award to be made to be confirmed by the Decree of the Court, without Appeal or Exception; yet Exceptions to the Award will be admitted; ruled upon Debate. *Hild v. Coath*, 2 Vern. 109.

Vide ante (C), pl. 3 [1 Eq. Ca. Abr. 49].

[52] CAP. X.

BANKRUPT.

- (A) Concerning the Commission and Commissioners.
- (B) What shall be deemed the Bankrupt's Estate, or such an Interest in him as the Commissioners may assign.
- (C) Who may be allowed to come in as Creditors.
- (D) Who are obliged to come in as Creditors.

(A) CONCERNING THE COMMISSION AND COMMISSIONERS.

1. The Granting a Commission of Bankruptcy is not a Matter discretionary, but *de Jure*; for though the Words of the Act of Parliament are, That the Chancellor may grant, yet that *may* is in Effect *must*. *Per North, Ld. K., Alderman Blackwell's Case, 1 Vern. 152.* And so he said it had been resolved by all the Judges.

2. But though the granting a Commission be *an Officio*, yet it must be at the Request of Persons interested; for if twenty swear that *J. S.* is a Bankrupt, yet a Commission cannot be awarded without a Petition for that Purpose. *Per North, Ld. K., Blackwell's Case, 2 Chan. Ca. 191.*

(But *per Holt, C. J.* If a Man contracts a Debt while he is a Dealer, and after leaves off Trade, and then commits an Act of Bankruptcy, there none of his Creditors becoming so since he left off Trade, can sue out a Commission; but if those who were his Creditors before he left off Trade sue out a Commission, the other Creditors may come in and join. *Hil. 9 W. 3, Meggott and Mills, Ca. in B. R. Temp. W. 3, 159. Vide Lord Raym. Rep. 287, S. C. and S. P.*)

3. If all the Creditors, who petitioned for a Commission, should agree to have it discharged or superseded, it may be granted, *1 Vern. 209.* *Per Jefferies, Ld. Chan.* And if other Creditors who were not Petitioners, should pray a Renewal of the Commission, or a Revocation of the *Supersedes*; *Q.* if it may not be granted, especially if the *Supersedes* was within four Months after the granting the Commission. [Alderman Blackwell's Case, 1687,] *Vide 2 Chan. Ca. 192, 193, 1 Vern. 208.*

4. If a Commission is granted, and the Bankrupt dies, yet the Commissioners may proceed. [Alderman Blackwell's Case, 1687,] *2 Chan. Ca. 193.*

5. If the King dies the Commission abates, but a new Commission may be taken out, and the Commissioners shall proceed from where they left off. [Alderman Blackwell's Case, 1687,] *2 Chan. Ca. 193.* But now it is otherwise by St. 5 G. 2. c. 30. f. 45.

[53] 6. If a Creditor offers Proof of his Debt to the Commissioners, which they disallow, and Distribution is not made. *Ld. Chan.* will hear the Proof, and give Order therein; though he said at first, that it was fit to leave it to the Course the Statute had provided. [Anonymous,] *1 Chan. Ca. 275.*

7. If one is examined by the Commissioners touching the Bankrupt's Estate; yet he may be re-examined in Chancery. *1 Chan. Ca. 73.*

8. If the Commissioners make a fraudulent Distribution of the Bankrupt's Estate, it may be set aside in Chancery, even on a Petition. *Per Trevor and Hutchins, Lds. Commiss. 2 Vern. 162.*

9. But it seems a Distribution by the Commissioners among the Creditors, upon a supposed Value of the Bankrupt's Real Estate, where the Commissioners had no Money to distribute, is not fraudulent, and not to be set aside. [Hitchcock v. Sedgwick, 1690,] *Vide 2 Vern. 158.*

(B) WHAT SHALL BE DEEMED THE BANKRUPT'S ESTATE OR SUCH AN INTEREST IN HIM AS THE COMMISSIONERS MAY ASSIGN.

1. If a Lessor covenants with his Lessee and his Assigns, to renew his Lease, and the Lessee becomes a Bankrupt, and the Commissioners assign this Covenant, the Assignee cannot have any Relief against the Lessor; Adjudged upon a Reference to *J. Windham* and *B. Turner*; and the Bill of the Assignee dismissed accordingly. *Hil. 17 Car. 2 [1666]. Drake and The Mayor of Exeter, 1 Chan. Ca. 71, 2 Vern. 97. S. C. cited per Cur', as so adjudged, Pl. 89; vide also 2 Vern. 194, Pl. 176 (2 Freeman, 183, S. C. and S. P. determined).*

2. But the Commissioners may assign an Equity of Redemption. [Drake v. Mayor of Exeter,] 1 *Chanc. Ca.* 71. [Vandenanker v. Desbrough, 1689,] 2 *Vern.* 97, S. P. cited *per Cur'*, and says, that *it was for some Time doubted*, the Clause in the Statute being, that the Assignee may perform Conditions not broken, and Conditions performable.

3. If A. devises £800 to be invested in Land, for the Benefit of the Wife of J. S. for her Life, and afterwards for her Children; and the Interest of the Money in the mean Time to go to such Persons as ought to receive the Profit, and J. S. becomes a Bankrupt, the Interest of this £800 shall not be liable to the Bankruptcy, this not being any Trust created by the Bankrupt, but a Maintenance intended the Wife, and given to her by her Relation. *Pasc.* 1689, *Vandenanker and Desbrough*, 2 *Vern.* 96.

4. If the Father, on his Son's Marriage, covenants during his Life to pay his Son £5 *per Ann.* and the Son becomes a Bankrupt, his Creditors shall not have the Benefit of this Agreement. *Mich.* 1690, *Moyses and Little*, 2 *Vern.* 194.

5. But if a Father devises a Legacy of £600 to his Son, payable at Twenty-one, and the Son obtains a Decree for it, and £637 is reported due: but before the Money is paid, the Son becomes a Bankrupt; yet the Commissioners may assign the Legacy and Benefit of the Decree; ruled upon a Demurrer. *Hil.* 1701, *Toulson and Groul.* 2 *Vern.* 432.

[54] * 6. A Man had devised Lands, which were in Mortgage, to be sold, and the Surplus of the Money to be paid to his Daughter; the Daughter married a Man, who soon after became a Bankrupt, and the Commissioners assigned this Interest of the Wife's; the Husband died, and the Assignees brought this Bill against the Wife and Trustees to have the Land sold, and the Surplus of the Money paid to them, but the Court would not assist in stripping the Wife (who was wholly unprovided for) of this Interest, but dismissed the Bill. *Mich.* 1698, at the Rolls, *Parker and Dykes*.

7. A Legacy of £1000 was given to one after the Death of her Mother, when she should attain the Age of twenty-one Years; and the Defendant was appointed Trustee for the raising and Payment thereof out of certain Lands; the Legatee was drawn into an improvident Match with one, who soon after became a Bankrupt, and the Commissioners assigned all his Effects, and gave him a Certificate of his Conformity; and the Assignees brought a Bill against the Trustee for this £1000 who insisted, that the Assignees could be in no better Condition than the Husband; and that if he were Plaintiff he could not prevail, without making a suitable Provision on his Wife; and that this Legacy being liable to a double Contingency, *viz.* the Death of the Mother and the Legatee's arriving at the Age of twenty-one Years, at the Time of the Bankruptcy, was not such an Interest as could be assigned: The Court held, that though both Contingencies have since happened; yet those being since the Assignment of the Bankrupt's Estate, and since a Certificate of his having conformed himself in every Thing to the Acts, he was now discharged as a Bankrupt; and this Portion could not pass without a new Assignment, which the Commissioners could not make, their Commission being determined, and so dismissed the Bill. *Mich.* 1717, *Jacobson and Peere Williams*. (1 *Will. Rep.* 386, S. C., and says the Bill was dismissed without Costs, because the Plaintiffs were Creditors. *Vide Gilb. Eq. Rep.* 140, S. C.)

As to what Interests of the Wife, the Commissioners may assign. *Vide Cooke's Bankrupt Laws*, 2d ed. p. 366.

. (C) WHO MAY BE ALLOWED TO COME IN AS CREDITORS.

1. If one lends Money to a Bankrupt, after a Commission sued out against him, but before actual Notice of it, he cannot come in under the Statute as a Creditor: By two Lords Commissioners against one. [Hitchcock v. Sedgwick, 1690,] 2 *Vern.* 156.

A Debt voluntarily paid a Bankrupt shall be paid over again: *scilicet* if recovered by due Course of Law. 1 *Vern.* 94. *But for this vide Title Notice.* [1 *Eq. Ca. Abr.* 330 *et seq.*]

2. A. on his Marriage gives a Bond to leave his Wife £500, or a Third of his Personal Estate at her Election; A. becomes a Bankrupt; and it was decreed, that the Wife should come in as a Creditor on her Bond; and what shall be paid in respect thereof, to be put out to Interest, which is to be received by the Creditors during the Bankrupt's Life, and the Principal to be paid the Wife, if she survives him. *Trin.* 1710, *Holland and Galliford*, 2 *Vern.* 662.

3. But where a Bond was given by the Husband, for payment of a Sum of Money to his Wife, in case she survived him, and the Husband after became a Bankrupt; *per* Ld. Chan. there can be [55] nothing stopped, by way of Dividend, out of the Bankrupt's Estate, to answer this contingent Debt or Demand, when it happens; but where a Bottomree-Bond was entered into, and the Ship returned safe before the Dividend actually made, they were let into a Share of that Dividend, though the Bond was contingent at first, because the Contingency was then at an End. *Mich.* 1728, *Ex parte Chancell versus Cassanet*. (2 *Will. Rep.* 497, S. C. *Sed vide ex parte Groome*, 1 *Atk.* 118, *cit.* Cooke's Bankrupt Laws, 2d ed. p. 235.)

4. A. and B. enter into Partnership, and by Indenture of Copartnership agree, that all such Debts as should be owing on the Joint Account, should be paid out of the Joint-Stock, and that the Joint-Stock should not be charged with the private or particular Debts of either of the said Partners. A. and B. became Bankrupts, and a Joint-Commission was taken out against them; and the Commissioners having assigned all their Estate to the Creditors on the Joint-Stock; J. S. who was a separate Creditor to one of them, brought his Bill to be admitted into a Share; and it was declared by the Court that the Estate belonging to the Joint-Trade, as also the Debts due from the same, ought to be divided into Moieties, and that each Moiety of the Estate ought to be charged, in the first Place with a Moiety of the Joint-Debts; and if there be enough to pay all the debts belonging to the Joint-Trade, with an Overplus, then such Overplus ought to be applied to pay particular Debts of each Partner; but if sufficient shall not appear to pay all the Joint-Debts; and if either of the Partners shall pay more than a Moiety of the Joint-Debts, then such Partner is to come in before the Commissioners, and be admitted as a Creditor for what he shall so pay over and above his Moiety; and decreed accordingly. 34 *Car.* 2 [1682-83], *Lord Craven & al'* and *Knight & al'*, 2 *Chan. Rep.* 226. 2 *Chan. Ca.* 139, S. C. *Lord Craven and Widdows*, *Easter* 35 *Car.* 2 [1683], and only there said that the separate Creditor was admitted, notwithstanding the Agreement of the Parties. A Quære is added, How the separate Creditors could have other Title than those under whom they claim?

5. A. B. and C. were Partners in the Trade of a Dry Salter; C. imbezzeles and wastes the Joint-Stock, contracts private Debts, and becomes a Bankrupt; the Commissioners assign the Goods in Partnership; on a Bill brought by the other Partners, they insisted to have an account, and the Goods sold, that out of the Produce of the Goods, the Debts owing by the Joint-Trade might be paid in the first Place; and that out of C's Share Satisfaction may be made for what C. wasted; and that the Assignees could be in no better Case than the Bankrupt himself, and were intitled only to what his third Part would amount unto clear, after Debts paid and Deductions for his Imbezzlement; and the Court seemed to be of that Opinion, but sent it to a Master to take the Account and state the Case. *Trin.* 1693, *Richardson and Goodwin*, 2 *Vern.* 293. (*Vide Goss v. Dufresnoy*, *Davies* 371, *cit.* Cooke's Bankrupt Laws, 2d ed. 552.)

6. A. and B. being Joint-Traders, a Commission of Bankruptcy issued against them; their separate creditors now applied by Petition, that they might be let in for their Debts, upon the respective separate Estates of the Bankrupts, under that Joint-Commission, the separate Estates being of small Value, and not sufficient to bear the Charge of taking out two new Commissions against them separately; and Ld. Chan. ordered them to be let in to prove their respective separate Debts upon the Joint-Commission, they paying Contribution to the Charge of it, and directed, as the Joint or Partnership Estate was in the first place to be applied to pay the Joint or Partnership Debts; so in like Manner the separate Estate should be in the first Place to pay [56] all the separate Debts; and as separate Creditors are not to be let in upon the Joint-Estate, until all the Joint-Debts are first paid; so likewise the Creditors to the Partnership shall not come in for any Deficiency of the Joint-Estate, upon the separate Estate, until the separate Debts are first paid. *Mich.* 1715, *Ex parte Crowder*, 2 *Vern.* 706. (*Vide* Cooke's Bankrupt Laws, 2d ed. 288.)

(D) WHO ARE OBLIGED TO COME IN AS CREDITORS.

1. If A. sells Land to B. who afterwards becomes a Bankrupt, and Part of the Purchase-money is not paid, A. shall not be bound to come in as a Creditor, under the Statute, but the Land shall stand charged with the Money unpaid, though no Agreement for that Purpose. *Chapman and Tanner*, 1 *Vern.* 267.

2. If A. being beyond Sea, consigns Goods to B. then in good Circumstances in

London, and before the Goods arrive *B.* becomes a Bankrupt, whereupon *A.* consigns them to another ; and the Assignees of the Commission pray Relief, and a Discovery ; and a Trial at Law is directed, whether such Consignment vested a Property in *B.*, and a Verdict is found for the Assignees ; yet Equity will not oblige them to come in as Creditors, it being allowable by any Means to prevent the Goods coming into the Hands of *B.*, or the Assignees. *Hil.* 1690, *Wiseman* and *Vandeput*, 2 *Vern.* 203. *Vide* *Cooke's Bankrupt Laws*, 2d ed. 432, 630.

[57] GAP XI.

BARON AND FEME.

- (A) What Things are vested in the Husband by the Marriage.
- (B) What Acts of the Wife's before Marriage shall the Husband avoid as done in Derogation of the Rights of Marriage.
- (C) How far the Husband shall be bound by the Wife's Acts before Marriage.
- (D) How far by her Acts during Coverture.
- (E) How far a Feme Covert shall be bound by the Acts in which she has joined with her Husband.
- (F) What Contracts between Husband and Wife are dissolved by the Marriage.
- (G) In what Cases the Husband must make a suitable Provision on his Wife, when he sues for her Fortune.
- (H) Suits and Proceedings by and against Husband and Wife, how to be.
- (I) Concerning the Wife's Pin Money and Paraphernalia.
- (K) Concerning Alimony and separate Maintenance.
- (L) What Right survives to either of them, or their Representatives, by the Dissolution of the Marriage.

(A) WHAT THINGS ARE VESTED IN THE HUSBAND BY THE MARRIAGE.

1. A Feme Sole having assigned her Term in Trust for herself, before Marriage, the Husband alone mortgages the Term ; and it was decreed, that such Mortgage was not good ; and it was likewise admitted by the Court to be the constant Practice, since Queen *Elizabeth's* Time to set [58] aside and frustrate all Incumbrances and Acts by the Husband, with respect to the Wife's Term, in Trust for her, and that he could neither charge nor grant it. *Per Finch*, Ld. K., 25 *Car.* 2, *Dowly* and *Perfull*, 1 *Chan. Ca.* 225 ; 2 *Freem.* 138 S. C. But the Law is now changed in this particular.

2. For where *A.* having disposed of a Term settled in Trust on his Wife by a former Husband ; though it was decreed void by *Finch*, Ld. Chan. yet upon an Appeal to the House of Lords, the Decree was reversed. *Sir Edward Turner's Case*, 1 *Vern.* 7.

3. It came afterwards in Question, upon an Assignment made by the Husband of such a Term, whether he could dispose of it : and it being urged, that it had been lately adjudged in the House of Lords that he might, Ld. Chan., wondered at that Resolution, which he said would not amount to an Act of Parliament, so as to change the Law ; but at last decreed such Disposition good, saying, There must not be one Kind of Equity above Stairs, and another here ; and thought that from henceforth it would not be sufficient to have the Husband's Consent and Privy to an Assignment of a Term in Trust for the Feme, before Marriage, unless he was likewise made a Party to the Assignment. *Mich.* 1681, *Pit* and *Hunt*, 1 *Vern.* 18.

Note : It appears in *Sir Edward Turner's Case* [see last preceding case] to have been agreed without doubt that where a Term is assigned in Trust for a Feme with the Privy and Consent of her Husband, the Husband cannot intermeddle or dispose of it. *Vide* 1 *Vern.* 7.

4. A Term being settled in Trust on the Wife by a former Husband, the second Husband first mortgages it, and then he and the Mortgagee assign it to *J. S.* who brought a Bill against the Wife and her Trustees, to have the legal Estate assigned over to him ; and it was held, that the Husband may as well dispose of a Term in Trust for the Wife, as if the legal Estate was in her ; and decreed accordingly, although

the Husband had made no Settlement on the Wife. *Trin.* 1692, *Tuder and Samyne*, 2 *Vern.* 270.

* 5. A. made a Settlement, whereby he created a Term for Years in Trust, to raise £400 a piece for his two Daughters; one of them marries B., and he and his Wife brought a Bill, and had a Decree to have the £400 raised and paid; but before it was raised B. assigns the Benefit of this Decree to one J. S. in Trust for Payment of his Debts, and made him Executor, and died, leaving his Wife and one Child unprovided; the Creditors brought a Bill to have the Benefit of the said Assignment; and though it was insisted upon, in Behalf of the Wife, that there was a Difference between a Term Trust to raise a Sum of Money for a Woman, and a Trust of the Term itself for a Woman; yet the Master of the Rolls held, that this was a Term for Years, and not a Sum of Money, and therefore not to be distinguished from Sir *Edward Turner's*, and must decree it (though against his Conscience) that there may be an Uniformity of Judgments. *Trin.* 1703, *Walter and Saunders*. But for this vide *Letter* (L) [1 *Eq. Ca. Abr.* 68].

6. If a Legacy be given to a Feme Covert, who lives separate from her Husband, and the Executor pays it to the Feme, and takes her Receipt for it; yet on a Bill brought by the Husband against the Executor he shall pay it over again, with Interest; for Payment to the Wife is not good. Decreed *Mich.* 1684, *Palmer and Trevor*, 1 *Vern.* 261.

7. A. devises the Surplus of his personal Estate to his Daughter, the Wife of B. for her separate Use, and makes her Executrix; and *Ld. Chan.* seemed to be of Opinion, that, the Devise being to her, and not to Trustees, what comes to her by Law belongs to the [59] Husband; but there was no Decree made in it. *Trin.* 1710, *Harvey and Harvey*, 2 *Vern.* 659. (1 *Will. Rep.* 125, S. C., no Decree appears to have been made.)

(B) WHAT ACTS OF THE WIFE'S BEFORE MARRIAGE SHALL THE HUSBAND AVOID, AS DONE IN DEROGATION OF THE RIGHTS OF MARRIAGE.

1. A Widow makes a Deed of Settlement of her Estate, and marries a second Husband, who was not privy to such Settlement; and it appearing to the Court, that it was in confidence of her having such Estate that the Husband married her, the Court set aside the Deed as fraudulent. *Howard and Hooker*, 2 *Chan. Rep.* 81.

2. So where the intended Wife, the Day before her Marriage entered privately into a Recognizance to her Brother, it was decreed to be delivered up, and a perpetual Injunction granted. *Lance and Norman*, 24 *Car.* 2, 2 *Chan. Rep.* 79.

3. So where a Conveyance was made by the Wife, before her Marriage, to Trustees, in Trust that they should permit her to receive the Rents and profits of the Estate, and act in every Thing as she, whether Sole or Covert, should appoint; the Lady being crazed in her Understanding endeavoured to run away from her Husband, and stirred up her Creditors to sue him; and the Conveyance appearing to be without the Husband's Privy, *Ld. Chan.* held it to be in Derogation of the Rights of Marriage, and decreed the Possession of the Estate to the Husband, and a Conveyance from the Trustees to the Six Clerks, that it might be subject to the Order of the Court. *Hil.* 1686, *Carlton and Earl of Dorset*, 2 *Vern.* 17.

4. A Woman, on Agreement before Marriage with her Husband, being to have a Power to act as a Feme Sole, and the Husband dying, and she marrying again, the second Husband not being privy to the Settlement on the first Marriage; it was decreed that the second Husband should not be bound by that Settlement made on the former Marriage. *Edmonds and Dennington*, a Case cited [in *Carleton v. Dorset*] to be decreed, 2 *Vern.* 17.

5. But where a Widow, before her Marriage with a second Husband, assigned over the greatest part of her Estate to Trustees, in Trust for Children by her former Husband; though it was insisted, that this was without the Privy of the Husband, and done with a Design to cheat him; yet the Court thought that a Widow may thus provide for her Children, before she put herself under the Power of a Husband; and it being proved, that £800 was thus settled, and that the Husband had suppressed the Deed, he was decreed to pay the whole Money, without directing any Account. *Mich.* 1685, *Hunt and Matthews*, 1 *Vern.* 408.

A Woman filed a Bill, whereby she set forth, that being entitled to an Estate for Life in divers Lands, &c., and being about to marry one Grey, she, with his Consent, and for

the Purpose of providing for her Children, conveyed by Indentures dated 9th and 10th January 1777 her Estate to Trustees, in Trust, to pay the Rents and Profits during her Life, to such Uses as she, whether sole or covert, should appoint, and that she made an Assignment of her Personal Estate to the same Uses, that afterwards (in fact within a Week of the Date of the said Conveyance) she married the Defendant *Mr Bowes*, who after his Marriage by force compelled her to revoke the Uses of her former Deed. She therefore prayed that the said Deed might be established, that the Instrument of Revocation might be delivered up to be cancelled, that Bowes might be dispossessed of the Estates, and that he and his Agents might be restrained from receiving the Rents. Bowes by his Answer swore that he had no Notice of the Settlement of the 9th and 10th January, 1777, before his Marriage. He also filed a cross Bill praying that the said Settlement might be set aside as fraudulent being executed by his Wife before Marriage without his Knowledge, and in derogation of his Marital Rights; and that the Deed of Revocation might be established. The Fact that the Deed of Revocation was extorted by Force having been established by a Verdict at Law, the only Question remaining was, whether the Wife's Settlement of 9th and 10th January 1777, should be delivered up to be cancelled according to the Prayer of Bowes's Bill. Per Buller, J., sitting for Lord Thurlow. The Cases on this Point may be divided into two Classes. 1. Those relating to Women who never married and who of course had no Children. 2. Those relating to Women who had Children by a former Husband. The Cases of the first Class decide, that if the Wife holds out that the Husband will be entitled on the Marriage to her Property the Deed is void. But they go no further. If such Deeds were universally void, the other Class of Cases could not have existed, for Children could make no Difference. If they are good in any case, to avoid them, the Party must shew to the Court that the Husband has been deceived. Mere Concealment is not enough. Again: Bowes the Plaintiff here seeks Equity, he must therefore do Equity. He demands to have this Deed set aside without offering to make any Provision for the Wife. This is a Ground for refusing Relief. In all Cases where a Husband comes here for his Wife's Fortune, he must make a Settlement. Decree therefore, that the Deeds of 9th and 10th January, 1777, be established, and an Account of Rents and Profits against Bowes from the filing of the Bill. Bowes v. Strathmore, 2 Bro. Chan. Ca. 345.

[60] (C) HOW FAR THE HUSBAND SHALL BE BOUND BY THE WIFE'S ACTS BEFORE MARRIAGE.

1. A. made a Settlement of Lands for the Payment of his Debts, and the Trustees never acting, his Wife after his Death enters and takes the Profits, and marries again, and she and her Husband continue to take the Profits; and he likewise dying, she marries another, who also continues to take the Profits; and a Creditor being unsatisfied, it was decreed by the Master of the Rolls, that the last Husband should answer, not only for the Profits received by himself, and Wife whilst sole, but likewise for what was received by the second Husband, and not the Heir at Law; and of the same Opinion was Ld. Chan. *Gilpin and Smith*, 1 Chan. Ca. 80. But he referred it to the Parties to moderate the Matter.

2. If a Man marries an Executrix, he shall answer for so much of the Personal Estate as she possessed, although he took it as a Portion with her; and this not only in Favour of Creditors, but likewise of an Heir. *Pose*, 1688, *Bachelor and Bean*, 2 Vern. 61.

3. But if a Feme Administratrix wastes the Assets, and then marries, and dies, the Husband is liable to no more than the Value of what came to his or his Wife's Hands after the Marriage. Decreed *Mich*. 1689, *Sanderson and Crouch*, 2 Vern. 118.

4. If the first Husband and Wife are guilty of a *Deceitavit*, and there is a Bond-Debt due: *Per Cur*. This makes such a Lien by the Deed, that the second Husband is bound; but where there is barely a Breach of Trust, or a Debt by simple Contract, there, in Equity the Plaintiff ought to follow the Estate of the Wife in the Hands of the Executor of the first Husband. *Hil*. 1684, *Norton and Sprig*, 1 Vern. 309.

(*Max*. It is Equity, that should make Satisfaction, which receiv'd the Benefit. But where there is no such Fund, out of which to make Satisfaction for the Breach of Trust, the second Husband must pay it, and take his Wife chargeable with that as well as other Debts. *Vide Gilpin and Smith, ut supra*.)

5. A Feme Sole bought Goods, but did not pay for them, she afterwards married, and dying, the Goods came to the Husband's Hands; the Creditor who sold the Goods brought a Bill against the Husband for a Discovery; to which the Husband demurred; and the Demurrer was over-ruled by Ld. Chan. who with some Earnestness said, He would change the Law in that Point. 28 Car. 2 [1676], *Greeman and Goodham*, 1 Chan. Ca. 295 [sub nom. *Freeman v. Goodham*]. Vide 1 Will. Rep. 465.

(In this Case, the Goods never coming to the Husband's Hands till after the Death of the Wife, made it a very hard Case upon the Creditor, and probably occasioned the Saving of Lord Nottingham; but even here he only over-ruled the Demurrer put in to a Bill for a Discovery of the Goods; and it does not afterwards appear, what afterwards became of the Cause: *Per Talbot*, C., in the Case of *Heard and Stanford*, Hil. 1735, Ca. in Eq. temp. Talbot, 175.)

* 6. But it has been since held, that, where a Man married a Woman Trader, who died, and at her Death was indebted to several Persons for Wares which she had bought of them, and which were by her in *Specie* at the Time of her Death, and came to the Hands of her Husband; though a Bill be brought against him, that he may either pay for those Goods, or let the Persons have them again; yet he may insist, that he is neither Executor nor Administrator to his Wife, and therefore not liable to her Debts, and that all her Goods belong to him by Law; ruled upon Demurrer. *Trin. 1700, Blackmore and Ley*; but *quære*.

* 7. The Defendant had married an Administratrix to her former Husband, to a Share of whose Personal Estate the Plaintiff was intitled; the Administratrix was likewise intitled to a Third, and before her second Marriage had wasted great Part of the Estate, and then [61] died; and this Bill was brought against her Husband, to have an Account of the Estate, and a Satisfaction for his Share; and being heard at the Rolls, an Account was decreed to be taken of what of the Estate had come to the Hands of the Administratrix before her second Marriage; and the Plaintiff to have a Satisfaction against the Defendant absolutely, for so much as came to his or his Wife's Hands after Marriage, and for what came to her Hands before her second Marriage, to have Satisfaction against the Defendant, so far as he had any Estate of his Wife's; and this Decree was affirmed by Ld. Chan. *Pasc. 1706, Powell and Bell (a)*; and it was said to have been several Times held, that where a Man marries a Woman, without stipulating for any particular Fortune, or making any Settlement; if after the Death of the Wife, Debts of hers appear, the Husband not being a Purchaser, in such Case shall be answerable for the Debts of the Wife in Equity, as far as he had any Money, or other Personal Estate of hers. (*Sed vide, Eq. Ca. Abr. Part 2, 134, Heard and Stanford*.)

(a) In this Case it did not appear what the Wife had in her own Right, and what as Administratrix of her Husband, in which Case the Marriage is no Gift in Law of the Goods, which she hath in *auter Droit*: And upon this Reason only are founded all the Cases, where a surviving Husband has been charged with his Wife's Debts after Death. *Per Talbot*, C., in the case of *Heard and Stanford*, Hil. 1735, Ca. in Eq. Temp. Talbot, 173.

By an Agreement previous to a Marriage, a Power was reserved to the Woman, of disposing of her Property by Will made after Marriage. After the Agreement, but before the Marriage, she made a Will. This Will is not protected by the Power, and therefore the Marriage is a Revocation of it. *Per Lord Thurlow, Hodsdon v. Lloyd*, 2 Bro. Chan. Ca. 534.

(D) HOW FAR BY HER ACTS DURING COVERTURE.

1. The Wife received Money due on a Bond entered into by one to her Husband; she usually received and paid Money for him; and the Husband having got Judgment on the Bond, he was ordered to acknowledge Satisfaction thereupon. 15 Car. 2 [1663], *Seabourn and Blackstone*, 1 Chan. Ca. 38. 2 *Freem.* 178, S. C.

2. Several Goods were devised to A.'s Wife for Life, and after her Decease to B. In this Case, though A. and his Wife were parted, and there had been great Suits for Alimony; and she, during the Separation, had wasted the Goods; yet the Ld. K. thought it reasonable, that the Husband should be charged for this Conversion of the Wife's, B.'s Title being paramount the Feme's, and not under her. Hil. 1682, *Lord Paget and Read*, 1 Vern. 143.

3. If the Wife, whilst she lives separate from her Husband, and has a separate

Maintenance, buys Goods of Tradesmen who know of the Separation and Maintenance, they cannot sue the Executors of the Husband for these Goods, neither will Equity give the Executors any Relief, because they have a very good Defence at Law. *Mich. 1682, Ferrars and Ferrars, 1 Vern. 71.*

*By Marriage Articles J. S. covenanted, that his intended Wife, who was seized of an Estate in fee, should have power by Deed or Will to dispose of her Estate after her Decease, to any Person whatever; and that he would do any act to confirm the same. Subsequent to the Marriage, she, by Lease and Re-lease reciting the Articles, conveyed to Trustees, after her Death to the Use of her Natural Son. Afterwards she and her Husband joined in levying a Fine of the Premises to other Uses. And by Lord Northington, The Wife having the legal Estate in her, the Lease and Re-lease were not good to pass her Estate, either as a Conveyance, or as an Execution of a Power; so the Estate passed by the Fine. *Bramhall v. Hall, Ambl. 467.**

*By Marriage Articles a Power was reserved to the Wife of disposing of all her Estate, real and personal, by Deed or Will. She, being entitled to the Trust of an Estate, during Coverture devised the same, by virtue of such Power. And by Lord Northington, The Articles were a good Reservation of the Estate, and the Will is a good Appointment. There are many Instances in which, Instruments intended as legal Conveyances being defective, the Court has refused to assist the Defect against the Heir, if there was not a meritorious Consideration. That was the Case in *Bramhall v. Hall*. Here the Provision is for Children, and therefore meritorious. *Wright v. Englefield and Cadogan, Ambl. 468.**

*J. S. Previous to his Marriage gave a Bond enabling his intended Wife to dispose of her Freehold Estate by Deed or Will notwithstanding her Coverture. It did not appear that any Settlement had been made on the Occasion, nor that any Transaction had passed but this Bond. And by Lord Camden, Though this Case differs from *Wright v. Cadogan*, in respect that there the Wife had only an Equitable Interest, where as here she had a legal one, yet the Principle of Determination is the same in both: Performance of the Agreement shall therefore be decreed here as it was there. *Rippon v. Dawding, Ambl. 565.**

*A Widow, seized in fee of Copyhold Lands, surrendered them to the Use of her Will. Afterwards, previous to a second Marriage, her intended Husband entered into Articles by which he agreed that she should have Power to settle or devise her Estate during Coverture. After Marriage she and her Husband mortgaged the Premises for Ninety nine Years, but no Fine was levied nor Surrender made, but the Lord's Licence to alien without incurring Forfeiture. Subsequent to this she made her Will devising the Premises to her Second Husband and his Son. And now on Ejectment by her Heir at law, By Willes, Ch. J. of C. B. Though I have the strongest Inclination in favour of the Defendant, this being a Court of Law, we must determine according to the strict Rules of Law, but Courts of Equity can go farther than we can. As to the Will, a Feme Covert cannot make a Will 34 and 35 H. 8, c. 5. And as to the Cases cited of a Power to devise derived from the Husband's Consent they were all Cases of Wills of Personal Property which differs essentially from Real; the Husband having by Marriage the sole Property in and Power over it. As to the Surrender, it was fluctuating and ambulatory, till some further legal Act done to complete it. The Marriage therefore either made it absolutely void or at least suspended it, in either of which Cases its Operation is prevented. As to the Mortgage, it must be bad at all Events. There ought to have been either a Fine or a Surrender so that the Feme might be privately examined. On the whole we are all of Opinion for the Lessor of the Plaintiff. It is certain that the Testatrix being a Feme Covert, could neither make a Will nor declare the Uses of the Surrender. *George v. ———, Ambl. 627.**

*Whether a Surrender of Copyhold Lands by a Feme Covert is good under a Power given by Articles of Separation to the Wife to dispose of her Estate quare. *Compton v. Collinson, 2 Bro. Chan. Ca. 377.**

*By Custom the Surrender of a Feme Covert with the Assent of her Husband is good *Vide Moor, 123, cit. in Compton v. Collinson, 2 Bro. Chan. Ca. 387.**

(E) HOW FAR A FEME COVERT SHALL BE BOUND BY THE ACTS IN WHICH SHE
HAS JOINED WITH HER HUSBAND.

1. If a Man seized in Tail, for valuable Consideration, bargains and sells to another in Fee, and covenants that he and his Wife will levy a Fine for better Assurance, and it is agreed, that £30 part of the Consideration-Money, shall be paid unto the Feme upon the Conuzance of the Fine by the Baron and Feme; and after the Baron and Feme acknowledge a Fine before a Judge in the Circuit, in the Vacation; and the said £30 is paid to the Feme, the Baron being sick a bed, and the Baron dies before the Term, and thereupon the Feme stops passing the Fine, and after brings a Writ of Dower; the Bargainee shall have no Remedy in Equity against the Dower, [62] because it is against a Maxim in Law, that a Feme Covert should be bound without a Fine. *Mich. 5 Car. 1* [1629]. *Hoby and Lunn*, 1 *Roll. Abr.* 375, but *quære*.

2. For if a Feme Covert, by Agreement made with her Husband, is to surrender or levy a Fine, though the Husband die before it be done, the Court will, by Decree compel the Woman to perform it. *Per Cur'*, *Baker and Child*, 2 *Vern.* 61.

(Upon looking into the Register's Minutes it appeared, that the Court made no Decree in it; but it was by Consent referred to Mr. Serjt. *Rawlinson*, for his Arbitration. Mr. *Murray* in the Case of *Thayer and Gould*, before Ld. Chan., *Mich. 13 Geo. 2* [1739].)

3. If Baron and Feme levy a Fine of the Wife's Land, to enable them to take up the Sum of £400 and they make a Mortgage for it, and after the Mortgage is forfeited, the Husband pays in part of the Mortgage-Money, but afterwards borrows as much more of the Mortgagee, as he had paid in before; the Mortgagee having the Estate in Law in him by the Forfeiture of the Mortgage, shall hold the Land against the Heir of the Wife, until the whole Money is paid; and if the Heir will not pay Principal, Interest and Costs, he must be foreclosed. Decreed *Pasc. 1682*, *Reason and Sacheverell*, 1 *Vern.* 41.

4. The Earl of *Huntingdon*, and the Countess *Eliz.* his first Wife, the Mother of the present Earl, join in a Mortgage of her Inheritance for £4500 to supply the Earl's Occasions, to pay for the Place of Captain of the Band of Pensioners, and subject to the Mortgage, which was for a Term for Years; the Estate was settled to Countess *Eliz.* for Life, Remainder to the now Plaintiff, her Son, in Tail; and the late Earl, in the Mortgage-Deed, covenants to pay the Money; and the Proviso was, that on Payment of the Mortgage-Money the Term was to cease; the Mortgage was several times assigned, and particularly in 1683, and the Countess joined in it; and there the Proviso was, that on Payment of the Money by them, or either of them, the Mortgage-Term was to be assigned, as they, or either of them, should direct or appoint. The Mortgage bore Date *Aug. 1*, 1682, on the 5th of the same *August*, the late Earl by Letter thanked the Countess for having sealed the Mortgage; and added, that the Profits of the Office should be religiously applied to pay off the Incumbrance; but yet afterwards, when Money came to be paid in, he paid off the Mortgage, but took an Assignment thereof in Trust for himself, and by Will devised his Personal Estate to the Defendant, the Countess his second Wife, and the Benefit of this Mortgage. The Plaintiff's Bill was to have the Mortgage assigned to him; but Ld. K. declared, he could not decree for the Plaintiff, but upon the usual Terms of Redemption, on Payment of Principal, Interest and Costs, discounting Profits; but upon Appeal to the Lords in Parliament, the Plaintiff obtained a Decree to have the Mortgage assigned to him. *Pasc. 1702*, between *The Earl and Countess of Huntingdon*, 2 *Vern.* 437.

5. The Wife joined with her Husband in a Fine, to raise £400 out of her own Estate, for the Use of her Husband to equip him as an Officer in the Army. The question was whether the Husband's Personal Estate should be applied to exonerate the Mortgage. *Per Cur'*. The Wife subjects her Estate to supply the Wants of her Husband; it must be taken to be a Debt due from the Husband, and to be paid out of his Personal Estate, if he be able: But all other Debts shall be first paid. *Mich. 1714*, *Tate and Austin*, 2 *Vern.* 689. 1 *Will. Rep.* 264, S. C.

6. If a Man marries a woman, who has a Jointure in some Houses which are burnt down, and they, on a Fine levied by them of the Houses, borrow £1500 to rebuild them, and by Deed between [63] the Husband and Conusee only, the Equity of Redemption is reserved to the Husband and his Heirs, and he lays out £3000 in Building: the Wife, she being no Party to the Deed, by which the Redemption was reserved to the

Husband, shall redeem, and not the Heir of the Husband. Decreed by *Nottingham*, L. C., and affirmed by *North*, L. K., *Hil. 35 Car. 2* [1684]. *Brend and Brend*, 1 *Vern.* 213.

7. If a Feme Covert agrees to sell her Inheritance, so as she might have Part of the Money, and the Land is sold, and her Part of the Money is put into Trustees Hands : this Money shall not be liable to the Husband's Debts, although she afterwards agreed it should be liable. Decreed between *Rutland* and *Molineux*, 2 *Vern.* 64.

A Bond given by a Feme Covert jointly with her Husband shall bind her separate Property, and Leasehold Estates shall be subject to the Decree of the Court ; but the Court will not decree that the Trustees of her real Estate shall make Conveyance of that real Estate, and by Sale, Mortgage or otherwise raise the Money to satisfy a general Engagement of the Wife ; neither will the Court order the Feme Covert to execute a Power, but, where the Power has been executed, will give a Remedy by stopping the Fund. Vide *Hulme v. Tenant*, [1] *Bro. Chan. Ca.* 16.

But in the Case of a Particular Engagement on the Part of the Wife (as where a Feme Covert, being authorised by Settlement to dispose of her separate Estate, had contracted for the Sale of it), the Court will decree a Specific Performance of the Contract. *Grigby v. Cox*, [1] *Ves.* 517, cit. *Ibid.*

(F) WHAT CONTRACTS BETWEEN HUSBAND AND WIFE ARE DISSOLVED BY THE MARRIAGE.

1. If the Husband and Wife by Deed agree before Marriage, that the Wife shall have Power to dispose of her Estate as she pleases, during the Coverture, and the Deed is put into the Hands of *J. S.* her former Agent, who during the Coverture pays the Rents and Profits to the Husband, with the Wife's Approbation, *J. S.* shall not be answerable for what he had received and paid to the Husband during Coverture ; for the Agreement being between the Husband and Wife only, it determined by the Marriage. Decreed *Pasc. 15 Car. 2*, between *Darcy* and *Chute*, 1 *Chan. Ca.* 21. But *Q. of this Reason.*

2. An Agreement was made between the Husband and Wife, and others on her Behalf, before Marriage, that she should dispose of her Goods, &c. as she pleased ; and the Husband dying, the Question was, whether they belonged to her, or should go to the Executors of the Husband, the Marriage being an Extinguishment of the Agreement ; but there is no Resolution. 1 *Chan. Ca.* 117 [*Pridgeon v. Pridgeon*]. *Furser v. Penton*, 1 *Vern.* 408, S. P. But no Resolution ; and the Covenant or Agreement there said to be with the intended Wife only.

3. A Man entered into Articles with his intended Wife, to settle certain Lands on her, &c. the Marriage is solemnized, and the Husband died before any Settlement made ; yet it was decreed that the Heir of the Husband should execute the Agreement, though it was urged, that the Marriage was a Waiver of the Benefit of it, and a Release in Law. *Mich. 30 Car. 2* [1678], *Haymer and Haymer*, 2 *Vent.* 343.

4. The Plaintiff being Executrix and Residuary Legatee of her former Husband, lends £100 to *A.* and *B.* and took a Note for it in her own Name, and a Bond in a Trustee's Name, and after marries *B.* one of the Obligors ; and it was held, that the Bond was not extinct. *Pasc. 1693*, *Cotton and Cotton*, 2 *Vern.* 290. *Prec. in Chan.* 41, S. C.

5. A Man entered into a Bond, conditioned to leave his intended Wife £1000, the Husband mortgages his Estate, and died ; and it was decreed, that though the Bond was by Law void, being extinguished by the Marriage, yet it should be made good in Equity ; and that the Wife may redeem and hold the Land till she was satisfied her Debt. *Hil. 1704*, *Acton and Pierce*, 2 *Vern.* 480. *Prec. in Chan.* 237, S. C., under the name of *Acton* and *Acton*.

[64] (G) IN WHAT CASES THE HUSBAND MUST MAKE A SUITABLE PROVISION ON HIS WIFE, WHEN HE SUES FOR HER FORTUNE.

1. A Man sued in the Spiritual Court for his Wife's Portion, and the Court of Chancery granted an Injunction to stay Proceedings till such Time as he had made a competent Jointure. [*Tanfield v. Davenport*.] *Toth.* 114.

(Whenever a Man marries a Ward of the Court without the Consent of the Court, the Court will let the Husband have no Benefit of the Portion, till he makes a suitable Settlement. *Mich. 12 Geo. 2* [1738]. *Phipps and Sheldon*, M.S. Rep.)

2. So where *A.* married the Legatee and Executrix of *J. S.* who, together with

his Wife demanded £200 due by Bond to the Testator ; the Defendant confessed the Debt, but insisted, that the Husband not having made any Provision or Settlement on his Wife, was not intitled to the Money ; and the Court declared, that the Security should remain as it was, till such Time as the Husband should make a suitable Provision, or till further Order from the Court. *Nel. Chan. Rep.* 377. The same Thing ordered [*Salisbury v. Bennet*], *Skin.* 288, admitted to be the constant Practice [*Oxenden v. Oxenden*], 2 *Vern.* 494.

3. Where the Husband and Wife demand the Execution of a Trust of a Real Estate devised by Will, for the Benefit of the Wife, it must be decreed according to the Will, for the Wife is *Cestuy que Trust* and it cannot be denied that she may require Execution of a Trust ; and when she has Execution, she may dispose of it as she pleases ; but where the Husband comes for a Personal Demand or for raising a Sum of Money the Court may impose Terms on him. *Mich.* 1708, *Lupton and Tempest*, 2 *Vern.* 626.

4. An Infant intitled to the Trust of Lands in Fee by a collateral Ancestor, marries without her Father's Consent, and the Father brings a Bill against the Husband and Wife and her Trustees, that a Provision might be made on her out of those Lands ; the Husband and Wife demur to the Bill ; and the Demurrer was allowed ; for it appears by the Plaintiff's own shewing, that he has no Right, either in Law or Equity, to the Lands ; but *Ld. Chan.* said, that if the Husband had been Plaintiff, and had been seeking any Favour from the Court, he could then make him do what was reasonable. *Pasc.* 34 *Car.* 2 [1682], *Micoe and Powell*, 1 *Vern.* 39.

A Feme Covert, entitled to a Sum of Money, died in the Life-time of her Husband leaving Children. The Question was whether the Husband should recover the Money, without making a Settlement on the Children. Per Lord Northington. The compelling Settlements at first arose upon the Husband coming here for Assistance. It is personal to the Woman. If carried further, it would be attended with bad Consequences to Creditors. There is no Case wherein this Court refused Assistance to the Husband after the Death of the Wife without obliging him to make Provision for Children. *Scriven v. Tapley*, *Ambl.* 509.

(II) SUITS AND PROCEEDINGS BY AND AGAINST HUSBAND AND WIFE, HOW TO BE.

1. A Legacy was given to a Feme Covert ; the Husband alone exhibited a Bill for it ; to which there was a Demurrer, because the Wife was not made a Party ; and the Demurrer was allowed ; for of Things merely in Action belonging to the Wife, as a Bond, &c. she ought to join in Suit ; *secus* of a Rent running in the Wife's Right after Marriage ; for if the Husband alone should sue, and be dismissed, that will not conclude the Case ; and if he die before Judgment or Decree, the Wife cannot revive the Suit. *Trin.* 14 *Car.* 2 [1662], *Clerk and Lord Angier*, 1 *Chan. Ca.* 41.

2. A Feme Covert, who has a separate Maintenance, may sue without her Husband ; resolved upon Demurrer. [*Regnes v. Lewis*], 1 *Chan. Ca.* 35.

[65] 3. A Wife, whose Husband is banished by Act of Parliament, may act in every thing as a Feme Sole. *Portland v. Prodgers*, 2 *Vern.* 104.

4. A Bill was exhibited against the Husband and Wife concerning the Wife's Inheritance ; the Husband stood out all the Processes of Contempt ; and it being moved, that the Bill might be taken *pro confesso*, it was opposed, because that the Wife had in the Interim obtained an Order to answer ; in which she set forth a Title to herself ; and the Court decreed, that the Bill should be taken *pro confesso* against the Husband only, and that he should account for all the Profits of the Land received since the Coverture, and the Profits which shall be received during the Coverture. *Hil.* 1 *Jac.* 2 [1686], *Ward and Meath*, 2 *Chan. Ca.* 173.

5. A Bill was brought by the Plaintiff against the Husband and Wife, Daughter of the Plaintiff ; the Husband put in a Plea in the Name of him and his Wife, and swears to the Plea, but the Wife would not be sworn ; and the Husband moved that the Plea might be accepted, suggesting that the Wife did it by Combination with her Mother ; and it was ordered that the Plea do stand for the Husband, and the Plaintiff to proceed against the Wife. [*Pain v. ———*], 1 *Chan. Ca.* 296.

6. If Husband and Wife exhibit a Bill for a Demand in Right of the Wife, the Defendants answer ; Witnesses are examined, and Publication passes, and the Husband dies, and the Wife marries a second Husband ; if they bring a new Bill, they may examine again the same Witnesses as were examined in the former Cause. [Anonymous,]

2 Vern. 197. But *vide* *Shelberry v. Briggs, et ux.* 2 Vern. 249, where the Plaintiff's Bill was to have the Payment of a Legacy, devised to him by a Will, of which the Defendant's Wife was Executrix. The Defendants answered, Witnesses were examined, and Publication passed. Then the Husband died, and it was held by the Court, that there was no Abatement, and that the Wife should be bound by the Answer and Depositions; though it might be otherwise, if the Demand had been of the Wife's Inheritance.

A Bill cannot be filed in the Name of a Feme Covert, without her Consent. *Vide* Mitford on the Pleadings in Chancery, 2d. ed. 28, and [Andrews v. Cradock] *Prec. in Chan.* 376, there cited.

To a Bill filed against a married Woman, her Husband also must be made a Party, unless he be an Exile, or have abjured the Realm. *Vide* Mitford on the Pleadings in Chancery, 2d Ed. 29.

After a Separation with a competent Allowance by way of Maintenance, the Husband cannot be sued for the Wife's Debts. She may be sued alone for them, and a Second Husband will be liable jointly with her for Debts contracted during such Separation. *Vide* *Compton v. Collinson*, 2 Bro. Chan. Ca. 384, 385.

7. If a Bill be brought against Baron and Feme for a Demand out of the separate Estate of the Feme, and the Husband is beyond Sea, and not amenable by the Process of the Court; yet if the Wife is served with a *Subpoena*, she must appear and answer the Plaintiff's Bill. *Dubois and Hole*, 2 Vern. 613.

8. Upon the Marriage-Treaty, the Husband agreed that the Wife should have her own Fortune to her own Use, to dispose of it as she thought proper; he afterwards running in Debt, was arrested by his Creditors; and the Wife, in consideration of their discharging the Action, gave her Note for the Payment of the Money; the Creditors exhibited a Bill against the Husband and Wife, and took out *Subpoena's* against both, and actually served the Wife, but not the Husband, he being at *Rotterdam*; but neither the Husband nor Wife appearing, an Attachment was taken out against both; and the Husband still keeping out of the Way, the Wife was taken up, and being moved to be discharged, Ld. K. and the Master of the Rolls held, that in this Case the Process was regular enough; and that the Husband was joined in the Suit only for Conformity. *Mich.* 1711, *Bell and Commissary Hyde. Prec. in Chan.* 328, and *Gilb. Eq. Rep.* 83, S. C.

9. If the Wife's Answer differs from the Husband's it shall not prejudice the Husband; as if she confesses a Trust, which he denies, 1 *Chan. Ca.* For she can be no Witness against her Husband. [*Cole v. Gray*,] 2 Vern. 79.

[66] (I) CONCERNING THE WIFE'S PIN-MONEY AND PARAPHERNALIA.

1. If by a Marriage-Settlement a Term is created for raising £20 *per Ann.* as Pin-Money, for the Wife's separate Use, which is constantly paid her by the Husband's Steward, except the last Year before the Husband's Death; there being but one Year in Arrear only, it shall be paid; but it would be otherwise if it had been in Arrear several Years. *Trin.* 1691, *Offley and Offley. Prec. in Chan.* 26, S. C.

* 2. The Plaintiff's Relation (to whom he was Heir) allowed his Wife Pin-Money, which being in Arrear, he gave her a Note to this Purpose; I am indebted to my Wife £100, which became due to her such a Day; after, by his Will, he makes Provision out of his Lands for Payment of all his Debts, and all Monies which he owed to any Person in Trust for his Wife; and the Question was whether the £100 was to be paid within this Trust; and Ld. K. decreed not, because in Point of Law it was no Debt, because a Man cannot be indebted to his Wife; and it was not Money due to any Trust for her. *Hil.* 1701, *Cornwall and Earl of Mountague.* But Q. for the Testator looked on this as a Debt, and seems to intend to provide for it by his Will.

* 3. If a Woman has Pin-Money, or a separate Maintenance settled on her, and she by Management or good Housewifery saves Money out of it, she may dispose of such Money so saved by her or of any Jewels bought with it, by Writing in Nature of a Will, if she die before her Husband, and shall have it herself, if she survive him, and such Jewels, &c. shall not be liable to the Husband's Debts. *Pasc.* 1692, *Herbert and Herbert*; and the Precedent of *Sir Paul Neal's Case* cited to the same Purpose; the Wife allowed what she had saved out of her Pin-Money against the Devisee of the Real Estate. *Mich.* 1694, *Milles and Wikes.*

4. If a Woman, on her Marriage, reserves to herself a Power of disposing of her

Personal Estate as she thinks proper, all that she dies possessed of is to be taken to be her separate Estate, or the Produce of it, unless the contrary can be made appear, and as she has a Power over the Principal, so she may dispose of the Produce or Interest. *Hil.* 1705, *Gore and Knight*, 2 Vern. 535. *Proc. in Chan.* 255, S. C. [Blotsow v. Sawyer,] 1 Vern. 245 [244], S. P., where it is said, that there had been several Decrees ratifying such Disposition.

5. If a Woman, by her Marriage-Articles, agrees to have no Part of the Husband's Personal Estate but what he should give her by Will, this bars her of her Paraphernalia. *Cholmely v. Cholmely*, 2 Vern. 82.

6. The Husband devised the Wife's Jewels to her for Life, the Remainder over to his Son: one Point of the Case was, whether they should go to the Administrator of the Wife, being her Paraphernalia: and though it was agreed, that where a Husband dies intestate, or does not by Will dispose of the Jewels of his Wife, she may claim them, (in case there be no Debts); yet, as he may devise (a) them, and as he has in this Case given them to her for Life only, and she has not made any Election or Claim to them as her Paraphernalia, they cannot go to her Administrator. *Clergis v. Albermarle*, 2 Vern. 245.

(a) That the Husband may devise them, *vide* [Hastings v. Douglas] *Cro. Car.* 343, but *vide* the Case of *Tipping and Tipping*, *Eq. Ca. Abr.* Part 2 [467, 498, 672], *et conf.*

The Husband's personal Estate being exhausted in Payment of his Debts; and the Wife having been obliged to suffer his Executors to dispose of her Paraphernalia for the same Purpose, the Question was, whether she should be permitted by Circuity to receive Satisfaction out of the Real Assets which he had charged with Payment of his Debts and which subject thereto he had devised to others. Lord Hardwicke observed that the Court had decreed Satisfaction for Paraphernalia out of Real Assets, where real Assets had descended and mentioned the Case of *Tipping v. Tipping*, 1 Wms. 730; but he said that the Case so adjudged had gone a great way, for that the Wife's Paraphernalia, by the Old Law, were, during the Husband's Life, in his Power; and as the Court had not, in any former Instance, decreed the Wife Satisfaction, by way of Circuity, out of Real Assets, against the Devisee, for her Paraphernalia, he would not establish a Precedent. *Probert v. Clifford*, *Ambl.* 6.

The Testator having by Will empowered his Wife, whom he made Executrix, to raise, by mortgage of a particular Estate, a sufficient Sum of Money for Payment of his Debts, in aid of his personal Estate, and having devised to his Wife the Use of her Jewels for Life, the Question was whether the Wife was not entitled to the Jewels absolutely, as her Paraphernalia, though the Personal Estate was not sufficient to pay the Debts; or whether they should be applied before the Real Estates, charged with the Debts; On the Authority of *Tipping v. Tipping*, 1 Wms. 729, Lord Thurlow decreed the Jewels to the Wife, in prejudice of the Charged Estate. *Boynton v. Parkhurst*, *Bro.* [1] *Chan. Ca.* 576.

[67] (K) CONCERNING ALIMONY AND SEPARATE MAINTENANCE.

1. If a Husband turns away his Wife, or uses her with Cruelty, by which means she is obliged to leave him, Chancery will upon her own, or *Prochein Amy's* Application, decree her a separate Maintenance, suitable to her Degree and Quality, the Fortune she brought, and her Husband's Circumstances. *Cary* 124. [Farmer v. Compton,] 1 *Chan. Rep.* 4, S. P. [Ashton v. Ashton,] 1 *Chan. Rep.* 164, S. P.

2. If Husband and Wife agree to live separate, and that the Wife shall have so much a Year, such Agreement will be decreed in Equity. *Nel. Chan. Rep.* 73.

3. If there is a Decree for a separate Maintenance, and the Husband offers to be reconciled, and the Wife refuses, though the Court will suspend the Payment of the Money, yet will order all the Arrears to be brought into Court; and according as there is Necessity, vacate the Decree, or give the Wife upon any ill Usage, Liberty to resort to, and have the Benefit of it. 26 *Car.* 2 [1675], *Whorewood and Whorewood*, 1 *Chan. Ca.* 250.

4. A Feme Covert, who had by her Husband's Consent £50 *per Ann.* settled on her, and who had, upon a Sentence in the Spiritual Court, obtained a Decree, for £50 *per Ann.* more for Alimony, suggests by her Bill, that her Husband had, on purpose to defraud her, procured the Tenants to surrender their Estates on which the said Rent was reserved, &c. and prayed that the Rent might be made good to her by the Decree

of this Court ; but it being insisted for the Defendant that the Settlement of the said Rent was only in Trust for the Husband, and that in the Deed there was not any trust declared for the Wife, and that she was a very lewd Woman, and had eloped, and her Husband offering in his Answer to take her again, Ld. Chan. would make no other Order in it, but that the Husband should stand in the Place of the Tenants, and admit the Rent payable by the Tenants to be still in being ; and she might proceed at law and recover the Rents there if she could. *Pasc.* 1682, *Mildmay and Mildmay*, 1 *Vern.* 53.

5. The Husband and Wife agree to part, and the Wife's Father agrees, upon the Husband's giving him a Note to pay back the Wife's Portion on demand, to save him harmless from any Debts his Wife may contract, and against all Demands for her Maintenance, &c., the Wife with her Child, went thereupon and lived with the Plaintiff, her Father, and were maintained by him ; and he now brought his Bill to have the Portion paid : which was decreed, on his giving Security to indemnify the Defendant against the Debts and Maintenance of the Wife and Child, although the Husband now offered to take his Wife home, and maintain her and her Child, and to allow the Plaintiff for the Time past. *Mich.* 1700, *Seeling and Crawley*, 2 *Vern.* 386.

6. If by Marriage Articles £6000 Part of the Wife's Portion, is agreed to be invested in Land, and settled in Trust for the Husband for Life, then to his Wife for Life, Remainder as a Provision for younger Children, Remainder to the Husband in Fee ; and the Husband by his Cruelty forces his Wife to live separate from him ; the Court will decree the Interest of the £6000 to be paid the Wife for her separate Maintenance, till Cohabitation, there being no Issue, the Money lying dead : and it being a Trust which is properly [68] to be directed by this Court. *Pasc.* 1705, *Orenden and Orenden*, 2 *Vern.* 493. *Gilb. Eq. Rep.* 1 ; *Pre. Chan.* 239.

7. A Wife having been used with Cruelty by her Husband, becomes intitled to £3000 as her Share of her Mother's Personal Estate, who died intestate : and it was decreed that the Wife should have the Interest of it for her separate Use, and then to the Husband, if he survived ; and afterwards the Principal to be paid the Issue ; and if no Issue, then to the Survivor of the Husband or Wife. *Pasc.* 1711, *Nicholls and Danvers*, 2 *Vern.* 671. The Reporter adds a Memorandum, that the Husband had given a Note to his Wife, that if he should again use her ill, she should have her Share of her Mother's Estate to her own Use. *Vide* [Williams v. Callow] 2 *Vern.* 752, a separate Maintenance decreed a Wife.

8. A Bill was brought to subject the Defendant's Jointure to the Payment of her Debts, which she contracted whilst she had a separate Maintenance from her Husband. *Per* Ld. Chan. had the separate Maintenance continued, there would have been some Reason to follow that, and make it liable ; but that being at an End, there is no Reason that the Jointure should be liable ; and the Bill was dismissed ; and the rather because the Executor of the Husband, who might have paid the Money, was not made a Party. *Pasc.* 1685, *Kenge and Delaval*, 1 *Vern.* 236. *Sed vide* *Compton v. Collinson*, 2 *Bro. Chan. Ca.* 384, 385, *cit. ante* 65.

9. A Woman who has a separate Maintenance, may dispose of what she saves out of it by Will. [Georges v. Chancie.] *Toth.* 97 ; [Pridgeon v. Pridgeon.] 1 *Chan. Ca.* 118, S. P. ; *Nel. Chan. Rep.* 56, S. P. ; [Bletsow v. Sawyer.] 1 *Vern.* 245 [244], S. P. ; *Vide* *Gage and Lister or Leicester*, *Eq. Ca. Abr.* Part 2 [172].

(L) WHAT RIGHT SURVIVES TO EITHER OF THEM, OR THEIR REPRESENTATIVES,
BY THE DISSOLUTION OF THE MARRIAGE.

1. If Baron and Feme, have a Decree for Money, in the Right of the Feme, and then the Baron dies, the Benefit of the Decree belongs to the Feme, and not to the Executor of the Husband : Certified by *Hyde*, C. J., and his Certificate confirmed by Ld. Chan. *Mich.* 15 *Car.* 2 [1663], *Nanney and Martin*, 1 *Chan. Ca.* 27.

2. If Money is left in a Trustee's Hands, for the Benefit of a Feme Covert, and the Husband dies, it shall go to the Feme, and not to the Executors of the Husband, he having made no Disposition of it in his Life-time. Decreed *Pasc.* 1683, *Twisden and Wise*, 1 *Vern.* 161.

3. The Husband, in Consideration of £500 Portion, Part in Lands and Part in Bonds, owing to the Wife, settles a Jointure of £45 *per Ann.* and the Husband dying before any Fine levied of the Lands, or Alteration of the Bonds, the Creditors of the Husband sue the Widow and the Executor of the Husband ; and it was held though there was

not sufficient Personal Estate besides, that as these Securities remained unaltered, and as the Law had cast them on the Widow, Equity could not take them from her; though it was urged that the Wife had a Jointure settled on her adequate to the Portion. *Trin.* 1688, *Lister and Lister*, 2 *Vern.* 68, *Freem.* 102.

4. But if upon an Intermarriage between A. and B., who has an Estate in Land, and a Fortune in Money, and who are both Infants, [69] an Act of Parliament is obtained for settling a Jointure on B. the Wife, in Bar of Dower; provided that the Jointure shall cease, if the Wife, when of Age, does not settle her Land, &c. but nothing is said as to the Personal Estate, and Part of the Fortune is a Mortgage of £1300 taken in a Trustee's Name, though the Wife, when she came of Age, settled her own Land only; yet the Husband dying, the Mortgage shall go to the Executors of the Husband, and shall not survive to the Wife as a Chose in Action. Decreed 1705, *Blois and Countess of Hereford*, 2 *Vern.* 501. And Ld. K. laid it down as a Rule, that in all Cases, where a Man makes a Settlement equivalent to the Wife's Portion, it shall be intended that he was to have the Portion, though there is no Agreement for that Purpose. Note: This was a Chose in Action in Equity, and some Stress laid on that, though it does not appear by this Report. (Note: In *Salwey v. Salwey*, *Ambl.* 692, this is called by *Aston*, Ld. Commis., a strange report.)

5. If a Man marries a Woman intitled to a Mortgage in Fee, and after Marriage assigns his Interest in the Mortgage to Trustees to call in the Money, and lay it out in Land to be settled on the Husband and Wife and their Issue, Remainder to the Heirs of the Husband; and the Husband and Wife die without Issue, this Mortgage being a Chose in Action, shall go to the Executor of the Wife, and not to the Executor of the Husband. Decreed *Mich.* 1700, *Burnet and Kinnaston*, 2 *Vern.* 401. 2 *Freem.* 239, *S. C. Prec. in Chan.* 118, *S. C. Vide* 2 *Vern.* 502.

6. A. being indebted to a Feme Covert becomes a Bankrupt; the Husband pays a Contribution, and dies before any Distribution, and then the Wife died; and it was held that the Executors of the Wife were intitled to the Dividend, re-paying to the Husband's Executors what had been paid for Contribution; for the Husband paying Contribution, does not alter the Property of the Bond. *Anon.* 2 *Vern.* 707.

7. But if a Sum of Money is awarded the Husband, which he is intitled to in Right of his Wife, and the Husband dies before it is paid, it will go to his Executors, and not survive to the Wife, the Award being a Sort of Judgment which has changed the Property. *Pasc.* 1686, *Oglander and Baston*, 1 *Vern.* 396.

If there be a Bond Debt due to the Wife, the Husband may sue alone without joining his Wife; but in case the Wife was joined in the Action, and Judgment is recovered, the Judgment will survive to the Wife; though had she not been joined, it would have gone to the Executor of the Husband. *Ibid.*

8. If a Man marries an Orphan of London, who dies before Twenty-one, yet her Share shall survive to the Husband, and shall not go to the other Children. *Fouke v. Lewen*, 1 *Vern.* 88.

9. If an inheritor carves out a Term for 1000 Years to Trustees, and she and her intended Husband declare the Trust to be for the Husband for Life, and after his Death for the Wife and her Heirs; and afterwards the Husband and Wife by Fine *sur concess.* grant a Term of twenty-one Years, reserving the Rent to the Husband and Wife and the Heirs of the Wife; yet the Administrator of the Wife shall not have the Benefit of the Rent reserved. *Saunders v. Beale*, 2 *Vern.* 62.

10. If one dies intestate, leaving a Daughter, the Wife of J. S. and the Daughter dies before any Distribution made, and then the Husband also dies, before any Distribution made, and before Administration taken to his Wife, the Share of the Daughter shall go to the Administrator of the Husband, and not to her Administrator; but the Reporter refers to the Decree. *Mich.* 1693, *Cary and Taylor*, 2 *Vern.* 302.

11. Baron and Feme Jointenants for their Lives, Baron sows the Lands, and dies before Severance; and the Question, was whether the Wife, or Executor of the Husband, should have the Corn; and the Court proposed that each should take a Moiety, which was agreed to. *Rowney's Case*, 2 *Vern.* 322.

[70] 12. A. purchases a Walk in a Chase, and takes the Patent to himself and to his Wife, and J. S. during their Lives and the Life of the Survivor; the Husband dies indebted, yet the Wife was decreed the Benefit of the Patent during her Life, for she cannot be a Trustee for her Husband; but after her Death J. S. is to be a Trustee for the Husband's Executor. *Trin.* 1688, *Kingdome and Bridges*, 2 *Vern.* 67.

13. If the Husband lends out Money in the Names of himself and his Wife upon Mortgages and Bonds, and dies, the Wife is intitled to the Money by Survivorship, if there are sufficient Assets besides to pay the Husband's Debts. *Trin. 1712, Christ's Hospital and Budgin, 2 Vern. 683. Vide Copping and ———, Eq. Ca. Abr. Pt. 2 [139] for S. P.*

14. The Plaintiff's Grandfather was Tenant for Life of a Farm, and the Inheritance was in the Plaintiff's Father, to whom he is Heir; on the Marriage of the Plaintiff's Father with the Defendant, who had a Portion of £300 in her Brother's Hands, and secured by his Bond to her, the Father and Grandfather join in settling this Farm upon the Defendant for her Jointure; and this Settlement is expressed to be made in consideration of £100 paid to the Grandfather for the Marriage Portion of the Defendant, which £100 was paid to him accordingly by her Brother; the Marriage took Effect, and the Defendant's Husband died indebted in several Bonds wherein he and his Heirs were bound; and Actions were brought against the Plaintiff, as his Heir on the said Bonds, to subject the Real Estate descended to the Payment of them; and he brought his Bill to have the remaining £200 of the Portion applied in Discharge of these Debts; which was decreed by the Master of the Rolls; but upon an Appeal to Ld. Chan. the Decree was reversed, and held, that it survived to the Wife; though he said, that if the Settlement had been in consideration of the whole Portion, and had been equivalent to it, it must have gone to discharge the Husband's Debts. *Mich. 1697, Cleland and Cleland. Prec. in Chan. 63, S. C. Vide [Blois v. Hereford] 2 Vern. 502.*

15. *Richard Middleton*, upon a Marriage-Treaty with *Barbara Wynn*, agrees, in consideration of £1250 Portion secured to her by Bond from her Brother, to clear his Estate, being £70 *per Annum*, of Incumbrances that were then upon it, within six months after the Marriage should be had; and for every £100 he should receive to settle £10 *per Ann.* on her for a Jointure, and to settle Lands on the first and other Sons of that Marriage; *Barbara* was no Party to these Articles, the Marriage takes Effect; *Barbara* dies within the six Months without Issue; *Richard*, on a Second Marriage with one *Dorothy* ———, who had a Portion of £1600 in Trustees Hands, by Articles agrees to lay out £1250 he was intitled unto in Right of his first Wife; and this £1600 when received, in the Purchase of Lands, to be settled on *Dorothy* for a Jointure, and for a Provision for the Issue of that Marriage; which Marriage after takes Effect, and then *Richard* dies before he had got in either of the Portions; and Ld. K. decreed it to the Representatives of *Richard*; and that it should not survive to the Administrator of the first Wife, he being a Purchaser by his Agreement to disincumber his Estate; and being in no Default, the Wife dying within the six Months, which prevented the Making the Settlement. *Pasc. 1711, Meredith and Wynn. Prec. in Chan. 312, S. C., and Gilb. Eq. Rep. 170, S. C., under the Name of Meredith and Wynn.*

A Copyholder for life, where there was a Widow's Estate by Custom, agreed to sell his Estate, and entered into Bond, that the Purchaser should enjoy. This did not bind the Widow, who shall have her customary Estate. *Musgrave v. Dashwood, 2 Vern. 45, 63.*

A Copyholder for Lives, where there was a customary Right in the Widow, to enjoin for Life the whole Estate of which her Husband should die seised, articulated for the Sale of his Copyhold for valuable Consideration, but died before it was actually surrendered. The Question was whether the Widow's Right to her Free-Bench was bound by the Articles. By Lord Hardwicke, where there is an Agreement for the Sale of a Copyhold Estate, the Court will Decree Performancer, even against the Assignees of the Seller, who is become a Bankrupt; so against an Heir at Law. It appears to me to be a strong Equity, that the Widow should be bound as well as the Heir. The Case of *Musgrave v. Dashwood* is ill reported and not an Authority sufficient for me to ground my Judgment on it. No State of it appears in the Register's Book. My Opinion is that the Purchaser is entitled to have Relief against the Widow. *Hinton v. Hinton, Ambl. 277.* Note: the Reporter says Lord Hardwicke's reasoning was looked on by the Bar to be imperfect, and against their Sentiments.

A Woman, entitled to a Rent-Charge, marries, and at her Husband's Death there are Arrears due. Per Bathurst and Aston, Lds. Commis. There is no doubt that Arrears survive, and here being no expressed or implied Intention of the Parties, that the Husband should have these, they shall go to the Wife, notwithstanding she has a Settlement. *Salwey v. Salwey, Ambl. 692.*

[71] CAP XII.

BILL.

- (A) By whom it may be brought.
- (B) Who are to be Parties to it.
- (C) Matters proper for a Bill in Equity.
- (D) Bills of Discovery : and herein of what Things there shall be a Discovery.
- (E) Bills *quia Timet*, in what Cases proper.
- (F) Bills of Peace to prevent Multiplicity of Suits.
- (G) Cross-Bills.
- (H) Supplemental Bill.
- (I) Bills of Interpleader.
- (K) *Certiorari* Bills.
- (L) Bills of Review and Reversal.
- (M) Bills original after a Decree.
- (N) Bill taken *pro confesso*.

(A) BY WHOM IT MAY BE BROUGHT.

1. The King may sue in Chancery for Equity. 1 *Rol. Abr.* 373.
2. The Chancellor himself may sue or be sued in Equity, but he cannot make a Decree in his own Cause. *Ibid.*
3. If an Alien purchases Lands in the Name of another, admitting the King is intitled to the Trust ; yet he must sue in Equity to have it executed. 1 *Rol. Abr.* 194.
4. The Church-wardens may join with a poor Person who is chargeable to the Parish. *March* 90.
5. A Bill may be brought in Behalf of an Infant *in Ventre sa Mere*, and an Injunction obtained to stay Waste. [*Musgrave v. Parry*,] 2 *Vern.* 711.
- [72] 6. Any one may bring a Bill as *Prochein Amy* to an Infant without his Consent, because it is at his Peril that he brings it, to be answerable for the Event ; but none can bring a Bill in the Name of a Feme Covert, as her *Prochein Amy*, without her Consent ; and if such Bill be brought, upon her Affidavit of the Matter it will be dismissed ; agreed by the Court. *Mich.* 1713, *Andrews and Cradock. Prec. in Chan.* 376, and *Gilb. Rep.* 36, S. C. ; *Vide post, f.* 75.

(B) WHO ARE TO BE PARTIES TO IT.

1. If a Man grants a Rent-Charge, and afterwards sells the Lands by Parcels, and the Grantee sues for the Rent, he must make all the Purchasers Parties. *Cary* 3, 33, S. P.
- (If Two or more have a Joint Interest, regularly they must be all Parties to the Bill ; so if Two or more are liable to a Demand you cannot proceed against one alone. 2 *Vern.* 195. So all Executors, Trustees, or their Representatives, are to be made Parties ; but this rule may be dispensed with, if any of them are not amenable, or if they have stood out Process to a Sequestration.)
2. But in case of a Charity, *it is not necessary that all the Tertenants should be made Parties*, for the Charity shall not be put to that Difficulty ; but the Tertenants may, if they seek a Contribution, undertake to make them parties to the Information, or help themselves by such Course as they shall think fit. [*Att.-Gen. v. Shelly*,] 1 *Salk.* 163. (*Vide Attorney General and Wyburgh & al', Abr. Eq. Part 2* [167, 192, 397, 632], S. P.)
3. If there be an Agreement in a Parish, by a Vestry Order, that £100 *per Ann.* should be paid to A. for a Lecture in the Parish, in a Bill for the Recovery thereof, all the Parties to the Order must be made Defendants ; otherwise it cannot be decreed. *Mich.* 15 *Car.* 2, *Henchman and Ayer, Hard.* 333.
4. The Bill being to have an Account of a Trust, the Defendant pleaded, that he was intrusted for three Children, *&c.* for the Plaintiff and his two Brothers ; and that the other two not being made Parties to the Suit, he was not bound to answer ; for otherwise he might be thrice called to an Account for the same Matter ; and the Plea was allowed. *Mich.* 1682, *Hanne and Stevens*, 1 *Vern.* 110.

5. But if A. devises several Legacies to *B. C.* and *D.* and that if his Estate fell short, each to abate in Proportion; but if it increased, that each Legacy should increase in Proportion; in this Case one alone may sue for his Legacy; and it is not necessary that the other Legatees should be made Parties. *Mich. 34 Car. 2. Haycock and Haycock, 2 Chan. Ca. 124.* Though one Legatee may sue, yet if the Residue of the Personal Estate be devised to three, *Q.* whether one of them may alone sue for his Part; and *vide Nel. Chan. Rep. 243*, where it is held that he cannot.

6. If a Bill be exhibited against the Sheriff and Plaintiff at Law, to be relieved against a Bail-Bond assigned by Fraud by the Sheriff; let the Proof of the Fraud be never so strong, yet if the Plaintiff at Law is not served with an Order to answer, so as to be made a Party, the Plaintiff can have no relief: Ordered by the Master of the Rolls. *Mich. 1682, Izraell and Narbourn, 1 Vern. 87.*

7. A Bill being exhibited for Discovery of a Bankrupt's Estate, the Defendant demurred thereto, because the Bankrupt was not made a Party: and the Demurrer was allowed. *Hil. 1688, Sharp and Gamon, 2 Vern. 32.*

[73] 8. Upon a Bill for a specifick Performance of a Covenant under Hand and Seal with A. for the Benefit of *B. A.* must be made a Party to the Suit; but if it had been only a Promise, either A. or *B.* might have brought the Action, according to the Case in (*Rolls versus Fates, 177*) *Yelverton's Reports, Hil. 1638. Cooke and Cooke, 2 Vern. 36.*

9. If a person claims any Thing due from the Testator, the Executor must be made a Party. [*Griffith v. Bateman.*] *Rep. in Chan. Temp. Finch 334.* All Executors must sue and be sued. [*Offley v. Jenney.*] *3 Chan. Rep. 92.*

10. If a Legatee of a Term sues for it, he must make the Executor a Party, although he alledges he has his Assent. *Moor and Blagrove, 1 Chan. Ca. 277.*

11. So if an Executor does actually release, yet he must be made a Party to the Suit. *Hil. 1681, Smithby and Hinton, 1 Vern. 31.*

12. But if the Plaintiff sues one Executor, and alledges in his Bill that he does not know who the other Executor is, and prays a Discovery, this will be no Cause of Demurrer; ruled *Mich. 1682, Bouyer and Covert, 1 Vern. 95.*

13. In a Bill to be relieved touching a Lease for Years, or other personal Duty against Executors, though the Executors be but Executors in Trust; yet it is not necessary to make the *Cestuy que Trusts*, or Residuary Legatees, Parties. *Anon. 1 Vern. 261. S. P. Lawson v. Barker, and Love v. Jacob, Bro. Chan. Ca. 303.*

14. In a Bill to be relieved against an Award made by some of the Members of the *East-India Company*, touching the *Quantum* of Freight due to the Plaintiff from the Company; the Arbitrators, and some of the particular Members being made Defendants, they demurred to the whole Bill, because the Plaintiff could have no Decree against them; and their Answers would be no Evidence against the Company; and the Plaintiff might examine them as Witnesses. And the Demurrer was allowed without putting them to answer as to Matters of Fraud and Contrivance. *Trin. 1700, Dr. Steward and The East-India Company, 2 Vern. 380.*

15. If any one sue in Chancery an Executor of an Obligor to discover Assets, all the Obligors must be made Parties, that the Charge may lie equal. [*Blois v. Blois.*] *2 Vent. 348.* The Reporter adds a *Quære*, Whether the Principal may not be sued without those who are bound as Sureties. *Vide Nel. Chan. Rep. 105*, where it is held not to be necessary to sue all the Obligors; and that any one who is compelled to pay the Money, may compel the others to contribute.

16. But it is clear, that if a Judgment be had at Law against one Obligor, you may sue the Executor of him alone to discover Assets, &c. because the Bond is drowned in the Judgment. *2 Vent. 348, 2 Chan. Ca. 29, S. P.*

17. If one of the Defendants is prosecuted to a Sequestration, the Cause may be carried on without him. *Mich. 1699, Parker and Blackburne, Prec. in Chan. 99.*

* 18. The Plaintiff being Residuary Legatee, brought this Bill against the Defendant, who was one of the Executors (without his Co-executor, who was beyond Sea) to have an Account of his own Receipts and Payments: The Defendant insisted, that his Co-executor ought to be made a Party; but *Ld. Chan.* ordered the Cause to go on, and said, That if any Thing appeared difficult on the Account, the Court would take care of it. And as a Bill may be brought against one Factor without his Co-factor, being beyond Sea, that the same Reason held here. *Mich. 1698, Cowslad and Goby [Pre. Ch. 83].*

[74] * 19. *Barnard Spark*, in 1661, made his Will, and amongst other Legacies devised an Annuity of £20 *per Ann.* to *B.* to be paid Quarterly, and gives other Legacies ; and then has this Clause, *All the rest of my Real and Personal Estate not before bequeathed (my Debts being paid) I give to my Brother John Spark*, and makes him sole Executor ; and he paid the Annuity several Years, and made his Will, and charged all his Real and Personal Estate with this Annuity, and devised all his Real and Personal Estate in *England* (Part of which was the Estate of *Barnard*) to his two Daughters, who were Defendants ; and all his Real and Personal Estate in *Barbadoes* to his two other Daughters that lived in *Barbadoes*, and were no Parties to this Suit : The two Daughters here paid the Annuity several Years, but then stopt Payment, on Pretence that the Words of *Barnard's* Will did not charge his Real Estate with this Annuity ; or if they did, yet the Personal Estate ought to be first exhausted, which did not appear to be : And the Real and Personal Estate in *Barbadoes* being equally liable by the Will of *John*, the Daughters, who have those, ought to be made Parties, for they might have made Satisfaction ; or however, they ought to have been before the Court, that the Defendants might at the same Time have a Decree against them to pay their Proportion ; for though at Law the Party may take his Remedy against which he pleases, yet in Equity all must be Parties, that Right may be done to all at the same time. On the other Side it was said, admit it to be so, in case it may be easily done, yet it is impracticable in this Case, and therefore ought not to be required ; and so held *Ld. K.* and that the Lands were charged by *Barnard's* Will ; and if any Satisfaction has been made by those in *Barbadoes*, it lay on the Defendant's Part to shew it. *Pasc. 1702, Quintine and Yard.*

* 20. *Sir Edmund Fortescue*, in the Year 1664, settled his Estate upon *Powel, Glendale*, and *Harris*, in Trust to pay his Debts in the first place, then to pay such Portions as he should give to his Children, and lastly, his Legacies ; and the Overplus to be laid out in a Purchase in Trust for the first Son, and the Heirs of his Body, and so for the second, &c., and for want of such Issue, in Trust for himself and his Heirs ; the Plaintiff, his Granddaughter and Heir at Law, on whom the Trust devolved, brought her Bill against the Administrator and Heir at Law of *Harris* (*Powel, Glendale*, and *Harris* being dead) to discover some Lands purchased with the Overplus Money by *Harris*, who had formerly been a Servant in *Sir Edmund's* Family, and who alone had transacted the Trust. To which it was objected, that the Representatives of the other Trustees ought to have been before the Court ; but the Plaintiff insisting only to have an Account of what came to the Proper Hands of *Harris*, and of his Receipts and Disbursements only, and not of any Joint-Receipts or Transactions by him, with the other Trustees ; the Objection was over-ruled. *Hil. 9 Ann. Lady Selyard and The Executors of Harris & al'.*

Where there are more Mortgagees than one, being Joint-Tenants, one cannot bring a Bill to foreclose, without making the others Parties. *Lowe v. Morgan*, [1] Bro. Chan. Ca. 368.

Where the Committee of a voluntary Society enter into Engagements on the behalf of the whole Society ; in a Bill by any Person, with whom they have entered into such Engagements, it is sufficient to make the Committee Parties, without including the other Members of the Society. *Cullen v. Queensberry*, [1] Bro. Chan. Ca. 101.

Where the Personal Representative is merely a formal Party, the Cause shall go on, though he be not before the Court ; and he may afterwards be brought before the Master, if a Decree be made. *Vide Fletcher v. Ashburner*, [1] Bro. Chan. Ca. 498.

In a Bill by a second Mortgagee, to redeem the first Mortgage, the Mortgagor, or his Heir, must be before the Court. If the Heir be abroad, the Court cannot proceed. *Fell v. Crown*, 2 Chan. Ca. 276. Note : In this Case, it being suggested, that the Heir was expected to be soon in *England* ; Lord *Thurlow* ordered the Cause to stand over.

In a Bill against a Trustee, who has assigned his Trust, his Assignee ought to be made a Party, and the Decree shall be against the Assignee in the first Place ; and the original Trustee shall be decreed to stand as a Security, for having broken the Trust. *Burt v. Dennet*, 2 Bro. Chan. Ca. 225.

Dr. Radcliffe, by his Will, devised his Manor of *L.* and all other his Lands and Hereditaments in *Yorkshire*, to his Executors and their Heirs, in trust to pay the Salaries of two travelling Physicians, and to pay the Overplus to University College, for the Purchase of perpetual Advowsons, and to convey the said Estate to the College in Trust for such Uses ; then he gave several Annuities, &c., which he charged on his *Buckingham-*

shire Estates, and then he gave all his Real and Personal Estate whatsoever (subject to the aforesaid Payments and Bequests) to his Executors, and their Heirs, Executors and Administrators; to be by them paid and applied (after payment and Performance of the several Legacies and Charges) to such charitable Uses as they in their Discretion should think best, but no part thereof to their own Use or Benefit. The Trustees had conveyed the Estate to the College, who laid out the Profits in the purchase of Adrowsons, till at length they possessed as many as the Statute of Mortmain would allow. And now an Information was filed against the College and the present Heir at Law of Dr. Radcliffe, praying a proper Application of the Surplus Profits of the Estate not laid out in the purchase of Adrowsons under the Directions of the Will. The question was whether it was not necessary to make the Trustees Parties. And by Lord Thurlow, suppose any thing results, it will exclude the Heir. The Trustees could only convey to the College such an Estate as they had, and if any thing results from the Yorkshire Estates, the Sweeping Clause takes it in. The Trustees must be before the Court; and the Heir, though absolutely disinherited, is interested to raise the Objection, that the Court cannot dispose of the Clause, because it would leave another Bill behind. *Attorney General v. Green*, 2 Bro. Chan. Ca. 492.

A Bill was filed by one Part-owner of a Ship, on behalf of himself, and the other Part-owners, for an Account of the Profits of the Ship. The Defendants demurred on the Ground, that all the Part-owners should have been made Parties. And by Sir Lloyd Kenyon, Master of the Rolls, this Objection is decisive. This is not like the Case of Part of the Parishioners filing a Bill for themselves and the other Parishioners to establish a Modus, but here all the Part-owners should have been Parties. *Moffatt v. Farquharson*, 2 Bro. Chan. Ca. 338.

In a Bill of Foreclosure, it is sufficient to make the first Tenant in tail a Party; for he sustains the interest of every body, and those in Remainder are considered as Cyphers. *Reynoldson v. Perkins*, Ambli. 564.

[75] (C) MATTERS PROPER FOR A BILL IN EQUITY.

Vide Title Courts and their Jurisdiction, Letter (B) [1 Eq. Ca. Abr. 129].

1. A Bill in Equity lies to set aside Letters Patent obtained by Fraud. *Attorney General versus Vernon*, 1 Vern. 277.

2. A Solicitor may have a Bill for Fees only, if for Business done in this Court; and so he may when the Business is done in another Court, if it relates to another Demand the Plaintiff makes in this Court. *Comes Raneleigh and Thornhill*, 17 Nov. 1683, 1 Vern. 203.

A Bill was filed for the Payment of several Bills, due for Business done by an Attorney at law and Solicitor in Chancery. Demurrer, because the Plaintiff's Remedy is, and ought to be, by Suit at law, or by Application to the Court of Chancery, in a summary way; and the Demurrer was allowed. *Parry v. Owen*, Ambli. 109.

3. A Bill in Equity will lie for recovering ancient Quit-Rents, though very small, as two or three Shillings per Annum. *Cox and Foley*, 1 Vern. 359.

A Bill in Equity will not lie to recover Quit-Rents, unless the Premises be uncertain. *Vide Bouverie v. Prentice*, [1] Bro. Chan. Ca. 200.

4. A Suit for small Tithes, not proper for Chancery; neither has it been used; per Sir John Churchill, as *Amicus Curiae*. 2 Chan. Ca. 237.

(The Court of Chancery will not retain a Suit by English Bill under £10 Value, except in Cases of Charity, nor under the Value of 40s. per Annum in Lands.)

5. The Plaintiff being Executor, and his Testator greatly indebted, and being desirous to be rid of the Assets as far as they would go, and that his Payments might not be afterwards questioned, brought a Bill against all the Creditors, to the intent they might, if they would, contest each other's Debts, and dispute who ought to be preferred in Payment; the Defendant being a Creditor demurred, for that the Bill contained Multiplicity of Matter wherein he was not concerned. But the Court overruled the Demurrer, and held it a proper Bill, and a safe Way for an Executor to take. *Hil*. 1688, *Buckle and Atleo*, 2 Vern. 37.

6. If A. obtains a Decree before the Ordinary for an Aisle in a Church, and brings Bill for the Decree of this Court to quiet him in Possession, the Bill will be dismissed with Costs; for this Court executes not its own Decrees by Bill without examining the

Justice of them, and in this Case the Court cannot examine whether the Ordinary have done right. *Pasc. 1691, Baker and Child, 2 Vern. 226.*

A Bill was filed for an Account of Timber cut down on the Premises let by the Plaintiffs to the Defendant, and for an Account of some Stones, which he had carried off the Land. By Lord Hardwicke, Bills are not to be maintained in this Court, merely for Timber cut down, after the Term is gone out of the Tenant by Assignment. Nor can Bills be brought here for an Account of Waste done, without at the same time praying an Injunction: for staying of Waste, and not Satisfaction of Damages, is the proper ground for the Court to admit such Bills. And it is to prevent Multiplicity of Suits, that the Court, when it grants an Injunction, will at the same time decree an Account of Waste done: as, in the Case of a Bill brought for Discovery of Assets, an Account may be prayed at the same time; and, though originally the Bill was brought only for a Discovery of Assets, yet, to prevent Multiplicity of Suits, the Court will direct an Account to be taken. The Cases cited do not come up to the present. In *Whitfield v. Bewick, 3 Wms. 267*, it does not appear, that an Injunction to stay Waste generally was not prayed. And as to Bishop of Winchester *v. Knight, 1 Wms. 406*, I am at a Loss to know on what Grounds the Court went; for it is far from being a general Rule of this Court, to entertain a Bill against an Executor, for a Tort committed by his Testator. The probable Reason for the Decree in that Case seems to be, that it was the Case of Mines. Digging Mines, is a Sort of Trade, and in many Cases this Court will relieve, and decree an Account of Ore taken, when in any other Tort done it will refuse Relief. It is sworn, that the Timber sold only for £8, so it is below the Notice of this Court in point of Value; and, as for the Stones, that Demand is vexatious, for they were removed in order to meliorate the Land. The Bill was dismissed with Costs, but without Prejudice to any Remedy the Plaintiffs might have at law. *Jesus College v. Bloom, Ambl. 54.*

The Plaintiff, who had obtained a Judgment at law, filed a Bill, to subject some public Stock which Defendant had in Trustees Names, to the Payment of Plaintiff's Demand. Afterwards she arrested Defendant by a *ca. sa.* whereupon Lord Hardwicke dismissed her Bill. And by him, where there is an Equitable Demand, and the Party is taken in execution on a Decree, Chancery will notwithstanding issue its Process against his Lands and Effects; and the Body being detained is not in such Case a Satisfaction, because he is detained for the Contempt. But Execution on a *ca. sa.* at law is a Satisfaction of the Debt, and therefore after that Equity will not lend assistance. *Horn v. Horn, Ambl. 79.*

Chancery will not entertain a Bill to rectify a Mistake of Names in a Recovery, suffered at a Court Baron; especially after a Length of Time, and against a Purchaser. *Bell v. Cundall, Ambl. 101.*

The Court will not stay Proceedings in either of two Bills, filed for the same Purpose, one in the Name of the Party originally interested, the other in that of his Assignee; but, if both be brought on by the Plaintiffs to hearing, will dismiss that which was brought improperly with Costs. Nor will the Court ever grant a Motion to stay Proceedings on such Grounds, except where several Bills are brought by the same Person for the same Thing, or (in the Case of an Infant) where several Bills are brought by several prochein amys for the same Thing. *Gage v. Bulkely, Ambl. 103.*

If it be represented to the Court, that a Suit, preferred in the name of an Infant, is not for his Benefit, the Fact shall be enquired into by a Master; and if he report, that the Bill is not for the Benefit of the Infant, the Court will stay Proceedings. [*Da Costa v. Da Costa, 3 Wms. 140, cit. Mitford on the Pleadings in Chan. 2d ed. p. 27. Vide Andrews v. Cradock, ante (A), pl. 6 [1 Eq. Ca. ABR. 72].*]

If two Suits be instituted, by different prochein amys, for the same Thing, the Court will direct a Master to enquire which is most for the Infant's Benefit; and, when that is ascertained, will stay Proceedings in the other Suit. *Vide Mitford, 27.*

In a Bill for a Partition, upon Proof of Title in the Plaintiff, a Decree is Matter of right, however inconvenient the Partition sought for may be. *Warner v. Baynes, Ambl. 589. Parker v. Gerard, Ambl. 236.*

A Bill will not lie, by one Parish against another, to have an Issue to ascertain Boundaries. *St. Luke v. St. Leonard, [1] Bro. Chan. Ca. 40.*

(D) BILLS OF DISCOVERY; AND HEREIN OF WHAT THINGS THERE SHALL BE A DISCOVERY.

1. If the King grants the Goods of a Felon, the Grantee may compel any one, in whose Possession they are, to discover them. *Cary* 1.

2. If a Person is outlawed, a Bill may be exhibited by the Attorney General to discover his Real and Personal Estate; for the Outlawry is in nature of a Gift to, or Judgment for, the King. *Mich.* 1655, *The Protector* and *Lord Lumley*, *Hard.* 22.

3. A Bill was exhibited by the Attorney General in the Exchequer, wherein it was charged that the Defendant, being a Merchant, had concealed the Custom of 290 Casks of Currants; and for the better effecting thereof, had given £40 a piece to two Custom-house Officers; and Relief and Discovery prayed; but upon a Demurrer it was doubted, whether the Defendant should be bound to discover. [*Att. Gen. v. Mico*'] *Hard.* 137. [*Att.-Gen. v. ———*], *Hard.* 201, S. P., adjourned, where it was alledged, the Attorney General would not prosecute for the Forfeiture, but for the Duty only.

[76] 4. If the Plaintiff alledges, that the Defendant had caused the Plaintiff's *Port Wines* to be seized as *French Wines*, on purpose to raise the Price of the Market, and to sell his own Wines at a better Rate, and detained the Plaintiff till he had sold his own Wines, and then relinquished his Prosecution, well knowing that the Plaintiff's Wines were *Port Wines*: And he prays an Answer and Discovery to those Matters, in order to his bringing an Action. The Defendant may plead the Act for prohibiting of *French Wines*, and a penal clause therein on any Man that should seize Wines, and afterwards relinquish his Prosecution; and it will be allowed. *Mich.* 1682, *Bird* and *Hardwicke*, 1 *Vern.* 109.

5. If it is charged by the Bill, that the Defendant in 1659, by Colour of an Order of Sequestration by the Committee, had seized several Tithes, &c., due to the Plaintiff, the Plaintiff may pray a Discovery of the Particulars so taken, and their Value; as where a Man by Colour of a Title enters into a House, &c., and possesses himself of the Goods, &c., for it may be impossible for the Plaintiff to discover the Particulars without such Bill; and this is a Charge, not by way of Trespass, but under Colour of Title. So where a Will is proved, and the precedent Administration revoked, such Bill is usually necessary for the Discovery of the Goods; and yet in Strictness of Law there was a Trespass; resolved upon a Demurrer. *Cage* and *Warner*, *Hard.* 1682.

6. A Bill was brought to discover who was Owner of a Wharf and Lighter, to enable the Plaintiff to bring an Action for the Damages his Goods sustained by the Lighter's being overset by Negligence of the Lighterman; to which the Defendant demurred, but the Demurrer was over-ruled. *Sir John Heathcote* and *Sir John Fleet*, 2 *Vern.* 442.

7. So where the Ship called the *Turkey Merchant*, taking fire by the Neglect of the Master or Ship's Crew; the Plaintiff, who was one of the Freighters, and had his Goods burnt, brought his Bill to discover who were Part-Owners of the Ship, to enable him to bring his Action; to which the Defendant demurred, and insisted that this was like the Case where a Fire happens in a Man's House, and burns his Neighbour's also, although he is liable to Damages at Law, yet the Plaintiff, in such Case, shall not be assisted in Equity; but the Court held that the Case put was not parallel; for though the Law gives an Action, yet it doth not arise out of any Contract or Undertaking of the Party; and that this and the precedent Case came within the Reason of the Case of any common Carrier; and therefore over-ruled the Demurrer. *Mich.* 1703, *Morse* and *Buckworth*, 2 *Vern.* 443.

A Bill was brought, stating, that a Lease of the Permission to supply the Inhabitants of Madras with Tobacco for ten Years, had been granted to the Plaintiff by the proper Officer of the East India Company; that, before the Expiration of the ten Years, the Company, by their Servants in India, had dispossessed the Plaintiff, and granted another Lease to other Persons; and that the Plaintiff intended to bring an Action; and praying, amongst other things, that the Company and their Secretaries might discover, by whom, and under what Authority, the second Lease was granted, and for that Purpose, set forth Letters, &c., of their Servants in India, &c. The Defendants demurred, but the demurrer was over-ruled, by Sir Lloyd Kenyon, Master of the Rolls. And by him, in observing on an Argument of the Defendant's Counsel, that it would be needless that the Secretary should discover Matters prejudicial to the Company; If any Parts of the Letters called for be so, he need not discover those Parts. In a Case of *Walpole* and *Allison*

r. White, it was so ordered, that the Discovery should be only of those Parts of the Letters which were necessary. *Moodalay v. Morton*, [1] Bro. Chan. Ca. 469.

8. A Bill was brought to discover who was Tenant of the Freehold, in order to bring a *Formedon*; to which there was a Demurrer, and it was allowed. *Hil.* 1683, *Stapleton and Sherrard*, 1 Vern. 212. Though the Case of *Bickerton* and *Bickerton* was quoted to the contrary. *Vide Cary* 22, where it is said that such Bills have been frequent.

9. A Demurrer to a Bill brought to discover the Tenant to a *Præcipe* on a voluntary Conveyance, allowed. *Mich.* 1684, *Sherburn and Clerk*, 1 Vern. 273; 1 Vern. 213, S. P. *Per* Ld. K. who said that there were Ways of knowing it without.

[77] 10. If a Bill be exhibited to discover whether a Woman be married or no, and Marriage would be a Forfeiture of her Estate, she is not obliged to discover; such a Bill dismissed. 24 Car. 2, *Monnins and Monnins*, 2 Chan. Rep. 68.

11. If a Bill be brought to establish an Agreement for a separate Maintenance, and the Wife seeks a Discovery of hard Usage, the Husband may demur to that Part, and it will be allowed. *Mich.* 1683, *Hinks and Nelthorpe*, 1 Vern. 204.

12. The Plaintiff's Bill was for a Discovery of a Personal Estate that was devised to Charities relating to the College of &c., the Defendant pleaded, that the Will was not yet proved, but was controverted in the Spiritual Court; but the Court over-ruled the Plea, a Discovery of the Estate being for the Benefit of all Persons interested therein, and necessary for the Preservation thereof. *Pasc.* 1688, *Dulwich College and Johnson*, 2 Vern. 49; *Wright v. Blicke*, 1 Vern. 106, S. P. *accord*, where the Right of Administration was contested. (*Vide Morgan v. Harris*, 2 Bro. Chan. Ca. 121.)

13. The Plaintiff having obtained a Judgment against the Defendant on a Bond of £1400 Penalty for Payment of £700 and Interest, brought his Bill, setting forth this Judgment, and complained that the Defendant, to defraud him of the Benefit of it, had assigned his Estate to Trustees, that he had lent £1200 to *R.* and *G.*, who were since become Bankrupts in the Name of one *E.*, but that it was in Trust for the Defendant; and therefore prayed a Discovery of the Matter: And that the Plaintiff might come in under the Statute of Bankruptcy for this £1200 Debt; and that the Commissioners might not make any Distribution till this Matter was determined. The Defendant demurred, for that there could not be a Discovery of a Man's Personal Estate in his Life time; and for that this Bill was in Nature of a foreign Attachment, which the Practice of this Court did not admit or countenance; but the Demurrer was over-ruled. *Pasc.* 1686, *Smithier and Lewis*, 1 Vern. 398.

14. But where *A.* obtained Judgment against *B.* and brought a Bill against *C.* for a Discovery of *B.*'s Goods, which *C.* had got into his Hands; and the Defendant demurred, because the Plaintiff had not alledged he had taken out Execution against *B.* the Demurrer was allowed. *Pasc.* 1686, *Angell and Draper*, 1 Vern. 399.

15. The Bill was to discover whether the Defendant had not assigned over a Lease; the Defendant pleads that there was a Proviso in the Lease, that in case he assigned over, the Lease should be void; and that this being in the Nature of a Penalty or Forfeiture, he ought not to be compelled in a Court of Equity to discover. For the Plaintiff it was said, that this was not a Penalty, but Part of the Contract; yet the Plea was allowed. *Hil.* 1700, *Fane and Atlee*.

* 16. The Defendant was one of the Supercargoes of the *Royal George*, belonging to the Plaintiffs; and on his being so appointed, entered into a Bond with Sureties, of £5000 Penalty, not to trade to any of the Places prohibited by the Act of the 9th of the late Queen for erecting the *South-Sea* Company, or contrary to the *Assiento* Contract with the King of *Spain*, and several other Restrictions; and he on his Part covenanted not to trade to any of the said Places, or contrary to the said Contract; and covenanted not to plead or demur to any Bill which should be brought against him in Equity for a discovering of his Trading or Dealings contrary to [78] his Agreement; and this Bill was brought, charging him with several Breaches of Covenant, to the Prejudice of the Plaintiffs, to the amount of several thousand Pounds, and for a Discovery thereof, &c., and the Plaintiffs by their Bill waved the £5000 Penalty of the Bond. To this Bill the Defendant pleaded the Statute 9 *Annæ*, and several Articles of the *Assiento* Contract, whereby whoever traded contrary thereunto, were liable to great Penalties, as Confiscation of Ship and Goods, and several other Forfeitures. And it was strongly urged, that by Law no one was bound to discover any Matters which tended to subject him to Penalties or Forfeitures; that it was the Business of Courts of Equity to relieve against, not to assist Forfeitures; and that this Covenant not to plead

or demur was illegal and void in itself, as it tended to deprive him of the Benefit of the Law, like a Covenant not to bring a Replevin, or such like. But the Plea was over-ruled : because he certainly might, if he thought fit, forego or waive the Benefit of the Law in those Particulars, which here he has expressly covenanted to do : and which were the more necessary to be required of him, as the Plaintiffs themselves were under like Penalties, in case any of their Factors or Agents traded contrary to that Act, or the *Assiento* Contract : And this Covenant not to plead or demur, was purposely to obviate the Pretence, that he ought not to discover any Thing whereby to subject himself to any Penalties : to the Illegality of which, since he has expressly consented to and covenanted for it, he shall not now be at Liberty to object : And it was said to be so resolved in a like Case between the *E. I. Company* and *Atkins*, in the Time of the Lord *Macclesfield*, on a very solemn Debate. *Morb.* 1728. *South-Sea Company* versus *Bumsted*. (Vide [*East India Company v. Atkins*] 1 *Str.* 168.)

A *Quare impedit* having been brought against a Bishop, he filed his Bill, to discover whether a Bond of Resignation had not been given by the Clerk, who had been presented, to the Patron ; in order to make use of it for his Defence at Law. The Defendants demurred ; and for them it was argued that if such a Bond were simoniacal, the Discovery would subject them to Penalties, and that if the Bond were not simoniacal the Discovery was immaterial. Lord Thurlow thought such Bonds not simoniacal ; and as to the Immateriality, after stating, that, though the Bond were not illegal, it might yet justify the Bishop in refusing to admit the Clerk, he observed, that where the Matter of a Bill was obviously frivolous, the Court might well interfere, but that there was no Instance of refusing a Discovery, because it was inconvenient to the Party making it ; for the Plaintiff pays the Costs of the Application, and whether it is material or not, is chiefly for him to judge. He therefore over-ruled the Demurrer ; adding that it would remain with another Court to determine, how far the Discovery was material. *Bishop of London v. Fytche*, [1] Bro. Chan. Ca. 96 ; and see *Mitford* on the Pleadings in Chan. 2d ed. p. 156. (Note : It was afterwards determined in the House of Lords, that general Bonds of resignation are simoniacal. *Cunningham's Law of Simony*, 52.)

A Son is not of course entitled to a Discovery from his Father of a Settlement : but must shew a Reason for such Discovery. *Lemster v. Pomfret*, Ambl. 154.

A Bill was filed by the Lord of a Manor, claiming by Prescription a Right to certain Tolls, for Goods landed at a certain Place, and praying a Discovery of the Goods landed there by the Defendant. The Defendant by his Answer denied the Plaintiff's Title, and refused to discover the Quantity of Goods landed. And by Lord Henley, Chancellor, the Defendant is not compellable to discover, till the Plaintiff has established his Right at Law. Where the Title is in Equity the Court will compel such a Discovery, but not where it is at Law. It would be very inconvenient by putting it in the Power of every Wharfinger or Lord of a Manor to harass Persons, and oblige them to make such Discoveries. *Northleigh v. Luscombe*, Ambl. 612.

(E) BILLS *quia Timet* IN WHAT CASES PROPER.

1. A. had the Use of Goods and a Library for Life, Remainder to the Plaintiff's Wife, who was dead ; but he, as her Administrator, brought his Bill to have the Goods, &c., secured to him after the Death of A., which was decreed accordingly. 12 *Car.* 1 [1636-37], *Bracken and Bently*, 1 *Chan. Rep.* 110.

2. A Bill was brought to deliver up an Apprentice's Bond and Indentures, he being out of his Time : and it was ordered that the Master do either bring his Action within a Year, or deliver up the Bond and Indentures : for if it were at the Master's Choice to stay as long as he pleased, he would perhaps stay till the Apprentice's Witnesses were dead. 17 *Car.* 2 [1665], *Baker and Shelbury*, 1 *Chan. Ca.* 70.

3. The Defendant's Testator gave the Plaintiff £1000, to be paid at the Age of twenty-one Years : The Bill suggested that the Defendant, who was Executor, wasted the Estate : and therefore the Plaintiff prayed that he might give security for the Payment of the Legacy at such Time as it should become due, which the Master of the Rolls decreed accordingly. *Hil.* 2 *Car.* 2 [1651], *Doncarleton and Sturt*, 1 *Chan. Ca.* 121.

Bill for Security of a Legacy, which the Defendant, the Executor, was to pay at the End of ten Years from the Death of the Testator : and though no particular Reasons

were assigned, as wasting Assets, or Insolvency; yet decreed on the General Rule of the Court. *Ferrand v. Prentice*, Ambler 273. *S. P. Johnson v. Delacruise*. Vide *Green v. Pigot*, Bro. Chan. Ca. 103.

4. If A. being seised of Lands in Fee, grants a Rent-Charge issuing thereout, and after devises the Lands to B. for Life, the Re-[79]-mainder to C. in Fee, and dies, C. may compel B. to pay the Arrears, for fear all should fall on C. in Reversion; although it was urged that this was a remote Possibility. *Hil. 25 Car. 2* [1674], *Hayes and Hayes*, 1 Chan. Ca. 223. 2 *Freem.* 138, S. C., 24 Feb. 1673.

5. If A. is bound for B. and has a Counter-Bond from B., and the Money is become payable on the original Bond, Equity will compel B. to pay the Debt, though A. is not sued; for it is unreasonable that a Man should always have such a Cloud hang over him. *Per North*, Ld. K. [*Ranelagh v. Hayes*], 1 *Vern.* 190.

(F) BILLS OF PEACE TO PREVENT MULTIPLICITY OF SUITS.

1. Upon a Motion for a new Trial after Verdicts upon two Issues, which were directed, the one to try whether the Lord of a Manor had a Grant of Free Warren; and the other, in case he had the Grant of Free Warren, whether there was sufficient Common left for the Tenants; Ld. Chan. said, That those Matters were properly triable at Law; but it being urged, that the Bill was brought to prevent Multiplicity of Suits, and was in nature of a Bill of Peace, a new Trial was granted upon Payment of full Costs. *Mich. 1681. How and The Tenants of Bromsgrove*, 1 *Vern.* 22; *Cary* 3. Bills of Peace proper in Equity. [*Ewelme Hospital v. Andover*,] 1 *Vern.* 266, where several Tenants of a Manor claimed a Right to the Profits of a Fair; and a Bill was allowed to establish it.

2. A Bill shewing that one Commoner had recovered one Shilling, or other small damages, against the Plaintiff for oppressing the Common, or for using the Common where he ought not; and therefore that the Defendant, another Commoner may accept of like Damages for what is past, to prevent Charges at Law, is in Nature of a Bill of Peace, and proper in Equity. [*Pawlet v. Ingres*,] 1 *Vern.* 308.

3. A. directed B. to pay to C. what sums C. should want, C. accordingly received two Sums of Money (amongst others) of B., for which he gave Receipts, as by the Order of A. A. and C. come to an Account, which being stated, they gave mutual Releases; but the two Sums not being entered in the Books of A. were not accounted for by C. B. not having received any Allowance from A. for the two Sums, prefers his Bill against C. to have the Money paid back. C. confessed the Receipts, but insisted that he ought not to pay the Money, for that they never had any Dealings together, but upon the Credit of A., and it was to be presumed that the Plaintiff had an Allowance from A., he never paying the Defendant any Thing, but upon the Credit of A. and the Receipts so worded. But the Court decreed that the Defendant should return the Money; for the Plaintiff has a fair Claim against the Defendant to avoid Circuity of Suits; for otherwise it would only turn the Plaintiff on A., and A. on the Defendant again in Equity, to set aside the Release, and to have an Allowance of these Sums. *Dolphin v. Haynes*, Show. P. C. 17.

*The Defendants, being concerned in a Speculation in Tea, borrowed by their Broker, a very large Sum of Money of the Plaintiff, on the Credit of the East India Company's Warrants: Afterwards, the Tea being sold at a Loss, and the Produce not amounting to the Sum borrowed on the Warrants, the Plaintiff filed his Bill against all the Parties on whose Account the Loan was negotiated, contending that they were bound (though not named) by the Act of their Broker, and stating the Whole as a Partnership Transaction. Only two of the Persons originally concerned, Dawes and Shuttleworth, were now alive, and solvent. Staples died, pending the Suit, which was revived against his Representatives. Cotencin was become bankrupt, and his Assignees were brought before the Court. For the Defendants it was argued that this was Matter merely at Law, and that the Plaintiff on his own Statement of the Matter as a Partnership Transaction, ought to have brought his Action against Dawes and Shuttleworth, the two surviving and solvent Partners; who were liable to the whole Demand. To this it was answered, that the Court will prevent a Circuity of Actions; that the Consequence of the Plaintiffs recovering at Law, against Dawes and Shuttleworth, would be that they must come into a Court of Equity, to recover against the Assignees of the Bankrupt, and the Representatives of the Dead party; and *Dolphin v. Haynes* was cited. But by Lord*

Thurlow, *Chancellor*, *In this case there is no Circuity of Suits ; for if the Plaintiff had recovered against the surviving Parties, see what would have been saved. The Question of Fact whether there was a Partnership Transaction would have been settled, before the other Parties could have been called upon for Contribution. It would have been tried at the Expense of about £100. Here is an immense Quantity of Pleadings and Depositions and an enormous Expence, to bring in question a Demand, which is merely at Law. Dismiss the Bill with Costs.* *Hoare v. Cotencin*, [1] Bro. Chan. Ca. 27.

[80] (G) CROSS-BILLS.

1. A Cross-Bill is a Bill brought by the Defendant against the Plaintiff in a prior Suit depending ; it must be brought before Publication past in the other Suit, except the Plaintiff in the Cross-Bill will go to Hearing upon the Depositions already Published, because of the Danger of Perjury and Subornation. *Vide* [Basset *v.* Nosworthy] *Rep. temp. Finch* 103.

2. If there be a Bill exhibited in one Court of Equity, there may be a Cross-Bill in another ; as if the Mortgagor exhibits a Bill to redeem in the Exchequer, the Defendant may bring a Bill in Chancery to foreclose ; *Per North, Lord K.* [Newburg *v.* Wren], 1 *Vern.* 221.

(H) SUPPLEMENTAL-BILLS.

1. The Plaintiff brought a Supplemental Bill for Discovery of more Evidence touching a Matter of Account to which the Defendant pleaded the former Bill, and that the Cause was heard, and an Account directed ; but he was ordered to answer to all Matters in this Bill not answered unto in the former Case, but the Plaintiff not to reply or proceed any farther without Order. 30 *Car.* 2, *Boere and Skipwith*, 2 *Chan. Rep.* 142.

2. In a Bill of Review a new Supplemental Bill may be added. *Hil.* 1682, *Price and Keyte*, 1 *Vern.* 135.

(I) BILLS OF INTERPLEADER.

1. If a Cause has been heard upon a Bill of Interpleader, and a Trial at Law directed to settle the Right between the Defendants, there is an End of the Suit, as to the Plaintiff ; so that if he afterwards dies, the Cause shall still proceed, and there needs no Revivor, each Defendant being in the Nature of a Plaintiff : Ruled upon Motion. *Anon.* 1 *Vern.* 351.

(A Bill of Interpleader is a Bill exhibited by a third Person, who not knowing to whom he ought of Right to render a Debt or Duty, fears he may be hurt by some of the Claimants, and therefore prays that they may interplead, so that the Court may judge to whom the Thing belongs ; and he thereby rendered safe on the payment : And this he may do, whether any Suits be actually commenced against him in Law or Equity, or is only in Danger of being molested by the printed Orders ; it appears that the Plaintiff in a Bill of Interpleader must annex to his Bill, or upon filing thereof, make an Affidavit, that there is no Collusion between him and any of the Parties.)

(K) CERTIORARI BILLS.

1. The Plaintiff brought a *Certiorari* (a) Bill to remove a Cause out of the Mayor's Court, his Witnesses living out of that Jurisdiction, and inserted other Matters relating to an Account not in Controversy in the Mayor's Court. After Examination of Wit[81]-nesses, the Defendant moved for a *Procedendo*, and insisted, that if the Cause should be heard here he could not be relieved, not having any Bill here ; but a *Procedendo* was denied, the Bill containing other Matters not determinable in the Mayor's Court ; neither can the Bill be divided : But the Cause after Hearing was dismissed out of this Court. *Mich.* 15 *Car.* 2 [1663], *Rich and Jaquis*, 1 *Chan. Ca.* 31. *Freem.* 174, S. C.

(a) A *Certiorari* Bill is for removing a Cause out of an inferior Court of Equity, upon Suggestion that the cause is out of its Jurisdiction, or that the Witnesses live out of the Jurisdiction, or upon some good Reasons given, why equal Justice may not be had in such Court ; but whether, after a Decree in any such Court, a Bill of Appeal or Review will lie to Chancery to reverse it, *quære*, & *vide* 1 *Vern.* 177, 184, 443.

2. The Plaintiff, an Apprentice, had sued in the Mayor's Court to have £150 repaid, which his Mother had given to the Defendant to take him as his Apprentice ; the Defendant brought his *Certiorari* Bill, and entered into Bond to prove his Suggestions within the Time limited, as usual ; and upon a Reference to a Master, he certified the Plaintiff had proved his Suggestions ; and thereupon, although a *Procedendo* was several Times moved for, it was denied ; so the Defendant was necessitated to reply, and both Sides examined their Witnesses ; and Publication being passed, the Plaintiff served the Defendant to hear Judgment ; and upon opening the Nature of the Case, Ld. K. and Master of the Rolls were both of Opinion, that it should be sent back to be determined in the Mayor's Court ; and the Register said it had been often done both Ways, sometimes retained and decreed here, but oftener sent back ; sometimes after Publication, and sometimes after a *Subpoena* served to hear Judgment. *Hil.* 1704, *Stephenson and Houlditch*, 2 *Vern.* 491.

(L) BILLS OF REVIEW AND REVERSAL.

1. If the Chancellor errs in a Decree in a Matter of Law, and it appears within the Decree, this Decree may be reviewed for this Error. 1 *Rol. Abr.* 332.

2. So if the Chancellor errs in his Conscience upon a Matter of Fact proved before him, there may be a Review upon this Matter, because there needs no Examination ; but this may be reviewed on the old Depositions ; and this is usual. *Ibid.* 382.

3. But if the Chancellor errs in his Decree upon a Matter of Fact, this Decree is final, and cannot be reviewed, because they cannot go upon a new Examination of Witnesses now ; for after Publication this cannot be done. *Ibid.*

4. No new Evidence, or Matter which might have been used in the first Cause, and of which the party had then Knowledge, shall be sufficient Grounds for a Bill of Review. [*Chambers v. Greenhill*,] 3 *Chan. Rep.* 76. [*Curtess v. Smalridge*,] 1 *Chan. Ca.* 43, S. P. Laid down by Counsel as a Maxim. [*Malpas v. Vernon*,] 2 *Chan. Rep.* 45, S. P.

Lord Bacon's Rule respecting Bills of Review, requires that the new Matter shall have come to the Knowledge of the Party after the Decree, and could not have been made Use of in the Cause at the Time of the Decree made. These words are dark in themselves, and the Construction which hath been put upon them, is, that the new Matter must have come to the Knowledge of the Party, after Publication passed. Per Lord Hardwicke, Patterson v. Slaughter, Ambl. 293.

And by him, in the same Case : All the Bills of Review, I have known, have been on New Matter, to prove what was before in Issue ; but a Party cannot be entitled to a Bill of Review, on new Matter, to prove a Title, which was not before in Issue. Ibid.

5. No Errors can be assigned on a Bill of Review, but Errors in Law ; and such must appear from the Facts stated in the Decree ; if new Matter is after discovered, it can only be assigned for Error, by Leave of the Court. *Pasc.* 1683, *Millish and Williams*, 1 *Vern.* 166. [*Fitton v. Macclesfield*,] 1 *Vern.* 292, S. P. *per Cur'*.

6. If a Man brings a Bill of Review, to which there is a Demurrer, and the Demurrer allowed, he cannot afterwards bring a new Bill of Review. 1 *Vent.* 441. [*Barbon v. Searle*,] 1 *Vern.* 417, S. P.

7. So where a Bill was taken *pro confesso*, and a Bill of Review brought, to which the Defendant demurred, which was allowed ; [82] and a new Bill of Review being brought, the Defendant demurred ; and for Cause shewed, that a Bill of Review lies not after a Bill of Review ; and the Demurrer was allowed. *Hil.* 1682, *Dunmy and Filmore*, 1 *Vern.* 135, 2 *Chan. Ca.* 133, S. C.

8. Where a Demurrer to a Bill of Review is allowed, it may be inrolled ; but if over-ruled, that cannot be inrolled, so as to prevent the Demurrer's being re-argued. *Hil.* 1690, *Woots and Tucker*, 2 *Vern.* 120, *per Cur'*.

9. A Decree was obtained for a large Sum of Money, and a Bill of Review was brought, and new Matter assigned for Error ; and the Rule of Court was pleaded, *viz.* that the Defendant ought first to pay the Money into Court before the Bill brought : But *per Cur'*, let him give good Security, and we will dispense with the Rule. 14 *Cur.* 2 [1662-63], *Levil and Darrey*, 1 *Chan. Ca.* 42.

10. On a Motion to stay Proceedings on a Decree until the Plaintiff was heard on a Bill of Review, it being insisted upon that a Bill of Review was in itself a *Superseas*, and like a Writ of Error at Law ; but *per* Ld. K. the Decree shall be performed

to a Tittle before any Bill of Review be allowed, unless the Plaintiff will swear that he is not able to perform the Decree, and will surrender himself to the Fleet, and lie in Prison till the Matter be determined on the Bill of Review. *Hil.* 1682, *Williams and Mellish*, 1 *Vern.* 117.

11. Upon a Motion that a Bill of Review might be admitted, without Payment of the Costs of the former Suit, amounting to £150, for which the now Plaintiff, as was pretended, had been in Execution almost twenty Years, and was not able to pay them. *Per Cur'*, Upon his making Oath that he is not worth £40, besides the Matter in Question, and besides a Suit depending between the same Parties to foreclose a Mortgage, the Debt being pretended to be overpaid, he shall be admitted to bring his Bill of Review without Payment of Costs. *Mich.* 1684, *Fitton and Macclesfield*, 1 *Vern.* 264. *Vide* 1 *Vern.* 292, S. C., where it is said, that paying of Costs upon bringing a Bill of Review, is dispensed with by a late Order.

A Bill of Review for error apparent will not lie after twenty Years, to be computed from the Time of the Decree made, not of the Incollment. And the same Doctrine holds in the Case of a Bill of re-hearing. *Per Lord Camden*, Chancellor, *Smith v. Clay*, *Ambl.* 645.

(M) BILLS ORIGINAL AFTER A DECREE.

1. A Feme Covert, after Separation from her Husband, had a Decree for Alimony, which Decree was confirmed on a Bill of Review; but the Husband being willing to be reconciled to his Wife, and to cohabit with her, exhibited an original Bill to set aside the Decree; and it was held by *Finch*, Ld. K., assisted by *North*, C. J., to be a proper Bill. *Hil.* 26 *Car.* [1675], *Whorewood and Whorewood*, 1 *Chan. Ca.* 250, where it is said to have been resolved, that where a Decree is temporary, or for special ends, an original Bill lies, to shew that the Purposes of the Decree are satisfied, and to put a Period to it. *Vide* [Lawrence v. Berney] 2 *Chan. Rep.* 128.

2. An original Bill to execute a Decree of Lands against a Purchaser, who claimed under Parties bound by that Decree was allowed good on Demurrer thereto, by Ld. K. *Trin.* 26 *Car.* 2 [1674-75], *Organ and Gardiner*, 1 *Chan. Ca.* 231.

[83] 3. If a Bill be brought to have the Benefit of a former Decree, the Plaintiff cannot examine Witnesses, much less the same Witnesses to the Matters in Issue in the former Cause; but on such a Bill the Court may examine the Justice of the former Decree; but then it must be by Proofs taken in the Cause wherein that Decree is made. [Johnson v. Northey.] *Per Cur'*, 2 *Vern.* 409; *vide* [Read v. Hambey] 1 *Chan. Ca.* 45, where it is said, that no original Bill ought to be brought to explain a Decree on any Matter precedent to the Decree.

* 4. An original Bill, barely in Nature of a Bill of Revivor, and not broader or longer than a Bill of Revivor only, does not open the first Decree to have it looked into; but if it be to enforce a Decree or carry it further, then it opens the Cause. *Pasc.* 1706, *Vare and Wordall*.

(N) BILL TAKEN *pro confesso*.

1. If the Defendant appears to the *Subpoena*, and prays a further Day to Answer, and has it, and afterwards stands out all the Processes of Contempt, the Bill will be taken *pro confesso*. [Denny v. Filmer,] *Nel. Chan. Rep.* 65.

2. But if the Defendant hath not appeared, the Court will not decree the Bill to be taken *pro confesso*, but will order a Sequestration against his Real and Personal Estate, until he clears his Contempt. [Nodes v. Batle,] 2 *Chan. Rep.* 283.

3. The Defendant being a Prisoner in the *King's Bench* refused to answer; whereupon it was prayed, that the Bill might be taken *pro confesso*, if he did not answer by a certain Day; but the Court was of Opinion, that the Bill could not be taken *pro confesso*, unless the Defendant was in the Prison of the Court; whereupon he was removed by *Habeas Corpus* into the Fleet, and having a Day given him to answer, and he still refusing, the Bill was taken *pro confesso*, and he was ordered to be kept close Prisoner. [Thomas v. Jones,] *Nel. Chan. Rep.* 50.

4. A Quaker being in Contempt for not answering upon Oath; and he being by Order brought to the Bar, Ld. Chan. admonished him of the Peril of persevering; but he still refusing to answer on Oath, the Bill was taken *pro confesso*. 29 *Car.* 2, *Anon.* 2 *Chan. Ca.* 237.

5. The Court of Policies and Assurances in *London* having decreed a Bill to be taken *pro confesso*, after the first Summons, their Decree, for this Reason, was reversed. *Johnson v. Desmineere*, 1 Vern. 223.

The Defendant had been served with a Subpoena, but had never appeared; and the Plaintiff had proceeded to Attachment and Sequestration. The Defendant not being found on any of these Processes, and the Sequestrators having returned that he had no real or personal Estate; it was moved, that he might be ordered to appear on a Day certain, and the Order published, as directed by 5 G. 2, c. 25; to the end that the Bill might be taken *pro confesso* under that Act. And the Court granted the Motion. *Mawer v. Mawer*, Bro. Chan. Ca. 388.

Where a Defendant puts in an Answer, after an Order that the Plaintiff's Bill shall be taken *pro confesso*, if the Plaintiff take Exceptions to it, it is a Waiver of the Process; because the Plaintiff shall not have the Benefit both of the Defendant's Answer, and of his own Allegations. And wherever an Order is made to take a Bill *pro confesso*, if the Defendant comes in on any reasonable Ground of Indulgence, and pays Costs, the Court will attend to his Application, if the Delay have not been extravagantly long; but when it has been so, the mere gratuitously putting in an Answer is not sufficient to over-rule the Order. By Lord Thurlow, Chancellor. *Williams v. Thompson*, 2 Bro. Chan. Ca. 279.

[84] CAP. XIII.

BONDS AND OBLIGATIONS.

- (A) Concerning Bonds voluntarily entered into.
- (B) When the Consideration of entering into a Bond fails, in what Cases there shall be Relief in Equity.
- (C) What shall be said an illegal Consideration; and herein of Bonds of Resignation, criminal Conversation, and such as deprive a Man of the Benefit of the Law.
- (D) Unreasonable Bonds relieved against.
- (E) Bonds given in Fraud of Marriage-Agreements relieved against.
- (F) Marriage-broked Bonds, what shall be void as such.
- (G) Bonds obtained from young Heirs, in what Cases to be relieved against.
- (H) Bond and Penalty, in what Cases moderated in Equity.
- (I) In what Cases a Defect in the Bond, or the Want of it will be supplied in Equity.
- (K) Concerning Co-obligors and Sureties.

(A) CONCERNING BONDS VOLUNTARILY ENTERED INTO.

1. If a Man enters voluntarily into a Bond, though there was no Consideration; yet, if there was no Fraud used in obtaining it, the Bond shall not be relieved against in Equity. 21 Car. 2 [1669], *Wright and Moor*, 1 Chan. Rep. 157.

* 2. But a voluntary Bond shall not be paid in a Course of Administration, so as to take place of Real Debts, though by simple Contract; but such voluntary Bond shall be paid before Legacies. Decreed by *Harcourt*, L. C., 23 Feb. 1712, *Jones and Powell*.

(S. C. cited by *Talbot*, C., in the Case of *Cray and Rooke* (*vide Eq. Ca. Abr.* Part 2). For the Bond although it be voluntary, transfers a Right in the Life-time of the Obligor; but Legacies arise only from the Will, which takes effect only from the Testator's Death, and therefore ought to be postponed to a Right created in the Testator's Life-time; and this Ld. Chan. added, was expressly proved by the Case of *Fairbeard and Bowers* (*vide Title Creditor and Debtor* (B), Pl. 15 [1 Eq. Ca. Abr. 143], and that this Opinion of Lord *Harcourt* was grounded upon precedent Authorities.)

A Man gave to a Woman, who had been a Common Prostitute, and whom he had kept two Years, a Voluntary Bond. On a Bill by the Executor of the Obligor, Lord Camden refused to relieve against this Bond. *Hill v. Spencer*, Ambl. 641.

[85] (B) WHEN THE CONSIDERATION OF ENTERING INTO A BOND FAILS, IN WHAT CASES THERE SHALL BE RELIEF IN EQUITY.

1. If a Lessee assigns his Lease, and the Assignee, in Consideration of such assignment, gives him a Bond of £300 conditioned to pay him £20 a Year, and the Rent to the Lessor, and the Assignee suggests, that the Lease being forfeited (as in Truth it was) there is no Consideration; yet if the Assignee may have the full Benefit of his Agreement, as he had in this Case, by the Lessor's not taking advantage of the Forfeiture, he shall have no Relief. Decreed 25 Car. 2 [1673], *Powel and Morgan, Rep. in Chan. Temp. Finch* 49.

2. If an Officer in the Army agrees to surrender his Commission to J. S. in consideration of £100, for which a Bond is given, and he surrenders accordingly, and J. S. cannot get himself admitted, yet J. S. shall not have Relief against this Bond, save only against Interest and Costs. Decreed Mich. 1682, *Berrisford and Done, 1 Vern.* 98. (*Vide Morris v. M'Kulloch, Ambl.* 432.)

3. In a Bill to be relieved against four Bonds entered into by the Plaintiff's Testator to the Defendant for quitting his Pretence, and procuring the Plaintiff's Testator to be admitted Purser of one of the King's Men of War: It was held *per Cur'*, that the Bonds could not be set aside, and that they could give no Relief, except for Interest and Costs, on Payment of the Principal. *Hil.* 1693, *Symonds and Gibson, 2 Vern.* 308. Quære of the Circumstances of this Case, for no more of it appears in the Book.

4. But where a Bond was entered into before the Wars, conditioned to pay £40 *per Ann.* for twelve Years, out of the Profits of an Office which Office was taken away by the Usurpers, but was again revived at the King's Restoration; and it was held that the Obligor should not be liable for more than the Time which the Office continued. Decreed 17 Car. 2 [1665], *Lawrence and Brasier, 1 Chan. Ca.* 72.

5. So if a Citizen of London is seised and possessed of Houses of a publick Title, and likewise of a Personal Estate, and devises £10,000 to his Daughters, and makes his Nephew Executor, who enters into a general Recognizance to the Chamberlain of London, for the Payment of the £10,000, and the Lands of a Publick Title, by the Restoration of the King, revert to the right Owner; and the Personal Estate by the Fire of London is very much lessened, so that it is doubted, whether the Whole will make up the £10,000, the Recognizance shall be made use of no farther than to make good the Value of the Testator's Estate, over and above the Losses by Fire, and the King's Return. Decreed Mich. 22 Car. 2 [1670], *Holt and Holt, 1 Chan. Ca.* 190.

[86] (C) WHAT SHALL BE SAID AN ILLEGAL CONSIDERATION; AND HEREIN OF BONDS OF RESIGNATION, CRIMINAL CONVERSATION, AND SUCH AS DEPRIVE A MAN OF THE BENEFIT OF THE LAW.

1. If a Man who has a Title to Lands applies himself to a Counsellor, to recover such Lands, and the Counsellor refuses unless the Party will give him a Bond, conditioned to give him half the Land when recovered, such Bond shall be delivered up, and the Counsellor shall have no more than his reasonable Charges. Decreed Mich. 32 Car. 2 [1680], *Skapholme and Hart, Rep. in Chan. Temp. Finch* 477.

2. The Defendant, upon his presenting the Plaintiff to a Parsonage, took a Bond from him to resign, which though in itself lawful, yet the Patron making an ill Use of it, *viz.* by preventing the Incumbent from demanding Tithes in Kind, the Court awarded a perpetual Injunction against the Bond. Mich. 1686, *Durston and Sandys, 1 Vern.* 411, *vide* [Grahme v. Grahme] 1 Vern. 131, where it was sent to be tried at Law, whether Bonds of Resignation were good (*a*), or not; *Ld. Chan.* saying, That Precedents in the Case were not directly to the Point.

Note: It has been decided in the House of Lords that general Bonds of Resignation are *Simoniacal*. *Vide* Bishop of London v. Ffytche, *Cunningham's Law of Simony*, 52.

(*a*) Such Bonds have been held good in Law, where there appeared to be no Corruption or *Simoniacal* Contract; and that a Man may bind himself to resign, as in Case of Plurality. Non-residence, or till the Patron's Son is of Age, and qualified to take the Benefice; but if it had been for a Lease of the Glebe, or Tithes, or Sum of Money, that had been *Simony* within the Statute. *Vide* *Cro. Eliz.* 180; *Cro. Jac.* 248.

* 3. The Guardian of an Infant presented to a Living, and took a Bond from the Incumbent to resign within two Months after Request of the Patron or his Heirs, it being designed that he should have the Living himself, when capable; the Patron afterwards died an Infant at the University, leaving two Sisters, who were his Heirs, and they pressed the Incumbent to resign; and for not doing it, put the Bond in Suit, and recovered Judgment; and this bill was brought to be relieved against the Bond and Judgment; and it was proved in the Cause, that they had treated with the Incumbent to sell him the perpetual Advowson, and had said, that if he would not give £700 for it, they would make him resign. *Per* Ld. K. The Proof in this Case lies on the Defendant's Part, and unless they make out some good Reason for removing him, I shall certainly decree against the Bond. Bonds for Resignation have been held good in Law: the Statute of 31 *Eliz.* against Simony, made the Penalty upon the Lay Patron; and I do not remember any Case of Resignation-Bonds before that Statute, and they have been allowed since, only to preserve the Living for the Patron himself, or for a Child, or to restrain the Incumbent from Non-residence, or a vicious Course of Life; and if any other Advantage be made thereof it will avoid the Bond; and where it is general, for Resignation, yet some special Reason must be shewn to require a Resignation, or I will not suffer it to be put in Suit; if it should not be so, Simony will be committed without Proof or Punishment; a particular Agreement must be proved, to resign for the Benefit of the Friend that would be presented; and without such Agreement the Bond ought not to be sued, but for [87] Misbehaviour of the Parson; and here are Proofs in this Case of Endeavours to get Money out of the Plaintiff; and decreed a perpetual Injunction against the Bond, and Satisfaction to be acknowledged upon the Judgment; and the Plaintiff to give a new Bond of £200 Penalty to resign; but that not to be sued without Leave of the Court. *Mich.* 1701, *Hilliard and Stapleton*.

4. If a Bond is given to a House-keeper for secret Service, and it does not appear she was a common Strumpet, Equity will not relieve against it. *Mich.* 1691, *Bainhour and Manning*, 2 *Vern.* 242.

5. But if it appears that there was *turpis Contractus*, and that the Woman used to practice after that Manner, and used to draw in young Gentlemen, Equity will relieve [*Whaley v. Norton*]. 1 *Vern.* 483; *vide* [*Mathew v. Hanbury*] 2 *Vern.* 187, where it is said, that though the Court may refuse Relief, when the Party who is culpable makes his Application; yet it is otherwise when his Executor sues.

A Bill for Payment of £100, and an Annuity of £40 was granted by Defendant to Plaintiff a young Woman who came to live in the Family of Defendant then a married Man, as Companion to his Sister, and afterwards occasioned a Separation between him and his Wife. By Lord Hardwicke, Though the Grant is expressed to be for divers Causes and Considerations, it is plain on the Evidence, nor is it disputed to what it is applied. It is also plain to me that what this unhappy Woman submitted to was from the Seduction of Defendant, her Youth and previous good Character are Evidence of this, and that certainly has been the principal Ground of the Determinations in this Court, where it has been considered as *Premium Pudicitiae* when the young Woman submitted to the Suggestions of the Man, and was guilty of no Fault before; nevertheless he dismisseth the Plaintiff's Bill (but without Costs), saying that this Case differed from the others by the Defendant being married, so that the Plaintiff was left without any Excuse; had she not known that he was married, as if the Wife were at a Distance, or if any Imposition on her were proved, it would be a different Thing. *Priest v. Parrot*, 2 *Veaz.* 160.

But Equity will not relieve against a voluntary Bond, given to a Common Prostitute, whom the Obligor had kept. Past Service does not render a Bond less voluntary, for it is no Consideration at Law. *Vide* *Hill v. Spencer*, *Ambl.* 631; *vide* [*Whaley v. Norton*] 1 *Vern.* 483.

6. The late Marquis of Anandale having had criminal Conversation with the Defendant, his House keeper, for two Years, and having a Child by her, who afterwards died, the Marquis gave a Bond of £4000 Penalty, conditioned to pay her £2000 within three Months after his Death; and some Time after the Marquis executed a Deed, whereby he agreed, either to pay the £2000, or to lay it out in an Annuity, and settle it on the Defendant Harris and her Child; and the Marquis being dead, and this Bond put in Suit, this Bill was brought to be relieved against the Bond, as being given *pro turpi causa*; and the Defendant's Cross-Bill was for a Discovery of Assets, and

Payment of the £2000, and the Court dismissed the original Bill, and decreed an Account and Satisfaction for the Defendant on her Cross-Bill, as being *Premium Pudoris*; and a Case was cited of *Ord and Blackett*, where Mrs. *Ord*, a young lady of about fourteen Years of Age, and intitled to £12,000 Fortune, was seduced by Sir *William Blackett*, who settled on her £300 *per Ann.* for Life; and the young Lady had a Decree for the £300, as *Premium Pudicitiae*: So in a like Case in the Exchequer about a Year ago, where a Man having debauched a young Woman, and intending afterwards to put a Trick on her, made a Settlement upon her of £30 a Year for Life, out of an Estate which he had nothing to do with; yet the Court decreed him to make it good out of an Estate which he had of his own. This Decree was afterwards affirmed on Appeal to the House of Peers. *Hil.* 1727, *The Marchioness of Anandale and Harris*. 2 *Will. Rep.* 432, S. C.; *Cray and Rooke*, *Mich.* 1725, S. P. *Vide Eq. Ca. Abr.* Part 2 [182].

7. If a Man who is made Tenant in Tail enters into a Recognizance not to suffer a Recovery, such Recognizance shall be delivered up as creating a Perpetuity. *Moor*, 809. Adjudged upon a Reference to the Judges out of Chancery.

8. So if one settles his Land upon his Daughter in Tail, and takes a Bond from her not to commit Waste, and the Daughter levies a Fine, and commits Waste, and the Bond is put in Suit; yet Equity will relieve against it. *Hil.* 1691, *Jervis and Bruton*, 2 *Vern.* 251.

9. But where the Father settled Lands on his Son in Tail, and took a Bond from him, that he should not dock the Intail. On a Bill to be relieved against the Bond, it was decreed to be good; for if the Son would not have given the Bond, the Father might have only made him Tenant for Life. *Trin.* 1691, *Freeman and Freeman*, 2 *Vern.* 233.

One Covenant of a Bond was that the Obligor would not plead or demur to any Bill which should be brought against him for Discovery of his Trading, &c., contrary to his Agreement; and now a Bill was brought (*int. al.*) to discover several Breaches of his Agreement. To this Bill the Defendant pleaded an Act of Parliament, under which the Breaches of his Agreement enquired after, would subject him to several Penalties and Forfeitures; and it was urged that by Law no Man was bound to discover any Matters which tended to subject him to any Penalties or Forfeitures, and that as to the Covenant not to plead or demur, it was illegal and void in itself, as it tended to deprive him of the Benefit of the Law. But the Plea was over-ruled, because he certainly might if he thought fit forego or waive the Benefit of the Law in those Particulars. And the Covenant not to plead or demur, was purposely to obviate the Pretence that he ought not to discover any Thing whereby to subject himself to any Penalties to the Illegality of which, since he has expressly consented to and covenanted for it, he shall not now be at Liberty to object. *Vide South-Sea Company v. Bunsted*, ante [1 *Eq. Ca. Abr.*] 77, 78.

[88] (D) UNREASONABLE BONDS RELIEVED AGAINST.

1. The Plaintiff for £90 lent, got a Bond of £800 from the Defendant, when he was drunk, and had Judgment thereon; the Defendant, in Right of his Wife, was intitled to certain Lands that were estreated in other Persons in Law, in Trust for her; the Bill was to have those Lands subjected to the Plaintiff's Satisfaction here, in as much as the Defendant was intitled to the Trust in the Right of his Wife; but the Court would not give the Plaintiff any Relief, not so much as for the Principal he had really lent; and the Bill was dismissed. *Pasc.* 23 *Car.* 2 [1671], *Rich and Sydenham*, 1 *Chanc. Ca.* 202.

(But if the Defendant, in this Case, had come into Equity, to set aside the judgment for Fraud, Equity would have obliged him to pay the Plaintiff what was really lent, according to that Maxim, *He that would have Equity done him, must do it to others.*)

2. A Man who had fallen out with his Mother, settled his Mansion house on his Brother, but first took a Bond from him in his Sister's Name, that the Brother should not permit his Mother to come into the House; and the Bond was decreed to be set aside. *Mich.* 1686, *Traitor and Traitor*, 1 *Vern.* 413.

(E) BONDS GIVEN IN FRAUD OF MARRIAGE RIGHTS AND AGREEMENTS
RELIEVED AGAINST.

1. If A. on a Treaty of Marriage of his Sister with B. lets her have £160 privately, that her Fortune may appear as much as was insisted upon by B. and takes her Bond to repay it, and the Executor of A. puts the Bond in Suit against the Executor of the Sister, who survived the Husband, the Bond shall be given up as fraudulent. Decreed between *Gale and Lendo*, 1 *Vern.* 475. *Note* : It is laid down as a Rule in Equity, that where the Son, without the Privy of the Father or Parent treating the Match, gives a Bond to refund any Part of the Portion, it is void. [*Kemp v. Coleman*,] 1 *Salk.* 156.

2. If on a Treaty of Marriage between A. and the Daughter of B. the Mother of A. surrenders Part of her Jointure to enable her Son to make a Settlement, and B. agrees to give his Daughter £3000 Portion ; and A. without the Privy of his Mother, gives a Bond to B. to pay back £1000 at the End of seven Years, the Bond shall be delivered up, as obtained in Fraud of the Marriage-Agreement. Decreed *Mich.* 1718, by the Master of the Rolls, and *Mich.* 1719, affirmed by Ld. Chan. *Turton and Benson*, 2 *Vern.* 764.

Proc. in Chan. 522, *Lucas's Rep.* 445 ; 1 *Will. Rep.* 496, S. C. The Bond will not be made better by being assigned to Creditors ; and says *Mich.* 1719, *Parker, C.*, affirmed the Decree made by the Master of the Rolls, saying, That these private Agreements were highly to be discouraged. See the Case of *Roberts and Roberts*, *Eq. Ca. Abr.* Part 2.

* 3. But where a Son, in Consideration of £3500, which he was to have as a Marriage-Portion with B. his intended Wife, covenanted that his Father would settle £300 *per Ann.* on her as a Jointure ; and the Father settled it accordingly ; and the Son gave a Bond to leave his Wife £1000 if she survived him ; the Son died, and the Father pretended the Wife ought not to have any Benefit of this Bond, for that it was in Fraud of the Marriage-Agreement ; and cited the Case of Sir *Nicholas Butler* and Sir *Henry Chancey*, where, on the Marriage of Sir *Henry's* Son with Sir *Richard's* Daughter, it was agreed, that the young Couple should have so much for present Maintenance ; the Son privately agrees with his Father to release Part of it ; and that it was set aside, though there the Son, as was said, gave nothing but his own, and he might dispose of his present Maintenance as he thought fit ; so here the Son gives nothing but his own Money : But *per Cur.*, the Cases are not alike ; there the Father was Party to the Articles, and deceived by the under-hand Agreement contrary to the Articles, but here the Son is only Party [89] to the Articles, and was to have all the Portion, and might give it as he pleased ; and decreed that there should be no Relief. *Mich.* 1699, *Gifford and Gifford*.

6. If a Bond is given in common Form for the Payment of Money ; but proved that the Consideration was, that the Obligor should marry such a Man, or should pay the Money due on the Bond, the Court will relieve against it, for Marriage ought to be free, and without Compulsion. Adjudged *Trin.* 1689, *Key and Bradshaw*, 2 *Vern.* 102.

7. So if A. being a Widow, gives a Bond to B. of £100 if she marry again, and B. gives a Bond to the Widow, to pay her Executors the like Sum, if she should not marry again ; and the Widow soon after marries, her Bond shall be delivered up. Decreed *Hil.* 1690, *Baker and White*, 2 *Vern.* 215.

(F) MARRIAGE-BROKAGE BONDS, WHAT SHALL BE VOID AS SUCH.

1. If A. gives B. a Bond of £100 for procuring him a Wife, which is effected accordingly, such Bond shall be cancelled. [*Arleston v. Kent*,] *Toth.* 27. [*Arundel v. Trevillian*,] 1 *Chan. Rep.* 87, S. P. decreed ; [*Glanville v. Jennings*,] 31 *Chan. Rep.* 3, S. P. decreed.

2. The Plaintiff gave a Bond to the Defendant, conditioned, in Effect, that if the Plaintiff married J. S. then the Plaintiff to pay a certain Sum of Money ; the Defendant procured the Marriage, and put the Bond in Suit ; but it was decreed to be delivered up, the young Gentlewoman having £2000 Portion, and the Man being sixty Years of Age, and having seven Children. *Pasc.* 2 *Jac.* 2, *Drury and Hook*, 2 *Chan. Ca.* 176. 1 *Vern.* 412, S. C.

3. It was decreed in Chancery, that a Bond of £1000 Penalty, for the Payment of £500 given for the procuring a Marriage between Persons of equal Rank, Fortune, &c., was good ; but upon an Appeal to the House of Lords the Decree was reversed ; for

that such Bonds to Match-makers are of dangerous Consequence, and tend to the Betraying and Ruining Persons of Fortune and Quality, and are not to be countenanced in Equity; and that Marriage ought to be procured by the Mediation of Friends and Relations; and that such Bonds would be of evil Example to Executors, Guardians, Trustees, Servants, and others who have the Care of Children. *Hall and Potter, Shaw, P. C. 76.*

* 4. Mr. *Dairell's* Maid had prevailed with his Niece (who was about 15 Years old, and lived in the same House with him, and was intitled to a good Fortune) to marry his Journeyman, without the Consent or Knowledge of her Uncle; and for the good Offices she was to do him in that Affair, he had given her a Bond of £100 con [90] ditomed to pay her fifty Guineas at six Months End; and after he had got the Niece's Good will, by the Help of this Maid, and she had been prevailed with to go into a Hackney-Coach with him, in order to marry him, he gave the Maid fifty Guineas more; the Marriage was had, and the Bond not being paid, was put in Suit, and Judgment obtained on it; and this Bill was brought against the Defendants (the Maid having married *Bruning*) to be relieved against this Bond, and to have the fifty Guineas repaid; for that the Bond was entered into, and the Money given for no good Consideration, but only on Account of this Marriage-Brokage: And the Master of the Rolls decreed the Bond to be given up, and Satisfaction to be acknowledged on the Judgment and the fifty Guineas received to be repaid; and if it were not done on Service of the Order, the Defendants were to pay Costs; and this notwithstanding the Husband insisted by his Answer, that he looked upon this as his Wife's Fortune, and had married her in Prospect of it; and this Decree was affirmed by Ld. K. *Wright. Mich. 1700, Goldsmith and Bruning.*

5. If a Bond is given to a Father, in order to obtain his Consent to the Marriage of his Daughter, to repay Part of the Portion, if the Daughter die without Issue, where the Daughter was intitled to her Portion by a collateral Ancestor, the Bond will be set aside as a Marriage-Brokage Bond. Decreed *Mich. 1707, Keat and Allen, 2 Vern. 588.*

6. If the Mother, who is Guardian to her Daughter, takes a Bond from the Husband, to give her a Release within two Years [? days. See 1 *Salk. 158*] after the Marriage, such Bond is of the same Nature with a Marriage-Brokage Bond, and shall be delivered up; for there is no difference between giving a Bond for procuring a Marriage, and a Bond to release Part of what became due. Decreed 8 *Ann. [1709 10] Duke Hamilton and Lord Mohun, 2 Vern. 652, 1 Salk. 158, S. C.*

(1 *Will. Rep. 118, Easter 1710, S. C.* mentions it as a Release to be given within two Years [? days. See 1 *Salk. 158*] after the Marriage, in pursuance of a Covenant in the Marriage-Articles, which were agreed on with great Deliberation; and that *Cowper, C.* relieved against this Covenant, saying, That to tolerate such an Agreement would be paving a Way to Guardians to sell Infants under their Wardship.)

(G) BONDS OBTAINED FROM YOUNG HEIRS, IN WHAT CASES TO BE RELIEVED AGAINST.

1. If A. lends B. and C. £200, and they enter into a Bond to him of £1000 to pay him £800 within three Months after either of their Fathers died, or they were married. C.'s Father dies, and B. marries, and his Portion is in the Hands of Trustees, A. shall not subject the Portion for the Payment of the Debt, it being an unreasonable Security. [*Rich v. Sydenham,*] 3 *Chan. Rep. 75.*

(Those hazardous Bargains with young Heirs to have double or treble the Sum lent, after the Death of their Father, or a Tenant for Life, or some other Contingency, are not always set aside in Equity, by reason of Necessity or Prodigality in them; for then it would be very difficult to deal with any young Heir in the Life of his Ancestor; but if they appear to be unreasonable, or are attended with Badges of Fraud, which are the Things which must in all Cases govern them; then they are regularly set aside; but then it must be by paying what was *bona fide* lent, together with Interest, in most Cases if the Obligor applies for Relief; but in case the Obligee applies, he shall have no Assistance, not even to recover what was really lent, because that would be to assist Fraud in Equity. *Vide 1 Vern. 141; 2 Vent. 359.*)

2. A young Gentleman and two others, employed one B. to borrow £500. B. employed C. who spoke to D. a Silkmán, and bought of him Silks for £500. A. gave a Bond and Judgment for the Money, and B. sold the Silks for £250, and kept £50 for his own [91] and C.'s Pains, and paid but £200 to A., and it was decreed that the Bond should

be given up upon Payment of the £200 and Interest ; but the Reporter makes a *Quære* as to Interest. 28 *Car. 2* [1676-77], *Waller and Dalt*, 1 *Chan. Ca.* 276, *Rep. Temp. Finch* 314, *Mich. 29 Car. 2* [1677], *Fairfax and Trigg*, S. P. decreed ; and the Court would not give Interest.

(*Rep. Temp. Finch*, 295, S. C., under the Name of *Waller and Dale*, *Easter 29 Car. 2*, decreed that upon Payment of the £200 and Interest, the Bond to be delivered up. 2 *Vern.* 78, *Whitley and Price*, S. P. *Trin.* 1688. *Vide* 1 *Vern.* 467, *Pl.* 449.)

The Plaintiff being a young Man in want of Money, was supplied by the Defendants Van Sommer and Paul with Silks for the Purpose of raising Money. He gave Van Sommer and Paul a Note for £2224 as the Price of the Silks, which he presently afterwards sold for about £1000, and now he brought his Bill to compel the Defendants to deliver up his Note upon Payment of what he received for the Silks. And by Lord Thurlow, Chancellor, In the Case in Eq. Abr. 91, the Court thought proper to charge the Person only with what he really made of the Goods ; and this is the proper Rule, for the Person advancing the Goods, knows they are not to be sold in the Shop, but in the Lump at a different kind of Market ; and that what can be got for them in that way is all that will redound to the Benefit of the Party to whom they were advanced : so that the Value they might be of to be sold in the Shop must be laid out of the Case. *Barker v. Van Sommer*, [1] *Bro. Chan. Ca.* 149.

3. The Defendant being an Exchange-Man had for many Years past practised on young Heirs, by selling them Goods at extravagant Values, and to be paid Five for One, and more on the Death of their Fathers ; and had in that Manner obtained from the Plaintiff, and two other young Gentlemen that were Heirs to good Estates, several Securities, wherein they were bound severally and jointly in £4000 for Payment of great Sums of Money ; and the Court decreed the Plaintiff's Security to be given up on Payment of what the Defendant really and *bona fide* paid to him alone ; and for his own proper Use. *Trin.* 1687, *Bill and Price*, 1 *Vern.* 467. (2 *Vern.* 78, *Trin.* 1688, *Whitley and Price*, S. P. ; and 2 *Vern.* 77, *Trin.* 1688, *Lamplugh and Smith*, S. P.)

4. A. Tenant for Life, Remainder to his first Son in Tail, Remainder to his Nephew B. B. enters into several Statutes to C. for Payment of Ten for One upon the Death of A. in case he died without Issue Male in the Life of B. C. in the Life of A. brings a Bill to compel B. either to pay the Principal and Interest, or be foreclosed any Relief against the Bargain ; B. by Answer declares the Bargain fairly made, and intends to abide by it, and that he would seek no Relief against it. A. dies, and C. being dead, B. brings his Bill against the Executor of C. and notwithstanding B.'s former Answer. he is relieved against the Bargain on Payment of Principal and Interest, without Costs ; and Lords Commiss. declared, That there being no further Proceeding than the Bill and Answer, that was only to double Hatch the Cheat. Decreed *Hill.* 1690, *Wiseman and Beake*, 2 *Vern.* 121. (2 *Freem.* 111, S. C. and Decree accordingly.)

(H) BOND AND PENALTY, IN WHAT CASES MODERATED IN EQUITY.

1. If the Obligee has received the greatest Part of the Money due on the Bond, at the peremptory Time and Place, and will nevertheless extend the whole Forfeiture immediately, refusing, soon after the Default, to accept of the Residue tendered to him, the Obligor may find Aid in Chancery. [Anonymous,] *Cary* 2.

2. If the Plaintiff gives the Defendant a Bond of £20 not to disparage his Trade, and the Plaintiff afterwards seeing a Customer of the Defendant's cheapening a Parcel of Flounders, says unto him, *Why would you buy of the Defendant ? These Fish stink ;* and the Defendant puts the Bond in Suit, and has a Verdict, Equity will not relieve, because of the Smallness of the Sum (a). But *per* Ld. K. it would be otherwise were the Penalty greater, as £100 or upwards (b). *Mich.* 22 *Car. 2* [1670], *Tale and Ryland*, 1 *Chan. Ca.* 183.

(a) For the Costs here and at Law would exceed the Penalty.

(b) It is a common Case to give relief against the Penalty of such Bonds to perform Covenants, &c., and to send it to a Trial at Law, to ascertain the Damages in a *Quantum damnificat*. *Vide* 1 *Sid.* 442 ; and *Max. of Eq.* 51, *Pl.* 13.

3. The Plaintiff being in Execution, the Defendant would not discharge him without Payment of the Penalty of the Bond, which he having done, the Court decreed the

Defendant to refund all, except Principal, Interest and Costs. [Friend *v.* Burgh.] *Rep. Temp. Finch*, 437.

(But now by the 4 & 5 *Ann. cap.* 16, the Defendant, pending any Action on a Bond, may bring in Principal, Interest, and Costs in Law and Equity, and the Court shall give Judgment to discharge him.)

[92] 4. If one is bound by Bond to transfer £300 *East India* Stock, before September the 30th then next; though the Stock is much risen, yet the Defendant shall be decreed to transfer the £300 Stock *in Specie*, and to account for all Dividends from the Time that it ought to have been transferred. *Gardner and Pullen*, 2 *Vern.* 394.

5. If the Vendor of Lands enters into a Recognizance of £1000 Penalty, for the quiet Enjoyment of the Vendee, though the Loss the Vendee sustains by having the Land evicted be much greater; yet the Court will not go beyond the Penalty of the Bond. [Bidlake *v.* Arundel,] 1 *Chan. Rep.* 95.

6. So if a Master of a Ship covenants with the *East-India* Company to pay a certain Mulet for every Cloth, &c. carried in the Ship, and the Master takes *J. S.* as his Mate, who makes the like Agreement with him, *mutatis mutandis*, and gives a Bond of £50 Penalty, that he should not carry Cloth, &c. though *J. S.* without the Knowledge of the Master, carries so many Cloths that the Mulet came to £70, and the Master is obliged to pay it; yet he shall not on his own Application, charge *J. S.* for more than the Penalty of the Bond. [Davis *v.* Curtis,] 1 *Chan. Ca.* 226.

7. *Max.* He who will have Equity done to him, must do it to the same Person. — So where there was a Settlement or Devise for Payment of Debts, and there was a Bond-Debt due, the Interest of which had out-run the Penalty, although such Conveyances for Payment of Debts are construed favourably; yet the Creditor on a Bill brought by him could not have more than the Penalty. [Anonymous,] 1 *Salk.* 154. decreed. For note, That where an Obligee is Plaintiff, a Court of Equity will not carry the Debt beyond the Penalty, because he has chosen his own Security, and has made himself Judge what Recompence he shall have, in case the Debtor pays him not, or performs not his Agreement; and there is no Equity that his Security should be enlarged or bettered for him; but when he is Defendant he hath the Maxim in the Margin on his Side; and therefore,

8. If Lands are extended on a Statute or Judgment, at much less than the real Value, and the Conusor will come into Equity to make the Conusee account according to the real Value, he shall not be relieved without paying the Conusee all that is due to him for Principal, Interest and Costs, though they exceed the Penalty. [Hale *v.* Thomas,] 1 *Vern.* 350.

9. So if the Obligee be delayed by Injunction. *Ibid.*

10. So where the Plaintiff came to be relieved against the Penalty of a Bond, though it was so decreed; yet it was on the Payment of Principal, Interest and Costs: and though they exceeded the Penalty, yet the Decree was affirmed in the House of Peers. [Duval *v.* Terry,] *Show. P. C.* 15.

(And this seems to be the Reason why an Obligee, who enters up Judgment, but does not take out Execution, shall, notwithstanding, have Principal and Interest from the Time of entering up the Judgment; for though after Judgment entered, he is not intitled to Interest at Law; yet, as he is intitled to the Penalty by Law, Equity will not relieve against it without paying Principal, Interest and Costs.)

(I) IN WHAT CASES A DEFECT IN THE BOND, OR THE WANT OF IT, WILL BE SUPPLIED IN EQUITY.

1. If one of the Obligors Names is omitted by the Scrivener to be inserted in the Bond, and yet he signs and seals the Bond, such an Accident is proper to be relieved against in Equity. *Per Cooper*, L. C. [Crosby *v.* Middleton,] 3 *Chan. Rep.* 99.

2. If for £200 borrowed the Obligor enters into a penal Bond for £400, but the Clerk, instead of *Quadringenta Libris*, writes *Quadragesima Libris*, yet it shall be good. [Sims *v.* Urry,] 2 *Chan. Ca.* 225.

[93] 3. If a Bond is taken away fraudulently, and cancelled, the Obligee shall have as much Benefit by it, as if it were not cancelled. [Brown *v.* Savage,] *Rep. Temp. Finch*, 184.

4. If a Grantee in a voluntary Deed, or Obligee in a voluntary Bond, lose the Deed

or Bond, they shall have Remedy against the Grantor or Obligor in Equity. [Underwood *v.* Stancy.] 1 *Chan. Ca.* 77. *Quare*, for these Matters are discretionary.

(Where it is necessary to make Affidavit of such Loss, *vide* Title Affidavit (A), Pl. 1, 2, 3, 4. For the Court of Requests was prohibited to grant Relief in such a Case. 1 *Rep.* 375, Pl. 1, Lot. 24.)

* 5. *J. S.* a little before his Death, entered into a voluntary Bond to his House-keeper for the Payment of an Annuity of £30 *per Ann.* and the Bond being lost, his Representatives were decreed to pay the Annuity, or the Penalty of the Bond, though it appeared that there were no Wages due to her. (*Maxim.* Equity relieves against Accidents.) *Hil.* 1700, *Lightbone* and *Weeden*.

(K) CONCERNING CO-OBLIGORS AND SURETIES.

1. If two are bound jointly, and one dies, the Survivor only is liable in Equity; but it is otherwise if they were bound jointly and severally. [Towers *v.* Moor.] 2 *Vern.* 99, *per Cur.*

2. An Obligee shall have Remedy against a Surety, where the Bond is lost, especially if the Money was lent on the Surety's Credit. [Underwood *v.* Stancy.] 1 *Chan. Ca.* 77.

3. But if upon the taking out Administration two are bound as Sureties, and afterwards the Sureties take up their Bond, and procure the Prerogative Court to take insufficient Security; yet they shall not be any farther chargeable in Equity than in Law. *Ratcliffe* and *Groves*, 1 *Vern.* 196. That a Surety shall not be further liable in Equity than at Law, *vide* [Simpson *v.* Field] 2 *Chan. [Cas.]* 22.

4. If the Principal in a Bond, being arrested, gives Bail, and Judgment is had against the Bail, and the Sureties are afterwards sued on the original Bond, and are obliged to pay the Money, the Sureties shall have the Judgment against the Bail assigned to them, in order to reimburse them what they had paid, with Interest and Costs; and the Sureties in the Original Bond are not to be contributory, for the Bail stands in the Place of the Principal. *Pasc.* 1708, *Parsons* and *Priddock*, 2 *Vern.* 608.

* 5. A Bond Creditor shall, in this Court have the Benefit of all Counter-Bonds or collateral Security given by the Principal to the Surety; and if *A.* owes *B.* Money, and he and *C.* are bound for it, and *A.* gives *C.* a Mortgage or Bond to indemnify him, *B.* shall have the Benefit of it to recover his Debt. *Mich.* 1692, *Maure* and *Harrison*.

* 6. If *A.* be bound in a Bond for Payment of Money, and *B.* be bound with him as his Surety only, and the Bond happens to be lost, Equity will set up the Bond, as well against a Surety as against the Principal, because the Bond was once a legal Charge against both. Decreed 1700, *Sheffield* and *Lord Castleton*. *Vide* 2 *Vern.* 393, *S. C.*, but not *S. P.*

[94] CAP. XIV.

CHARITY.

(A) What shall be a good charitable Use.

(B) What shall be a superstitious Use, or a Charity to which the King is intitled.

(C) Where a Defect, with respect to the Lands or Goods appointed, or the Persons to take, shall be supplied in Favour of a Charity.

(D) What shall be said to be appointed to a Charity, and whose Persons and Estates made liable.

(E) What shall be a Dis-employment of a Charity, as by altering it from the Donor's Intentions; not increasing the Rents as the Price of Things increases, &c.

(F) Concerning Commissioners of charitable Uses.

(A) WHAT SHALL BE A GOOD CHARITABLE USE.

1. If a School-House is erected by the voluntary Contributions of the Inhabitants of *A.* on the Waste of the Lord of the Manor, and the Lord infeoffs Trustees in Trust

that the Inhabitants of A. may for ever have a School, as of the Gift of the Lord of the Manor; this is not a Free-School, and so not a Charity within the Statute of 43 *Eliz.* for which the Inhabitants have a right to sue in the Attorney General's Name. [Att.-Gen. v. Hewer,] 2 *Vern.* 387.

2. So if the Lord of a Manor should erect a Mill, and convey it to Trustees, to the Intent that the Inhabitants might have the Convenience of grinding there; this would not be a Charity within the Statute. [Att.-Gen. v. Hewer,] *Per* Ld. K. 2 *Vern.* 387.

(The 43 of *Eliz. cap.* 4, enacts, That the Commissioners shall inquire of the following Uses as good and charitable; *viz.* for Relief of aged and impotent, and poor People; for Maintenance of sick and maimed soldiers, Schools of Learning, Free Schools, Scholars in Universities, Houses of Correction; for Repairs of Bridges, of Ports and Havens, of Causeways, of Churches, of Sea banks, of Highways; for Education and Preferment of Orphans, for Marriage of poor Maids, for Supportation and Help of Young Tradesmen, of Handicraftsmen, of Persons decayed; for Redemption or Relief of Prisoners or Captives, for Ease and Aid of poor Inhabitants concerning payment of Fifteenths, setting out of Soldiers, and other Taxes for other Things within the Purview of the Statute. *Vide Duke's Char. Uses*, 109.)

[95] 3. If Money is given to maintain a preaching Minister, though this is no charitable Use mentioned in the Statute; yet *per* Ld. K. and two Judges, it is within the Equity of the Act; and it was ordered to be paid accordingly. *Pop.* 139.

(A Gift of Lands, &c., to a Chaplain or Minister, to celebrate Divine Service, is neither within the Letter nor Meaning of this Statute; for it was on purpose omitted in the Penning of the Act, lest the Gifts intended to be employed upon Purposes grounded on Charity, might in Change of Times, contrary to the Minds of the Givers, be confiscated into the King's Treasury; for Religion being variable, according to the Pleasure of succeeding Princes, that which at one Time is held for Orthodox, may at another be accounted superstitious; and then such Lands are forfeited, as appears by the Statute of 1 *E. 6. c.* 14. *Sir Fran. Moor's* Reading on the Statute 43 *Eliz. c.* 4. But it has been ruled otherwise; for *Summa est Ratio quæ pro Religione facit.*)

4. An Impropiator devised to one that served the Cure, and to all that should serve the Cure after him, all the Tithes and other Profits, &c., though the Curate was incapable of taking by this Devise, in such Manner, for want of being incorporate and having Succession; yet Lord *Finch* held, that the Heir of the Devisee should be seised in Trust for the Curate for the Time being. [Anonymous,] 2 *Vent.* 349.

5. A Devise of Lands to the Company of Leather-Sellers in *London*, to maintain a charitable Use there, was, upon an Appeal to Ld. Chan. held good, notwithstanding the Statute of Wills prohibits the Devising to a Corporation in Mortmain; and there said, that there were several Precedents of the Kind. *Duke's Char. Uses*, 80.

6. So if there be a Devise to the Principal, Fellows and Scholars of *Jesus College* in *Oxon.* and their Successors, to find a Scholar of his Blood; though this Devise be void in Law, because the Statute of 34 *H. 8.* of Wills, disallows of Devises to Corporations in Mortmain; yet it shall be good, as a Limitation and Appointment to a Charity, within the 43 *Eliz.* *De Layd's Case*, *Hob.* 136.

7. So where a Devise was of Lands to *Trinity College* in *Cambridge*, for the Maintenance of a Fellow there; and if any Cavil should hinder this Devise, or that the same cannot go to the College by reason of the Statute of Mortmain, then he devised the same to *S. S.* and his Heirs; and upon an Information exhibited by the Attorney General, to have this Land established in the College, it was decreed accordingly, notwithstanding the said Statute and the said Clause in the Will. 1 *Lec.* 284, *The King versus Newman in Curia.*

The Testatrix gave to the Trustees all her ready Money, &c. (subject to her Debts) to lay out and expend the same in the erecting and new building of a neat Parsonage House, which, her Will was, should be erected at the upper end of the Garden belonging to the said Parsonage House, to be from time to time, back, occupied and enjoyed by the then present and other future Incumbents. And the Question being whether this was within the Meaning of the Statute of Mortmain, Lord Bathurst, Chancellor, decreed in favour of the Charity, no Land being to be purchased. Brodie v. Chandos. [1] Bro. Chan. Ca. 444, in not.

But in a former Case, where the Testatrix devised to Trustees to buy Ground for an Alms-house in the Parish of I. and to erect an Alms-house, &c.: And Sir Thomas

Clark, Master of the Rolls, had declared, that if the Trustees could obtain the Gift of a Piece of Ground in the Parish of I. they might erect an Alms-house upon it, and ordered [95] that two Years should be allowed to the Trustees in order to procure if they could, a Gift of such Piece of Land : On an Appeal to the Lord Henley, Chancellor, he reversed the Decree, denying the Authority of Attorney General v. Bowles as to this Point, and saying that in common Sense such a Building must be considered as Money laid out in Land since it improves the Site, is demandable in a Præcipe, and is a Purchase of so much Realty. Attorney General v. Tyndall, Ambl. 614, Bro. Chan. Ca. 444, in not. S. C. (Vide Attorney General v. Bowles, 2 Ves. 547.)

(B) WHAT SHALL BE A SUPERSTITIOUS USE, OR A CHARITY TO WHICH THE KING IS INTITLED.

1. If any Lands, Tenements, Rents, Goods, Chattels, &c., have or shall be given towards the Finding a Stipendiary Priest, for Maintenance of an Anniversary or Obitt, Lamps or Torches, &c., to be used at certain Times, to help to save the Souls of Men out of supposed Purgatory ; these are superstitious Uses, which are given to the King. Vide the Statute 1 E. 6, c. 14 ; [Holloway v. Watkin,] Cro. Jac. 51, 4 Co. 104. Duke's Char. Uses, 106.

2. But if there be a charitable Use intermixed with the superstitious Use so that they may be distinguished, there the King shall have only so much as is given to the superstitious Use. [Adams & Lambert's Case,] 4 Co. 104.

3. If Lands are given upon Condition to find a Priest, this is a superstitious Use within the Words. Ibid.

[96] 4. If Lands are limited to a Man's Kindred, to pay certain Sums of Money to superstitious Uses, the King shall have the Lands ; but if it had been so limited, that his Friends or Kindred should have the Residue of the Profits above the superstitious Use, this had saved the Land, Duke's Char. Uses, 106, and the King should only have the Sums of Money thus limited.

5. If one gives £20 per Ann. for the finding of a Priest, and appoints to the Priest £10 per Ann. in this Case all shall go to the King ; for the Residue shall be intended for the finding of Necessaries ; otherwise it is, if a Condition be annexed to the Gift to give £10 per Ann. to a Priest : For there the King shall have but £10. Duke's Char. Uses, 107.

6. An Inquisition having found that one A. had devised to J. S. and her Heirs absolutely, without any Trust, that she did it for the Good of her Soul ; and that the Devisee owned that this Estate was not hers, but belonged to God and his Saints : And the Court of K. B. held, that this could not be averred to be a superstitious Use, by reason of the Statute of Frauds ; and said that a Monk may take now by Purchase and seemed to think so of a Nun : But an Information being preferred in the Exchequer for a Discovery, and an Application of the Devise to an Use truly charitable, it was held, that the Statute of Frauds did not bind the King ; that he, as Head of the Commonwealth, is instructed and empowered to see that nothing be done to the Dishonour of the Crown, or the Propagation of a false Religion ; and to that End intitled to pray a Discovery of a Trust to a superstitious Use : And that this being a superstitious Use, the King shall order it to be applied to a proper Use. 4 W. & M. between The King and Lady Portington, 1 Salk. 162.

7. If a Charity is devised to the Poor indefinitely, the King shall have the Disposal thereof. [Att.-Gen. v. Peacock,] Rep. Temp. Finch, 245.

8. A. having devised £1000 to be applied to such charitable Uses as he had by Writing under his Hand formerly directed, and no such Writing to be found, it was held that the King should appoint, who gave it to the Mathematical Boys in Christ's Hospital ; which was decreed accordingly ; and that the Parties should be indemnified from the Writing referred to. Hil. 1683, between The Attorney General and Syderfin, 1 Vern. 224.

The Testator by his Will gave a Moiety of the Residue of his Estate, to such of the Living in Hospitals as his Executor should appoint. Afterwards he struck out of his Will the Name of the Executor, but did not appoint any other Executor. It was decreed by Lord Thurlow Chancellor, that the Court would appoint ; and it was accordingly referred to a Master, to which of the Living in Hospitals the Legacy should be paid. White v. White, [1] Bro. Chan. Ca. 12.

Archbishop Secker, among many charitable Legacies, gave to his Trustees, the Incumbent and Dr. Stinton, since dead, £1000 Stock, for the Purpose of establishing a Bishop in his Majesty's Dominions in America, and ordered that if any Charity to which he had given a Legacy, should no longer subsist, such Legacy should fall into the Residue. It was contended that there being no Bishop in those Parts of America, nor any likelihood that there ever would be one, the Legacy was void, and fell into the Residue. But by Lord Thurlow, Chancellor, The Money must remain in Court till it shall be seen whether any such Appointment shall take place. *Attorney General v. Bishop of Chester*, [1] Bro. Chan. Ca. 444.

Archbishop Secker also gave £1000 to be laid out upon repairing Parsonage Houses. The Counsel for the Bishop of Chester said, that, the Archbishop's other Trustees being dead, the Selection of the Objects belonged to his Vicar, alone. But by Lord Chancellor, It must be referred to the Master, and Proposals of proper Objects must be laid before him. *Ibid.*

The Testator gave £200 to the Corporation of Q. Anne's Bounty, to augment Poor Livings, and directed his Executors to divide the Residue of his personal Estate into three Parts, and to pay one third either to the Corporation of Queen Anne's Bounty or the Society for propagating the Gospel, and another third to some public Charity. The Legacy to the Corporation of Queen Anne's Bounty was held to be void, as by the Rules of that Institution, it must have been laid out in Land. The Legacy which was given to the same Charity or to the Society for propagating the Gospel was, on the same Account, ordered to be paid to the latter. And the Legacy to some public Charity was declared to be good, but that the Executors ought to dispose of it under the Eye of the Court, and therefore were to propose a Charity to the Master. *Widmore v. The Governors of the Corporation of Queen Anne's Bounty*, [1] Bro. Chan. Ca. 13, in not. Vide Ambl. 636, S. C.

Testator directed his Executors should build and erect an Hospital, for which Purpose he charged his personal Estate with £2000. Residue to the same Uses as the real Estate. The Legacy of £2000 was declared void by the Statute of Mortmain. *Pelham v. Anderson*, [1] Bro. Chan. Ca. 444, in not.

9. A. being a benefited clergyman, devised £600 to Mr. *Barter*, to be distributed by him to sixty pious ejected Ministers, and adds, that he did not give it them for the Sake of their Non-conformity, but because he knew many of them to be pious and good Men and in great Want: He also gave Mr. *Barter* £20 and £20 more to be laid out in a Book of his, intitled *Barter's Call to the Unconverted*. And it was held by North, Ld. K., that this was a superstitious Use, which though void, yet the Charity is good, and shall be applied in *eodem genere*; and therefore decreed it for the Maintenance of a Chaplain for *Chelsea College*. *Trin.* 1684, between *The Attorney General* and *Barter*, 1 Vern. 248. But this Decree was reversed, 1 W. & M. by Lds. Commiss. [*Att.-Gen. v. Hughes*,] 2 Vern. 105.

10. A. devised a Salary for Maintenance of Independent Lectures in three Market-Towns, and devised the Estates thus charged to his Nephew, who afterwards devised it for the Payment of his Debts; a Bill was brought to have the Lands sold for Payment of the Debts; and afterwards upon an Information for the Charity, the growing [97] Payments and Arrears were decreed, and the Independent Lectures changed into Catechistical Lectures in the same three Market-Towns; and this, though there was not sufficient to pay the Debts. *Cumbe's Case*, said to be decreed 1679. [*Att.-Gen. v. Guise*,] 2 Vern. 267.

11. A. by Will charged his Estate with an annual Sum for the Maintenance of Scotchmen in the University of *Oxon*, to be sent into *Scotland* to propagate the Doctrine of the Church of *England* there; and Presbyters being settled in *Scotland* by Act of Parliament, the Question was, whether this Devise should be void, and so fall into the Estate and go to the Heir, or should be applied *Cy pres*; but there is no Resolution. *Pasc.* 1692, *The Attorney General and Guise*, 2 Vern. 266.

(C) WHERE A DEFECT, WITH RESPECT TO THE LANDS, GOODS, &c., APPOINTED, OR THE PERSONS TO TAKE, SHALL BE SUPPLIED IN FAVOUR OF A CHARITY.

1. An Appointment of Lands to a Charity will be good, though there be neither Livery of Seisin nor Attornment. *Duke's Char. Uses*, 109, 110.

2. If a Debt owing by Statute, Bond, Judgment, or Recognizance, which in Law is

a Thing in Action, is given for the Creation of a Free School, this shall be a good Appointment within the Statute to maintain a charitable Use. Decreed 3 *Car.* 1, *Ibid.* 79.

3. If Copyhold Lands are devised to a Charity, they shall pass without any Surrender, and shall bind the Heir; but the Lord shall not lose his Fine. *Ibid.* 110.

4. Tenant in Tail may devise Lands to a Charity, and such Devise shall be good, though there was neither Fine or Recovery. *Ibid.* 100. [Att.-Gen. v. Rye,] 2 *Vern.* 453, S. P. decreed.

5. If a Feme Covert Administratrix devises to a Charity, it shall be good. *Damus's Case, Moor,* 822.

6. But if an Infant, Lunatick, or Feme Covert, do by Will or by Deed give any Thing to a charitable Use, it shall be void. *Duke's Char. Uses,* 110.

7. If A. devise Freehold Lands to a Charity, but the Will is not executed in the Presence of three Witnesses, according to the Statute of Frauds, this Will being void, shall not operate as an Appointment. *Mich.* 1707, *Attorney General versus Barnes,* 2 *Vern.* 597. [Genner v. Harper,] 1 *Salk.* 163, S. P. *Prec. in Chan.* 270, *Gillb. Rep.* 5. *Vide Jenner and Harper, Eq. Ca. Abr.* P. 2 [191].

8. If Lands are given to Churchwardens of a Parish to a charitable Use, although the Devise be void in Law, they not having a Corporation capable of taking in Succession; yet they shall be capable for this purpose: Decreed. *Duke's Char. Uses,* 82.

9. If Lands are devised to a Corporation by a wrong name as to the Mayor and Chamberlain, instead of Mayor and Commonalty; yet, as the Intent of the Testator appears, it shall be good. *Mayor of London's Case, Ibid.* 83.

10. If Money is given to a Parish generally, it shall be intended to be to the Poor of the Parish. [West v. Knight,] 1 *Chan. Ca.* 134.

[98] 11. Money was given for the Good of the Church of *Dulk*; and this was resolved to be a good Gift, notwithstanding these general Words. *Duke's Char. Uses.*

12. If one devise Lands to A. for Life, Remainder to the Church of St. Andrew in *Holborn*; in this Case the Parson of the Church shall have this Remainder. *Ibid.*

The Court will not marshall Assets in favour of a Charity. *Attorney General v. Tyndall, Ambl.* 614; [1] *Bro. Chan. Ca.* 444, in not.

(D) WHAT SHALL BE SAID TO BE APPOINTED TO A CHARITY, AND WHOSE PERSONS AND ESTATES MADE LIABLE.

1. If one devises the Rents of his Land to a Charitable Use, by this the Land itself is devised; so a Devise of the Rents and Profits. *Duke's Char. Uses,* 112.

2. If a Man who has made a Lease of his Lands, devises the Rent to a Charity, this shall be construed largely for a Devise of the Rent then reserved, or afterwards to be reserved on an improved Value. *Ibid.* 71.

3. A. seised of a Manor of the yearly Value of £240. devises several Legacies, and particularly to his Heir at Law 40s., and then adds, *That being determined to settle for the future, after the Death of me and my Wife, the Manor of F. with all Lands, Woods and Appurtenances, to charitable Uses, I devise to M. N., &c., upon Trust, that they shall pay yearly, and for ever, several particular Sums to charitable Uses, amounting in the Whole to £120 per Annum, and gives the Trustees something for their Pains:* And there being an Overplus, it was decreed to go in Augmentation of the Charities, it appearing to be the Testator's Intent to settle the whole Manor; and that the Heir should have no more than the 40s. *Arnold and Attorney General, Show. P. C.* 22, in *Domo Proc'*, and affirmed on Appeal.

4. If two Executors jointly intermeddle with the Receipt of Money, and one trusts the other with Money given to perform a charitable Use, and he wastes it, and dies insolvent, the surviving Executor shall be charged therewith; but *secus*, if he had not meddled in the Execution, or had not joined in proving the Will. *Duke's Char. Uses,* 66.

(Though Purchasers for valuable Consideration without Notice, are by the express Words of the Statute exempted from having their Purchases impeached, yet the Persons selling and disposing of Lands, Goods, &c., in Breach of their Trust, and having Notice of the charitable Use, shall make Satisfaction; so shall their Heirs and Executors, as far as they have Assets. *Duke's Char. Uses,* 6.)

5. If a Rent Charge is granted to a charitable Use out of Lands, in several Counties, the Commissioners are to charge this Rent by their Decree, upon all the Lands in

every County, according to an equal Distribution, having a Regard to the yearly Value of all the Lands charged, and cannot by their Decree charge one or two Manors with all the Rent, and discharge the Residue in other Counties and Places, for that would be decreeing contrary to the Intent of the Donors. *Duke's Char. Uses*, 65.

6. The Town of A. was, upon a Commission of charitable Uses, decreed liable to a Charity; and the Grantees distrained for the whole on One, who held only Part of the Lands chargeable. And [99] it was held that the whole Town being made chargeable, they might sue for the whole on any Part; but a Commission was awarded to apportion each Man's Share. [Villa de Market Raisen v Brownlow.] 1 Chan. Rep. 91, vide [Genner v. Harper] 1 Salk. 163, where it is held, that all the Tertenants of Lands liable to a Charity need not be made Parties to the Suit.

(E) WHAT SHALL BE A MIS-EMPLOYMENT OF A CHARITY, AS BY ALTERING IT FROM THE DONOR'S INTENTIONS, NOT INCREASING THE RENTS AS THE PRICE OF THINGS INCREASES, &c.

1. If one who hath a Lease of Lands charged with a Charity, commits Waste, this is such a Misemployment for which the Commissioners may decree the Lease void. *Vide Duke's Char. Uses*, 155.

2. To keep the Profits of Land or Money given to a charitable Use in one's Hands, whether it be concealed or not; not to pay it when it is due; or convert it to other Uses, is a Mis-employment, for which the Commissioners may decree Satisfaction. *Ibid.* 116.

3. If Money be given for the Relief of the Poor, and it is paid out to build a Conduit, this is a Mis-employment: Adjudged 5 Car. 1 [1629-30]. *Ibid.* 94.

4. Several distinct Charities were given to a Parish, viz. £12 *per Ann.* for repairing the Church, £6 *per Ann.* for mending the Highways, and so much to the Poor; in all £40 *per Ann.* And the Trustees having paid 10s. a Day to a Lecturer, and laid out other Parts of it for the Service of the Parish, but not according to the Directions of the Donor: It was held by Ld. Chan. that if it should be admitted, that Parishioners might charge and apply Parochial Charities as they thought fit, it would destroy all Charities; and therefore ordered, that for what was paid the Parson they should not be allowed a Farthing; but that for the other Payments they should be allowed the Money; being promiscuously paid for several Years before; but that for the future it should be paid according to the Terms of the Charity. *Pasc.* 1682, *Man and Ballat*, 1 Vern. 42.

5. A Man having devised £50 *per Ann.* for a Lecturer in Polemical or Casuistical Divinity, so as he was a Bachelor or Doctor in Divinity, and fifty Years of Age, and would read five Lectures every Term, and would at the End of every Term deliver fair copies of the same to be kept in the University; and in Default of such Lecturer, he gave £50 *per Ann.* to ——— College in Oxon: With the Consent of the Heir, Application was made to mitigate the Rigour of the Qualifications, viz. That a Man aged forty, might be capable, that three Lectures may be sufficient every Term, and that if fair Copies were delivered once in every Year, it may suffice: But Ld. Chan. refused to intermeddle, though no Opposition was made, and said, That it was not in the Power of the Heir to alter the Disposition of his Ancestor. *Pasc.* 1682, *Attorney General on the Behalf of Peter-house College in Cambridge, &c. v. the Margaret and Regius Professors in Cambridge, &c.*, 1 Vern. 55.

[100] 6. If Trustees under-let the Land, and make a Lease good by Law, yet the Commissioners may make this Lease void, and order the Settlement of the Land on other Trustees. *Duke's Char. Uses*, 123.

7. If one give his Land, then worth £10 a Year, to maintain a Preacher, School-master, and poor People in Deal, and the Land after comes to be worth £100 a Year, it must be all employed to increase the several Charities. *The School of Thetford's Case*, 8 Co. 130, where Lands were set at an Under-value, and had been for a long Time so enjoyed, the Lease was set aside, and the Tenant decreed to pay the Arrears of the Rent according to the full Value. [Reresby v. Farrer.] 2 Vern. 414.

Sir D. Williams by his Will gave the whole Profits of the Titles in G. to be disposed of for ever to the Uses thereafter specified, and then gave to several Charities and other public Uses several certain Sums to be paid annually; all which Sums taken together made up the Value of the Titles at that time. The Titles having since been greatly

increased, and producing more than sufficient to answer those particular Sums in the Will, the question was whether the Surplus should be applied in augmentation of those Uses or should go to the Heir at Law. And by Ld. Hardwicke, Chancery, This is a stronger Case than that of Thetford School, for the Testator declares that the whole Profits shall be applied: and being the Case of Tithes it is much stronger still, because Tithes are uncertain, and might by this Time have been of much less annual Value by Change of Arable into Pasture. Attorney General v. Johnson, Ambl. 190. (Vide Attorney General v. Coventry, 2 Vern. 397.)

Note: In such Case the Court is not bound to direct that all the Uses shall be augmented proportionably; but may use its Discretion as to the Method in which the Surplus shall be distributed among the several Charities. Vide Ambl. 191.

8. If in the Constitutions for founding an Hospital it was ordained, that no Lease should be made for above twenty-one Years, and the Rent not to be raised, nor above three Years Rent taken for a Fine: though the Tenant of the Hospital Lands is intitled to a beneficial Lease upon Renewal; yet this Constitution is not to be followed according to the Letter; but as Times alter, and the Price of Provisions increases, so the Rent ought to be raised in Proportion. *Mich. 1707, Watson and Hinsworth Hospital, 2 Vern. 596, vide [Att.-Gen. v. Smith,] 2 Vern. 746, S. P.*

(F) CONCERNING COMMISSIONERS OF CHARITABLE USES.

1. Commissioners may appoint Trustees, and enable a certain Number, and their Heirs, to demise the Lands, &c., for the best Advantage of the Charity: or that, when such a Number of them die, the Survivors may elect others, and so continue the Number appointed. *Duke's Char. Uses.*

(2. If Trustees to a charitable Use misbehave themselves by making Leases at low Fines and small Rents, &c., the Commissioners may decree them void; they may likewise turn them out for any Breach of Trust, and appoint others. *Ibid. 124.*)

By the Statute of 43 *Eliz.* the Commissioners have Power to inquire of Abuses, of Breaches of Trust, of Negligence, of Mis-employment, of not Employing, of Concealing, of Defrauding, of Mis-converting, of Mis-government, &c. See this Statute expounded, 2 *Inst. 710.*

3. The Commissioners are not to inquire of the Mis-employment of any charitable Use in another County, than that wherein the Lands given to such Use do lie. *Duke's Char. Uses, 118.*

4. If the King erects a Free-School, and gives Lands to it, and appoints four Knights, and the Heirs Male of each of their Bodies, to be Governors and Visitors, and that none others shall intermeddle but Knights; by the Saving in the Statute the Commissioners are excluded from having any Jurisdiction. *Ibid. 125.*

[101] 5. So if Lands be given to a charitable Use, and the Donor appoints Trustees, and likewise Visitors, to see the Trust performed; in this Case the Commissioners cannot, by virtue of the Statute intermeddle. But if the Visitors are Trustees also, then the Commissioners shall have Jurisdiction. *Duke's Char. Uses, 124.*

(The things excepted in the Statute and concerning which the Commissioners can have no Jurisdiction, are those relating to Colleges and Halls in either of the Universities of *Oxford*, and *Cambridge* the Colleges of *Winchester*, *Westminster*, and *Eaton*; Towns Corporate, where there are special Governors, Colleges, Hospitals, or Free Schools which have special Visitors or Overseers appointed to them by the Founders: also Purchasers for valuable Consideration without Notice, &c., are protected by the Statute.)

CAP. XV.

COMMISSIONS FOR EXAMINING OF WITNESSES.

(A) In what Cases a Commission will be granted.

(B) Concerning the Commissioners, and the Execution and Return of the Commission.

(A) IN WHAT CASES A COMMISSION WILL BE GRANTED

1. If a Man is to perfect his Answer upon Interrogatories, or to be examined for a Contempt, although the Rule of Court be, that he shall be examined in four Days, or stand committed; yet if the Party be in the Country, he shall have a Commission to take his Examination. *Mich. 35 Car. 2* [1683], *Anon. 1 Vern. 187.*

2. If certain Exhibits of Writings, which were given in at a Commission for Examination of Witnesses, are altered and interlined since the Commission executed, a new Commission will be granted to examine as to this Matter; but not as to the Merits on new Interrogatories. *Hil. 25 Car. 2* [1674], *Richardson and Lowther, 1 Chan. Ca. [102] 273.* Though it was objected, that the Party had a Commissioner present, and that he could not know it, but by the Discovery of his Commissioner, who ought not to discover the Examination.

Where the Commissioners on one Side have not attended the Execution of the Commission, and the other Commissioners have proceeded *ex parte*; in order to obtain a new Commission, the Affidavit must state that neither the Party applying nor his Agents have seen, heard, or been informed of the Depositions on the other Side, nor will voluntarily see, &c., till he hath examined, or till Publication passed. On such an Affidavit, a new Commission shall be ordered, at the Expence of the Party applying, with Liberty for the other Party to cross-examine. *Geast v. Barber, 2 Bro. Chan. Ca. 1.*

3. But where a Witness alledged, that he had mistaken himself at a Commission, and the Commission being returned, he came to London, and made Oath, that he was surprised; upon which a special Commission issued to re-examine the Witnesses, which was done accordingly; but this special Commission was suppressed by the Master of the Rolls, by the Advice of the Six Clerks, as contrary to the Course of the Court. [*Randal v. Richford,*] *1 Chan. Ca. 25.*

(But it is now the Practice of the Court, to obtain an Order, on Motion and Affidavit of Surprize, to have the Witness examined *via voc* in Court, or his Depositions amended, the Witness, being first examined before an Examiner; but when he is examined in Court, or when his Depositions are read, the Order for that Purpose must be produced in Court.)

4. If after Publication any new Matter arises upon Debate, or Hearing the Cause, which may be thought material by the Court, a new Commission may be granted. [*Newland v. Horsman,*] *2 Chan. Ca. 75.*

5. A general Affidavit of having material Witnesses beyond Sea shall not be sufficient for a new Commission; but the Witnesses must be named in the Affidavit, and the Point mentioned to which they can materially depose. [Anonymous.] *1 Vern. 334.*

The Bill after stating an Injury done to Plaintiff, and that he intended to bring an Action, prayed a Commission to examine Witnesses. On a Demurrer it was insisted, that such a Commission should not be granted till after the Action brought, but the Demurrer was over-ruled. *Moodalay v. Morton, Bro. Chan. Ca. 469.*

The Testator by a Codicil to his Will gave, amongst other Legacies, £10,000 to the Plaintiff. Afterwards he made a second Codicil, in which after repeating all the Legacies given by the former Codicil, in nearly the same Words, he added a Legacy of £5000 to A. M. The Plaintiff had filed her Bill to have both Legacies paid to her, and stated Circumstances to shew that the second Codicil was intended to be an Augmentation of the former. And now she moved for a Commission to examine Witnesses, and swore that the subscribing Witnesses to the Codicils were in India and that she was advised that their Testimony as to what passed between the Testator and them at the Time of his executing the second Codicil would be material to her at the Hearing. But Ld. Thurlow, Chancellor, refused to grant a Commission on this Affidavit, saying that the Plaintiff ought to swear that she believed the Legacy in the second Codicil was meant to be augmentative, and that without it, the issuing the Commission would appear to be only for Delay. *Coote v. Coote, Bro. Chan. Ca. 448.*

To obtain a Commission to examine Witnesses abroad, it is not necessary that the

should be an Affidavit that the Matter arose there, but it is sufficient to read so much of the Answer as shews that the Fact is so. Akers v. Chaney, 2 Bro. Chan. Ca. 273.

(B) CONCERNING THE COMMISSIONERS, AND THE EXECUTION AND RETURN OF THE COMMISSION.

1. If the Commissioners misbehave themselves, the Court may grant an Attachment against them; but regularly a Commission cannot be suppressed, but upon a Reference and Certificate of Irregularity. *Cary* 43.

2. If a Commissioner in a Cause be himself to be examined as a Witness, he must be first examined; and if others be before him examined in his Presence, he cannot afterwards be examined, having heard the former Examinations; and for that Cause a Commissioner was examined in Court, his former Depositions being suppressed. [*North v. Champernoon*,] 2 Chan. Ca. 79.

Where two of the Commissioners make one Return, and the other two make a different Return, a new Commission shall be ordered: but in such Case the proper Course is not to except to the Returns, but to move to have them suppressed. Corbet v. Davenant, 2 Bro. Chan. Ca. 252.

3. When a Commission is returnable *sine dilatione*, if it be within the Kingdom, it must be returned by the second Return of next Term; if executed afterwards, it is void, and the Depositions ought to be suppressed: *Per Cur.* Anon. 2 Vern. 197.

On Motion for a Commission to examine Witnesses in Spain, a Difference was taken, and agreed to, between a Commission to take an Answer, and one to examine Witnesses, in a Country at War with us: In the former Case it must be executed in the very Country; in the latter, it may at the nearest Neutral Port; and accordingly in this Case the Commission was directed to Faro. — *v. Romney*, Ambl. 62.

[103] CAP. XVI.

COMMON.

(A) IN WHAT MATTERS RELATING TO A COMMON WILL A COURT OF EQUITY INTERPOSE AND EXERT A POWER.

1. If a Commoner, against whom £10 Damages at Law had been recovered by another Commoner for oppressing the Common, brings a Bill to examine his Witnesses, and prove his Right of Common *in perpetuum rei memoriam*, such a Bill will not be admitted till such Commoner has recovered at Law in Affirmance of his Right. *Hil.* 1684, *Pawlet and Ingres*, 1 Vern. 308; and *Vide* 1 Vern. 312, *Gell v. Hayward*.

2. But if the Bill had been, that one Commoner had recovered one Shilling, or other small Sum, for Damages against the Plaintiff for oppressing the Common, or for using the Common when he ought not, and therefore that the other Commoners may accept of the like Damages for what was past, to prevent Charges at Law, that had been in the Nature of a Bill of Peace, and proper in this Court. [*Pawlet v. Ingres*,] 1 Vern. 308.

3. A Man having granted to *J. S.* Common in his Down for 100 Sheep and five Rams, the Bill complained, that the Grantor over-stocked the Common; so that the Plaintiff, the Grantee, could have no Benefit of the Grant, and prayed the Grantor might be enjoined not to over-stock, &c., but upon Debate the Court dismissed the Bill. (For a Commoner may have an Action, if the Lord, or any other Person surcharges the Common. *F. N. B.* 125, 9 Co. 112, S. P.) *Mich.* 1689, *Fines and Cob*, 2 Vern. 116.

4. If the Lord of a Manor incloses Part of the Common, and suggests that it is only an Improvement within the Statute of *Merton*, and the Tenants, by Force, throw open the Inclosures, Chancery will grant an Injunction, and direct an Issue to be tried at Law, whether there was sufficient Common left beyond what was inclosed. *Decreed Hil.* 1697. *Arthington and Fawkes*, 2 Vern. 356; *Weekes v. Slake*, 2 Vern. 301, S. P.

And in the above Case of Arthington and Fawkes, the Plaintiff having suggested by his Bill that some of the Defendants were not entitled to inter-common upon the Waste in question, though they pretended to have such Right, the Court on the hearing, also ordered an Issue as to whether those Defendants had a Right of Common there. 2 Vern. 356.

5. There was an Agreement for an Inclosure, but all that claimed Common were not Parties to it; and although it was insisted upon, that to decree the Agreement would be to do a manifest Wrong; [104] yet the Court decreed it, and awarded a Commission to set out each Person's Title, and said, that if any that had Interest were not Parties to the Agreement, they could not be bound, and so at no Prejudice; but however, that it should not be in the Power of two or three wilful Persons to oppose a public Good. *Thirveton and Collier*, 16 Car. 2 [1664-65], 1 Chan. Ca. 48.

6. So where an Agreement was between the Lord and some of the Tenants to stint a Common, it was decreed, though opposed by one or two humourous Tenants. *Trin.* 1689, *Delabeere and Beddingfield*, 2 Vern. 103, and there said, that an Agreement to stint was more favoured than an Agreement to inclose.

7. But in a Case where it was not charged in the Bill, that the Defendant would be benefited by the Inclosure, nor charged that there was any Agreement for an Inclosure; on a Demurrer, for these Reasons, the Bill to compel the only Freeholder in the Manor to consent to an Inclosure, was dismissed. [*Constable v. Davenport*.] 1 Chan. Rep. 259.

8. A Common which has been inclosed for thirty Years, shall not afterwards be thrown open. *Hil.* 1681, *Silway and Compton*, 1 Vern. 32.

9. So where there was a Decree for an Inclosure twenty Years since, to which the Husband agreed; but the Wife having an Estate within the Manor, and her Husband's Agreement not in Strictness binding her, she would now disturb the Inclosure; but it being proved, that she was benefited by the Inclosure, and designed only to make an unreasonable Advantage to herself, the Court decreed that it should stand. *Pasc.* 1687, *Rothwell and Widdrington*, 1 Vern. 456.

10. If the Lord of the Manor enfranchises a Copyhold, with all Commons thereunto belonging or appertaining, and afterwards buys in all the other Copyholds, and then disputes the Right of Common with the Copyholders he had enfranchised, and recovers at Law; though the Common be extinct at Law, yet it shall subsist in Equity, and the same Right of Common as belonged to the Copyhold will be decreed. *Hil.* 1691, *Styant and Staker*, 2 Vern. 250.

(Where the Lord's Enfranchising a Copyhold, with all Common thereunto belonging, is an Extinguishment at Law. *Vide* 2 Cro. 253; *Feld.* 189; *Moor*, 667; 1 *Broom*, 173, 230, and where a Release of Common in one Acre is an Extinguishment of the whole Common, or where the Unity of Possession of the whole Land makes an Extinguishment, *vide* 4 Rep. 37; 1 *Inst.* 122; 8 Rep. 136.)

[105] CAP. XVII.

CONDITIONS AND LIMITATIONS.

- (A) Who are to take Advantage of a Condition, or will be prejudiced by it.
- (B) In what Cases the Breach of a Condition, or the not performing a Condition precedent or subsequent, will be relieved against, the Matter resting in Compensation.
- (C) In what Cases a Gift or Devise, upon Condition not to marry without Consent, shall be good and binding or void, being only *in Terrorem*.

(A) WHO ARE TO TAKE ADVANTAGE OF A CONDITION, OR WILL BE PREJUDICED BY IT.

1. If by a Settlement Lands are limited to the second Son in Fee, provided that if the eldest Son die without Issue, the second Son shall, within six Months after the Death of the eldest Son, pay £1500 to a Sister; or in Default thereof the Land to go

to the Sister and her Heirs; and the eldest Son dies without Issue, and the Sister dies within the six Months; upon the second Son's refusing to pay the Money, the Land shall go to the Heir, and not to the Executor of the Sister; for to decree otherwise, would be to destroy the known Difference between a Condition and a Limitation. Decreed, with the Assistance of the two Chief Justices, *Trin.* 1686, *The Earl of Winchelsea and Wentworth*, 1 *Vern.* 402, 430, S. C.

(Words which create a Condition are, *upon Condition, so that, to the Intent, to pay, to the effect, &c.* *Co. Lit.* 204; *Hard.* 10, 11. But as to Words which make a Condition in a Will, though not in a Deed, *vide* 10 *Co.* 40, 41, and there it is held, that if there be express Words of Condition annexed to the Estate, it cannot be construed a Limitation, as the Words *quamdiu, dummodo, dum, quousque, durante, &c.* But this Opinion is now exploded; for though Words which properly create a Condition be used; yet, if the Estate be limited over, it shall be a Limitation. 2 *Brownl.* 65, 66; 1 *Rob. Abr.* 412; 1 *Mod.* 86. And *per Hale*, C. B. There is no other Case to warrant the contrary Opinion, but that of 10 *Co.* 40, and by him it may properly be called a conditional Limitation. 1 *Vent.* 199, of which the Heir cannot take Advantage, though it may determine the Party's Estate without Entry or Claim, which seems to be the chief Difference between a Condition and Limitation. Also if Lands are devised to the Heir at Law, upon Condition that he pay a Sum of Money or do any other Act; this, on Failure of Performance, shall be construed a Limitation, though not mentioned; for if it were a Condition, no Body could take Advantage of it, the Benefit of Conditions annexed to the Real Estates belonging to the Heir, as those to the Personal do to the Executor. *Cro. Eliz.* 204; 3 *Co.* 22; *Owen*, 112; 2 *Mod.* 7; 1 *Lutw.* 809.)

[106] 2. A Man seised in Fee devised Lands to his Daughter and her Heirs, and his Mind is, That if his Son pay to her £50, then his Son shall have the Land; the Money was not paid at the Day; the Daughter sold the Land; and it was decreed against the Vendee, the Son paying the Money; for the Court took it to be but in Nature of a Security. *Hil.* 30 *Car.* 2 [1679], *Bland and Middleton*, 2 *Chan. Ca.* 1. But the Reporter being of Opinion, that the Son took but an Estate for Life, adds a *Quære*, why a Fee-simple should be (as it was) decreed him, seeing thereby he had more Benefit by the not performing the Condition, than if he had performed it.

3. A man devised Lands called *S.* to his younger Son, and declared, that if he should any way be hindered from enjoying them, then in lieu thereof he should have all the Land at *B.* A Moiety of the Lands called *S.* were evicted from the Devisee, who thereupon insisted to have the whole Lands at *B.* but the Court decreed that he should have as much of the Lands only at *B.* as were equal in value to those evicted. *Mich.* 1684, *Tyle and Tyle*, 1 *Vern.* 270.

A Legacy was given upon Condition that the Legatee should release all Claims on the Testator's Estate within a limited Time. The Legatee took the Legacy, but did not actually release. Lord Henley held he was bound by his Election, and decreed his Executors to release, and this Decree was, on a Re-hearing, affirmed by Lord Camden. *Northumberland v. Aylesford*, *Ambl.* 540, 657.

4. If Legacies are given by Will to four Grandchildren, upon Condition, that as they come of Age, they shall release all Claims to the Testator's Estate, this Condition must be taken *distributively*, and such only as refuse to release shall forfeit their Legacies. *Per* Ld. K. *Hawes v. Warner*, 2 *Vern.* 478.

5. A Man having Issue a Son by the first Venter, and two Sons and six Daughters by a second Wife, settles his Estate in Question on his eldest Son by his second Wife, in Tail Male, Remainder to his second Son by his second Wife, and the Heirs Male of his Body; and in Default of such Issue to the Son by the first Wife; provided if both his Sons by the second Wife died without Issue Male, so that the Estate came to the Eldest Son; that then his Eldest Son, or his Heirs should within four Months after the Estate came to him, or them, pay £1000 to his Daughters; or in Default, the Trustees therein named to enter and raise it: The Son by the second Wife entered, and suffered a Recovery of one Moiety of the Lands, and died without Issue, and the other Son by the second Wife died also, by which one Moiety of the Land came to the Heir of the eldest Son by the first Wife; and the Moiety thus descended was decreed liable to the whole Sum of £1000 although it was objected, that the Estate never came to the Eldest Son; and though a Moiety came to his Heirs, yet as so great a Benefit did not accrue to him as was intended, he should be only answerable in Proportion. *Mich.* 1698, *Hooley and Booth*, 2 *Vern.* 359.

G. J. S. having Issue three Sons, *William* his eldest, *Nathaniel* his second, and *Daniel* his third; *William* died in the Life-time of his Father, leaving Issue only a Daughter; afterwards the Father devises the Estate in Question to *Anne* his Wife for her Life, and after her Death to his Son *Daniel* and his Heirs; provided that if *Nathaniel* do, within three Months after the Death of my Wife, pay to *Daniel*, his Executors or Administrators, the Sum of £500, then the said Lands shall come to my Son *Nathaniel*, and his Heirs; the Wife lived several Years after, and during her Life *Nathaniel* died, leaving the Plaintiff his Heir, and the Wife afterwards dying, the Plaintiff brought this Bill within three Months after her Death, praying, that upon Payment of the £500 he might have a Conveyance of the Estate; and the Principal Point in the Case was, this £500 [107] being to be paid *Nathaniel* within a limited Time, and he dying before that Time came, whether his Heir at Law could now, on Payment of the Money, make a Title to these Lands; for it was agreed that he was not Heir at Law to the Testator; and it was insisted upon that he could not; that this was a Condition precedent, and merely personal in *Nathaniel*, who had neither *Jus in re* nor *ad rem*, and could neither have devised or released, or extinguished this Condition; and being a bare Possibility, and he dying before it was performed, his Heir could not make it good; and though the Word Heirs be used in the Devise to *Nathaniel*, yet that is not designed to give them any Estate originally, but to denote the Quantity of the Estate which *Nathaniel* was to take; and for this were cited *Lampet's Case*, 10 Co. [16], and *Brett and Riden's Case*, *Flow. Com.* On the other Side it was insisted, that this was like the common Case, *Co. Lit.* 205, 219, b, where a Feoffment is made on Condition that the Feoffor shall, before such a Day, &c. there, if the Feoffor die before the Day, his Heir may perform the Condition, for the Reasons there mentioned; and that it being so at Law, it should still be construed more liberally in Equity, where the Letter of a Condition is not always required to be strictly performed; and for this was cited 1 *Chan. Ca.* 89. *Bertie and Fulland*, 3 *Chan. Ca.* [129]. That the Possibility of performing this Condition was an Interest or Right, or *Scintilla Juris*, which vested in *Nathaniel* himself; that he survived the Testator; and therefore this differed from *Brett and Riden's Case*, *Flow. Co.* 110, that consequently such Right, Possibility or Interest, descended to his Heir, and might be performed by him; as before the Statute *de donis*, the Possibility of Reverter descended to the Heir of the Donor; and for this were cited *Parson versus Hoopers*, 2 *Sacred. Cr. Ca.* 358; *Cro. Jac.* 591, 8 Co. [94], *Matthew Manning's Case*, and others. The Cause being first heard by the Master of the Rolls, was thought by him a Matter of great Difficulty, and therefore he appointed the Counsel to speak to it when the Court was full. Afterwards it was decreed by Ld. Chan. with the Assistance of the Master of the Rolls, for the Plaintiff, on *Litt. sect.* 334, 335. And Ld. Chan. said, That though a Condition, in Strictness of Law, was not devisable, yet since the Statute of Uses the Devise may take Benefit of it by an equitable Construction, &c. and that *Nathaniel* might have released or extinguished this Condition. *Mich. 5 G. 1. Marks and Marks*. (*Lucas's Rep.* 420.)

(Since the Statute of Wills and Statute of Uses executory Devises and springing Uses have been allowed of: These were first allowed of with respect to the Testator or Party himself; afterwards it came to be allowed of to other Persons; and therefore at this Day in Devises and Limitations of Uses, an Estate may be limited over to a third Person upon the Defeasance of a former Estate in Fee, if the Condition be not too remote in Point of Time; and though there have been Words found out to save in Appearance the Maxims of the Common Law, yet in effect and in Truth the very Benefit and Advantage of the Condition is passed over to a third Person, notwithstanding the Maxim of Law, That a Stranger cannot take Advantage of a Condition. *Per Parker, C.* in *S. C.* *Lucas's Rep.* 423.)

The Testator devised to his Son A. in tail, Remainder to his Daughter B. in tail, Remainder to his Daughter C. in tail, Remainder to her Son D. and his Heirs on Condition that he pay to his elder Sister Plaintiff's Mother £100 at or soon after his being possessed of the Estates, and for non-payment the Estate should go to Plaintiff's Mother, &c. A. B. and C. and the Plaintiff's Mother, &c. being dead and D. seized in possession of the Remainder in Fee, the Plaintiff as Executor of his Mother filed his Bill to have the £100 raised. And Lord Hardwicke here accordingly saying it was according to Law that the Devise should extend to her Executors, and as the Testator was writing what would be the Law, he left off with putting an " &c." *Emrey v. Martin*, *Ambl.* 231.

John Richardson Currer, having an Estate for Life under the Will of Sarah Currer with Remainder in tail to Henry Richardson Jervis & his sons Estates for ever with the

Estate under the Will to Trustees to Uses by which the Tenant in Tail would take only a Life Estate, but provided that his own Estates should not be conveyed until the Tenant in Tail should suffer a Recovery and bar the Remainders in the former Will. Henry Richardson did Acts of Ownership and prepared for but never suffered the Recovery and so &c. This is not a Case of Election, but a Condition precedent which the Tenant in Tail not having performed, John Richardson Currier's own Estate never vested, and the Estate of Sarah Currier is not affected by it. Roundel v. Currier, 2 Bro. Chan. Ca. 67.

After a Devise to J. S. in tail, with Remainders over, there was a Proviso that if J. S. or his Issue or any of them should do any Act to change, charge or defeat the Bequests, such Person or Persons so doing, &c., should pay to the next in Remainder, &c., £2,000. Lord Keeper Henley, held, that the Condition being repugnant to the Estate which J. S. took, was void. King v. Burchell, Ambl. 379; 4 Term Rep. 296, in not., S. C.

(B) IN WHAT CASES THE BREACH OF A CONDITION, OR THE NOT PERFORMING A CONDITION PRECEDENT OR SUBSEQUENT, WILL BE RELIEVED AGAINST, THE MATTER RESTING IN COMPENSATION.

1. If A. conveys Lands to B. &c. and their Heirs, upon Trust, that if C. the Son of A. within six Months after the death of A. should secure to Trustees £500 for the younger Children of C., then after such Security given, to convey to C. and his Heirs, and until the Time for giving such Security, [108] in Trust for the eldest Son of C., and in Default of such Security to convey to such eldest Son and his Heirs, if C. dies before any such Security given; yet this Condition precedent being only in Nature of a Penalty, the Intent of the Trust shall be regarded, which was to secure £500 to the younger Children. *Trin. 19 Car. 2, Wallis and Crimes, 1 Chan. Ca. 89; 1 Mod. 307, S. C. cited.*

(Conditions precedent are such as are annexed to Estates, and must at Law be punctually performed before the Estate can vest. A Condition subsequent is, when the Estate is executed; but the Continuance of such Estate dependeth on the Breach or Performance of the Condition; though this Distinction is often mentioned in Courts of Equity, yet the prevailing Distinction is to relieve against Conditions, where Compensation can be made, whether they be precedent or subsequent, as appears by this and several other Cases.)

2. The Testator devised his Estate to the Defendants in Trust, for the Use and Benefit of the Plaintiff, but declared his Will to be, that the Plaintiff should have no Benefit of the Devise, unless the Plaintiff's Father should settle on the Plaintiff two full Thirds of the Estate settled on the Father on his Marriage, and in Default thereof the Estate to the Defendants; the Father made no Settlement on the Plaintiff, but devised all his Estate to him for Life, but subject to the Payment of Debts; it was admitted, and so adjudged by the Court, that this Estate was executed in the Plaintiff by the Statute of Uses, and consequently that this is a Condition subsequent; yet the Court declared, that though Conditions subsequent, which are to divest an Estate, need not be literally performed; yet even in such Case, if the Party cannot be compensated in Damages, it would be against Conscience to relieve; and therefore ordered the Master to examine the Value of the Estate devised, and the Amount of the Debts which that Estate was charged with, and to report to the Court, whether, after Debts paid, there would be two full thirds of the Father's Estate, which was settled on him in Marriage, left to the Plaintiff; and upon a Rehearing would not vary the former Order, declaring that the Difference was, whether this Case lay in Compensation or not; and if a Compensation was made, he would relieve against the Breach of the Condition; but in Case a sufficient Compensation was not made, he would then consider farther of it. *Pasc. 1683, Popham and Bampfild, 1 Vern. 79, 167, S. C.; 2 Vern. 222, S. C. cited as a Case in which there was Relief; 2 Vern. 338, S. C. cited as a Condition which was relieved against upon an equivalent.*

3. If a Feme Covert, having Power by Will to devise Lands, devises them to her Executors to pay £500 out of them to her Son; provided that if the Father gives not a sufficient Release of certain Goods to her Executors, that then the Devise of the £500 should be void, and go to the Executors; and after her Death a Release is tendered to the Father, and he refuses; yet upon making the Release afterwards, the Money shall be paid to the Son; for it was said to be the standing Rule of the Court, that a Forfeiture should not bind where a Thing may be done after, or a Compensation made for it, as where the Condition is to pay Money, &c., and though it is generally binding

where there is a Devise over, yet here it being to go to the Executors, it is no more than the Law implies. *Cage and Russel, 2 Vent. 352.*

4. If a Man Devises Lands to *J. S.* upon Condition to pay £20,000 to his Heir at Law, *viz.* £1000 *per Ann.* for the first sixteen Years, and £2000 *per Ann.* after, till the Whole should be paid, and the Heir enters for the Non payment of one of the £1000 *per Ann.*, *J. S.* [109] shall be relieved upon Payment of the £1000, together with Interest from the Time it became payable, without any Deduction for Taxes, the Court declaring, that wherever they can give Satisfaction or Compensation for the Breach of a Condition, they can relieve. *Mich. 6 Ann. [1707], Grimston and Lord Bruce, 1 Salk. 156; 2 Vern. 594, Mich. 1707, S. C.*

5. If one having three Daughters, devises Lands to his eldest upon Condition that she, within six Months after his Death, pay certain Sums to her two other Sisters; and if she failed, then he devised the Land to his second Daughter on the like Condition, &c., the Court may enlarge the Time for Payment, though the Premises are devised over; and in all Cases that lie in Compensation, the Court may dispense with the Time, though even in case of a Condition precedent. *Pasc. 1691, Woodman and Blake, 2 Vern. 222.* Note: The following Case, which seems to be between the same Parties, is otherwise stated.

6. One seised in Fee of Lands of £10,000 Value, settles it so, that in case his eldest Daughter, within six Months after his Death, should pay £6000 to the Use of his other four Daughters, then the eldest to have the Land; but if she failed in Payment, then the second to have the like Privilege; the six Months passed without payment; and the eldest Daughter having assigned over her Interest to one to whom she was indebted, by which the Estate was to go out of the Family, contrary to the Intention of the Donor: the Court took Time to consider, whether they could relieve in this Case, or not. *Woodman and Blake, 2 Vern. 166. (See the Book.)*

7. If the Father makes a voluntary Settlement on his eldest Son in Tail Male, Remainder to a second Son, &c., in which is a Proviso, that, if the eldest did not pay the second £600 at his Age of twenty-one Years, the Estate of the eldest should in Law and Equity cease; and the Father afterwards marries a second Wife, and by Deed, taking Notice of the former Settlement, and that the Son had not paid the Money, conveys the same Lands to the Use of his Children by his last Wife; the eldest Son shall not be relieved, the Conveyance being partly voluntary, and the Condition special, that his Estate should cease in Law and Equity. *Pasc. 1687, Longdale and Longdale, 1 Vern. 456, and the Son's Bill dismissed accordingly; and the rather, for that the Son had set up a Lease against his Father, which was obtained by Surprise; and the Deed in Law was defective, and amounted only to a Declaration of Trust.*

8. But where one devised his Lands to *J. S.* his Kinsman, paying, within a limited time, a thousand Pounds a piece to his two Daughters, who were his Heirs at Law, and *J. S.* made Default, and the Daughters recovered in Ejectment; yet *J. S.* was relieved on payment of Principal, Interest and Costs; though it was insisted, that this was to the Disinheritance of the Heir, and in Favour of a voluntary Devisee. *Mich. 1699, Barnardiston and Fane, 2 Vern. 366.*

9. A Man devised to each of his Daughters £20,000, payable at the Age of twenty-five Years; but if they, or either of them, married before the Age of sixteen, or if the Marriage were without the Consent of their Mother and Trustees, then they should lose £10,000 of the Portion, which should go to his other Children; one of them married before the Age of sixteen, and though it was with the Consent of all the Parties, yet *Ld. K.* held, that both the Terms of the Condition ought to have been observed. *Lord Salisbury's Case, [110] 2 Vent. 365; but vide 2 Vern. 223, S. C.* reported, where it is said, that the Father treated with the *Lord Salisbury* about the Marriage, though he died before it was had; and there the Decree is quite contrary; and with this last Resolution agrees *Skin. Rep. 285, S. C.*

10. *A.* devised his Lands to Trustees for three Years, and if within the three Years there happened a Marriage between *G.* who was a distant Relation, and of the same Blood, and *W.* his Niece and Heir at Law, then to *W.* for Life, Remainder to her first Son, &c., in Tail Male by *G.* to be begotten: But if the Marriage should not take Effect within the three Years, or if the Marriage should be before the Years of Consent, and not ratified when of competent Age, then to *F.* in Tail, who was likewise a remote Relation of the Testator, but not of the same Blood. The Marriage between *G.* and *W.* did not take effect within the three Years, though several Proposals

were within the Time made by her Friends to his Guardians, but not accepted by them; and though she herself had pressed the Match as far as the Modesty of her Sex would permit. She afterwards married the Plaintiff, and by her Bill prayed the Benefit of the Devise, the Condition being answered by her to what she was capable of doing, having married a Person, as was urged, equal in Circumstances, &c., to G. but her Bill was dismissed by the advice of *Holt and Treby*, Ch. Justices, *Hil.* 9 W. 3 [1698]. *Bertie and Lord Faulkland*, 3 *Chan. Ca.* 129. 1 *Salk.* 231, S. C., where it is said, that the Decree was reversed in the House of Lords. 2 *Vern.* 333, S. C., where it is said, that the Matter was ended there by Compromise. (*Ca. in B. R. Temp.* W. 3, 182, S. C., says Appeal was had to the Lords, where no Determination; but ended by Compromise.)

(C) IN WHAT CASES A GIFT OR DEVISE, UPON CONDITION NOT TO MARRY WITHOUT CONSENT, SHALL BE GOOD AND BINDING, OR VOID, BEING ONLY *in Terrorem*.

1. If there be a Portion of £8000 given to a Woman, provided she marries not without the Consent of A., and that, if she marries without his Consent she shall have but £100 *per Ann.*, yet if she marries without his Consent she shall be relieved, for the Proviso is *in Terrorem* only. *Trin.* 15 *Car.* 2 [1663]. *Sir Henry Bellasis and his Wife and Sir Will. Ermin*, 1 *Chan. Ca.* 22; 2 *Chan. Rep.* 22, S. P.; [*Shipton v. Hampson*.] *Nel. Chan. Rep.* [Rep. Temp. Finch], 145, S. P. decreed; [*Jervois v. Duke*.] 1 *Vern.* 20, S. P.; [*Garrett v. Pritty*.] 2 *Vern.* 293, S. P. *if there be no Limitation over.* (This agrees with the Register Book, *per* Sir F. Jekyll, Master of the Rolls, in the Case of *Hervey and Ashton*, *Mich.* 1736, *Eq. Ca. Temp.* Talbot, 215. *Vide Ante* [1 *Eq. Ca. ABR.* 109–110], (B), *pl.* 9, 10).

2. But it was said, that if the Portion upon such Marriage had been limited over to another, it had been otherwise. [*Bellasis v. Ermin*.] 1 *Chan. Ca.* 22; [*Sutton v. Jewke*.] 2 *Chan. Rep.* 95, S. P. decreed; [*Stratton v. Grymes*.] 2 *Vern.* 357, S. P. decreed, and the Distinction taken *ut supra*.

(A Devise upon Condition not to marry at all, or not to marry a Person of such a Profession or Calling, is void by our Law, whether there be a Limitation over or not; but if it were upon Condition not to marry a Papist, or a certain Person by Name, it may be good. 1 *Vern.* 20. But by the Civil Law a Gift or Devise upon Condition not to marry without Consent is void, though there be a Limitation over; for the Maxim there is *Matrimonium esse liberum*: *Per Hale*, C. J.)

A bare Gift of the Residuum is not such a Bequest over as will deprive a Daughter of a Legacy on condition of marrying with Consent, but there must be an express Bequest over of the particular Legacy. By Lord Hardwicke, Chancellor, *Wheeler v. Bingham*, *Wils.* 135.

3. If by Lease £9000 is secured for a Feme Sole, in case she marries not contrary to the Liking of A., and if she doth, then for such Person as A. shall nominate; and for want of such Nomination, for A. and she marries without the Consent of A., yet he can [111] not dispose of the Lease otherwise than for her Benefit. *Mich.* 16 *Car.* 2 [1664]. *Fleming and Waldegrave*, 1 *Chan. Ca.* 58, 2 *Vern.* 573, S. C. cited, where it is said, that there may be a Difference between a Condition that she shall not marry without Consent, and where it is that she shall not marry against Consent.

Testator devises the Residue to his Children, but if any of his Daughters shall marry without Consent of her Mother or Guardians, her Share to go to those unmarried. This is a Condition subsequent, and a Daughter who married without Consent is entitled. *Vide Jones v. Suffolk*, Bro. *Chan. Ca.* 528.

4. If A. devises a Messuage, &c., to B. his Wife for Life, Remainder to C. his Granddaughter in Tail, upon Condition that C. marries with the Consent of his Wife, and D. and E. or the major Part of them; and if she marries without their Consent, or dies without Issue, devises the same to F. and her Heirs; and after C. steals away, and is married without the Consent of any of them; and all of them, as soon as they heard of it, protest against the Marriage, but afterwards consent to it, and then B. dies, and D. and E. swear that they do not know, but that if their Consents had been asked before, there might have been such Reasons given, that they might have assented; yet C. shall not be relieved in Equity, for the subsequent Assent cannot divest the Estate which was before vested in F. And there shall be no collateral Averment, that it was intended only *in Terrorem*. *Fry and Porter*, 1 *Chan. Ca.* 138. Upon the first Hearing a decretal Order was made by the Master of the Rolls, that she should

be relieved, but upon a Re-hearing by Ld. K. assisted by the three Chiefs, her Bill was by their unanimous Opinion dismissed. 1 *Mod.* 300, S. C. ; 2 *Chan. Rep.* 26, S. C.

The Testator having only one Child, a Daughter, devised all his Real and Personal Estate to J. S. in Trust, after paying an Annuity to his Widow, for his Daughter if she married with the Consent and Approbation of J. S. but if she should marry without such Consent or Approbation then the Premises to go to, &c. The Daughter married within a Month after the Testator's death without even asking the Consent of J. S., but about eleven months after her Marriage she obtained his Approbation in writing. The Question was whether she had forfeited the Estate. And Lord Hardwicke, Chancellor, held that he was at Liberty to construe the Word and, to mean or, which, he accordingly did, and then the subsequent Approbation was sufficient and a previous Consent was not necessary. He also held that supposing the Condition had made consent necessary, yet that Notice to the Daughter being Heir at Law would have been requisite to work a Forfeiture. *Burleton v. Humfrey*, Ambl. 256.

5. A. by Will gives his Grandaughter £200, on Condition she continued with his Executors till she was Twenty-one; but if she was taken from them by her Father (who was a Papist), or married against the Consent of his Executors, then he gave her but £10. The Daughter was placed by the Executors with a Clergyman, who before she was Twenty-one, with Consent of one of the Executors, permitted her to make a Visit to her Father; and he took that Opportunity to marry her to a Papist, and she was decreed the Legacy at the Rolls, but upon a Re-hearing Ld. K. held, that she should have but the £10 only; and he said, That in this Case there was no Difference between a Condition that she shall not marry without Consent, and that she shall not marry against Consent. *Hil.* 1706, *Cragh and Wilson*, 2 *Vern.* 572. *Quære*, Whether there was any Limitation over.

6. Lands were settled in Trust for raising Portions for Daughters, payable upon their Marriages, with the Consent of Trustees; but if they married without such Consent, then to remain over to another, &c. The Daughters were old, and never intended to marry, but to lay out their Portions in a Purchase of Annuities for their Lives; and it was held that they should have their Portions immediately, upon giving Security to indemnify against the Persons to whom the Portions were devised over. Decreed 25 *Car.* 2 [1674], *Needham and Vernon*, *Rep. Temp. Finch*, 62. *Aston v. Aston*, 2 *Vern.* 452, S. P., decreed upon giving Security to refund, if the Condition should be broken, though no Mention made that the Daughters did not intend to marry.

The Testator by his Will gave to Trustees £4000 for the Use of J. W. if she married with Consent, if not, then only £1000, and a similar Legacy to the Use of M. W., then followed this Clause, If either of these Girls should marry into the Family of G. or R. and have a Son, I give all my Estate to him for Life (with Remainders over); if they shall not marry then I give the £8000 and my Estate to Randall. A Bill was filed and there was a Decree that the Money should be invested in the Funds till the Event should happen, with Leave for the Parties interested to apply, as Occasions should arise. The Girls being married with Consent, but neither of them into the Families of R. or G., Randall filed his Bill for the Residue as forfeited to him. But by Lord Thurlow, Chancellor, Nothing could vest till they married, Marriage being a Condition precedent: then can any Thing vest till the whole Contingency becomes impossible? The Plaintiff supposes, that if the Girls once married they had lost all Chance of marrying into the Family of R. or G. If the Testator had said so, it would have been very well; suppose one of them, after the Death of her Husband, to marry into one of the favoured Families, and to have a Son, who comes here to claim the Estate: the Court would not incline to refuse him. The Decree that the Money should be invested, &c., must be carried into Execution. *Randal v. Payne*, [1] *Bro. Chan. Ca.* 55.

7. A. devised £300 to B. her Daughter, and if she married under Twenty-one, without Consent of the Executors or major Part of them, the Legacy to go to the Children of her Sister, the Wife of C., and made C. and two others Executors; B. being at the House of C. there marries his Son by a former Wife with his Privy, being under Twenty-one; B. and her Husband bring a Bill for the Legacy. [112] C. in Favour of his other Children insists that the Legacy is forfeited. The other Executors confessed they had Notice of the Courtship, and did not contradict or disapprove of it; and the £300 was decreed the Plaintiffs, there being at least a tacit Consent. *Hil.* 1706, *Mesgrett and Mesgrett*, 2 *Vern.* 580.

In the Settlement of an Estate on two Daughters was a Proviso, that if either of them should marry without the previous Consent in writing, of the Mother, the Moiety settled on such Daughter should be to her separate Use. The Mother proposed and encouraged the Marriage of one of her Daughters with S. a fit Person; but afterwards, out of Pique and Resentment, refused her Consent. Lord Hardwicke, Chancellor, held this to be no Forfeiture; on the Ground that the withdrawing Consent after such Encouragement is a Delusion on the young Persons. Strange v. Smith, Ambl. 263.

8. A Father devises Lands in Trust to permit his Daughter S. to receive the Rents until her Marriage or Death, and in case she marry with the Consent of Trustees, then to convey the Premises to her and her Heirs; but if she died before Marriage, or married without such Consent, then to convey to other Persons. The Daughter afterwards marries with the Consent of her Father, who settles Part of the Lands on her and her Husband, and dies; this Settlement shall be no Revocation of the Will as to the Devise of the other Lands to her; and by the Father's consenting in his Life-time, the Condition is dispensed with. *Mich. 1716, Clerk and Berkeley, 2 Vern. 720.*

* 9. A. devised to his Daughter M. the Plaintiff, £100, to be paid by his Executors upon her Day of Marriage, or Age of twenty-five Years, which should first happen, upon Condition that she should marry with the Consent of such and such Persons; and if she married without their Consent, then to have £50 only, and no more; and gave the Residue of his Personal Estate to the Defendants. M. married the Plaintiff, without such Consent, before she was Twenty-one: And it was held by the Master of the Rolls, that this was more than a Clause *in Terrorem*, and that the Devise of the Surplus of the Personal Estate, was a Devise over of the £50 on M.'s Disobedience. *Mich. 1699, Amos and Horner.*

(*Note*: No Resolution was taken in this Case, but it went off for want of Parties, and never came on again. *Per Jekyll*, Master of the Rolls; *vide Eq. Ca. temp. Talbot, 215.*)

10. The Defendant's Father devised to him, who was his Heir at Law, all his Lands, &c. (except such and such Parts), charged with the Sum of £2500 to his Daughter (since married to the Plaintiff) at her Age of twenty-one Years, or Marriage, which should first happen, and devised the excepted Lands in Trust to be sold for the Payment of his Debts: Provided, that if his said Daughter should marry in the Life-time of her Mother without her Consent first had in Writing, then £500 Part of the said £2500 should cease, and should be applied towards Payment of his Debts charged on the said excepted Lands; and appoints his Wife to be Guardian of his said Daughter, and makes her Executrix, and dies: The Daughter attains her Age of twenty-one Years, and without the Consent or Privy of her Mother intermarries with the Plaintiff, who was a Gentleman of some Estate, and called to the Bar, but had made no Settlement or Provision for his Wife; and therefore the Defendant, the Heir at Law, refused to raise or pay any Part of his Sister's Portion; and insists likewise, that by her Marriage without her Mother's Consent, £500 Part of her Fortune, was become forfeited: Whereupon the Plaintiffs brought their Bill to have the whole Portion raised by Sale of the Lands charged therewith. *Per* Ld. K. This is a Portion to be raised out of Lands, and therefore to be considered as Land; and though it be to go towards Payment of Debts on Breach of the Condition, and there appear one hundred and twenty Creditors concerned, yet none that are in Danger of losing their Debts: it is then to be considered as it stands upon the Condition itself; and therefore the Plaintiff must have her whole Portion; for the Testator has appointed two Periods of Time to intitle her to it, *viz.* [113] Marriage, or the Age of Twenty-one: And as she has attained that Age, it becomes a vested and settled Interest in her, not to be divested by the Marriage without the Consent of the Mother; for that Consent cannot in any Reason be carried farther than during her Minority. *Hil. 1712, King and Withers, Prec. in Chan. 348; Gibb. Eq. Rep. 26.*

The Testator bequeathed to each of his Daughters £1500, to be paid to them respectively at the Time of Marriage with the Consent of his Executors, whom he also made Guardians of his Daughters during their Minority. There was also in the Will, a Clause for their Maintenance and Education, till the Portions become payable. One of the Daughters after having attained 21 died unmarried, and the Question was, whether the Portion survived, or in other Words, whether the time of Payment was confined to Marriage. Lord Camden, Chancellor, after observing that it was very unnatural for a Parent to impose a Consent to Marriage during his Daughter's whole Life, said, that considering

all the Clauses of this Will the Portions must be understood to be payable at Twenty-one or Marriage with Consent. *Knapp v. Noyes*, Amb. 662. (*Webb v. Eton*, 110m. Wils. 159.)

The Testator bequeathed Part of his Personal Estate to Trustees, to pay one Moiety thereof to M. T. at her Age of Twenty-one Years, if unmarried, and the other Moiety to her at her Age of Twenty-five Years, if unmarried; but if she should marry, before she shall be Twenty-one, with Consent of her Mother, then one Moiety to be added on her and her Issue in such Manner as her Mother should think proper, and the other Moiety to be disposed of as M. T. should think fit: But in case M. T. should die before Twenty-five Years unmarried, then the whole of this Legacy was bequeathed to her Mother, to whom there was also a Gift of the general Residue of the real and personal Estate. M. T. married before she was Twenty-one against the Consent of her Mother. Lord Thurlow, Chancellor, held that hereby the Bequest to M. T. was rendered void, and became the Property of her Mother, as Part of the Residue. *Scott v. Tyler*, 2 Bro. Chan. Ca. 431 [Dick. 712], in the Arguments on which Case the Law respecting Conditions in restraint of Marriage is very particularly discussed.

CAP. XVIII.

CONTRIBUTION AND AVERAGE.

(A) Contribution and Average, in what Cases.

(B) In what Proportion.

(A) CONTRIBUTION AND AVERAGE, IN WHAT CASES.

1. If a Man grants a Rent Charge out of all his Lands, and afterwards selleth them by Parcels to divers Persons, and the Grantee of the Rent-Charge will from Time to Time levy the whole Rent upon one of the Purchasers only, he shall be eased in Equity by a Contribution from the rest of the Purchasers. [Anonymous,] *Cary*, 3.

2. One Executor, who pays Debts and Legacies, may compel the other to contribute. [*Rowe v. Billing*,] *Toth.* 89.

3. If the Collector of Fifteenths levies all the Tax within one Township upon one Inhabitant, he shall have the Aid of the Court of Exchequer to make the others contributory. [*Dimock's Case*,] *Lane*, 65.

4. If Tenant in Fee mortgages his Estate, or charges it with a Sum of Money, and after devises it to one for Life, Remainder to another in Fee, Equity will compel the Tenant for Life to bear his Proportion of the Mortgage or Charge, that all may not fall on the Remainder-Man. Decreed *Hil.* 25 Car. [2] [1674], *Hays and Hays*, 1 Chan. Ca. 223.

[114] 5. So if it be a Rent-Charge, Equity will make the Tenant for Life pay the Arrears. [*Hays v. Hays*,] 1 Chan. Ca. 223, *per Cur'*.

6. A. on his Marriage agrees to settle Lands for the Benefit of his Wife, and their Issue, and afterwards aliens Part of those Lands; and Lord Nottingham decreed, that the Jointress should have the Deficiency of her Jointure made good out of the Inheritance of the Lands remaining unsold: But that Decree was reversed by *Jephries*, L. G., who held, that where the Jointress and Issue claim by the same Settlement, they shall contribute proportionably in the Discharge of any prior Incumbrance on the Estate. *Hil.* 1686, *Carpenter and Carpenter*, 1 Vern. 440.

7. If A. devises his Real Estate to his Son for Life, Remainder to his first Son, &c., in Tail, with Remainders over, and devises specifically a Leasehold Estate to his Daughter, and dies, not leaving Assets to pay his Debts, which affected as well his Real as Personal Estate, the Son and Daughter shall contribute in Proportion in paying the Debts, each Estate being liable at Law, and the Testator's Intention equal between them both. Decreed *Hil.* 1717, *Short and Long*, 2 Vern. 756. (1 Wils. Rep. 403, by the Name of *Long and Short*.)

8. If a Man, who is a Widower, settles Lands to raise £100 a-Year for his eldest Son, and £100 a-piece for his younger Children: and afterwards marries again, and

has Children by his second Wife : the Children by the second Wife shall be equally intitled with the other younger Children ; and though the Portions of the younger Children are by the Settlement to be paid according to their Seniority ; yet, in case of a Deficiency, they shall be paid in Average : Decreed *Mich. 1 Jac. 2* [1685]. *Brathwait* and *Brathwait*, 1 *Vern.* 334.

9. One Surety may compel another in Equity to contribute towards Payment of a Debt for which they were jointly bound. [*Fleetwood v. Charnock*.] *Tolth.* 41. ([*Peter v. Rich.*] 1 *Chan. Rep.* 34, S. P.)

10. If three are bound as Sureties in Recognizance, and one of the Sureties is sued at Law, and the other Surety, together with the Principal, happens to be insolvent, he who is sued may compel the other Surety to contribute a Moiety. [*Hole v. Harrison*.] 1 *Chan. Ca.* 246 ; [*Morgan v. Seymour*.] 1 *Chan. Rep.* 120, S. P. ; [*Swain v. Wall*.] *Ibid.* 150, S. P.

11. If you sue in Chancery the Executor of one Obligor to discover Assets, you must make all the Obligors Parties, that the Charge may be equal. [*Blois v. Blois*.] 2 *Vent.* 348. But a *Quære* is put, Whether you may not sue the Principal, and leave out them which are bound only as Sureties.

Though Co-obligors are intitled to a Contribution, yet *quære* whether it is necessary for the Obligee to make them all Parties.

12. But it is held clearly, that if a Judgment be had at Law against one Obligor, you may sue the Executor of him alone to discover Assets, because the Bond is drowned in the Judgment. [*Blois v. Blois*.] 2 *Vern.* [Vent.] 348.

13. The Plaintiff being one of the Owners of a Ship, loaded on board her 210 Tons of Oil, and the Defendant loaded on board her 80 Bales of Silk, upon a Freight by Contract, both to be delivered at *London* ; the Ship was pursued by Enemies, and forced into a Harbour, &c., and the Master ordered the Silk on shore, being the most valuable Commodity (though they lay under the Oils, and took up a great deal of Time to get at them). The Ship and Oils were afterwards taken, and the Owner of the Oils brought his Bill to have [115] Contribution from the Owner of the Silk : and although it was admitted that, if Goods were thrown overboard in Stress of Weather, or in Danger or just Fear of Enemies, in order to save the Ship and the rest of the Cargo, that which is saved shall contribute to a Reparation of that which is lost ; and the Owners of the Ship shall be Contributors in Proportion ; but in this Case the Loss of the Oils did not save the Silks, neither did the saving the Silks lose the Oils : And the Bill was dismissed accordingly ; which Dismission was confirmed in the House of Lords. [*Sheppard v. Wright*.] *Show. P. C.* 18, 19.

14. If one makes a Lease, and the Lessee covenants to pay the Rent, and to repair the Premises, &c., and the Lessee makes 100 Under Leases, and the Rent is behind, and the Premises out of Repair, and the original Lease is avoided for Non-payment of Rent ; and some of the Under-Lessees bring a Bill to be relieved against the Forfeiture ; though Equity will not apportion the Head Landlord's Rent, but the Under-Lessees, who are Plaintiffs, must pay the whole Rent in Arrear, and repair all the Houses ; yet having so done they may compel the other Under-Lessees to contribute in Proportion. *Trin.* 1689, *Webber and Smith*, 2 *Vern.* 103.

* 15. A Man devised a Rent-Charge of £10 *per Ann.* to A. issuable out of *Black Acre* ; with a Clause, that if it should be behind, it should be lawful for him to enter, and hold till he was satisfied ; and by the same Will devised a like Rent-Charge of £10 *per Ann.* to B. issuable out of the same Land, with like Clause of Entry, &c., the Land was not of sufficient Value to answer both the Rents ; and they were both in Arrear, and both Devises had brought several Ejectments, and had recovered ; and the Defendant being in Possession, the other Grantee brought his Bill to have an Account of the Profits, and that one Moiety might be applied to satisfy the Arrears of his £10 *per Ann.*, and it was decreed accordingly. *Hil.* 1697, *Eure and Eure*.

* 16. On a Marriage-Treaty between the Defendants, £3000 being the Wife's Fortune, and £3000 more added to it by *William Chambers*, Father of the Defendant *John*, were invested in Lottery Annuities, in the name of Trustees ; and thereupon by Indenture, 18 *July* 1718, previous to the Marriage, reciting that £6000 was so invested in Lottery Annuities, it was agreed that the same should be turned into Money, and laid out in a Purchase of Lands to be settled to the Use of the Defendant *John* for Life, then to Trustees during his Life, to support, &c., then to *Elizabeth* the intended Wife for her Life, with Remainder to Trustees for two hundred Years, Remainder to

the first and other Sons successively in Tail Male, with Remainder to *William Chambers* in Fee: And it was thereby declared, that the two hundred Years Term was in Trust, that in case the Defendant *John* should have a Son, and one or more other Children, then the Trustees after the Death of *John* and *Elizabeth*, should by Mortgage or Sale raise for younger Children, if more than one, £2000 between them, and Interest at £5 *per Cent. per Ann.* for their Maintenance; and that till such Purchase the Trustees, with the Consent of *John* and *Elizabeth*, should let the £6000 continue in Annuities, and pay the Interest to such Persons as would be intitled to the Lands, and the Trustees not to be answerable for more than they received, or for each other. And by the said Indenture *William Chambers* covenanted, in consideration of the said [116] Marriage, to settle several Lands therein particularly mentioned, to the Use of himself for Life; then to *John Chambers* in Tail Male, with Remainder to himself in Fee. The Marriage took Effect, the £6000 was not laid out in a Purchase, but in the Year 1720, by Consent of *John* and *Elizabeth* and the Trustees, being in Lottery Annuities, was subscribed into the *South Sea Company*, whereby a Loss of about £3000 happened. *William Chambers* was dead, having made no Settlement of the Lands specifically agreed to be settled, which therefore were descended to the Defendant *John*, his Son, in Fee; the Defendants had Issue the Plaintiff, their only Son, and four Daughters, who were likewise Defendants: And this Bill was brought to have the Remainder of the £6000 laid out in a Purchase, and settled pursuant to the Uses before-mentioned; and the first Question was, on whom the Loss of the Money subscribed into the *South-Sea Company* should fall; and as to that, it was agreed on all Hands, that the Trustees having subscribed the Lottery Annuities into the *South-Sea Company* by Consent of the Defendants *John* and *Elizabeth*, were indemnified therein, not only by the Terms and Covenants in the Settlement, but also by the Act of Parliament made in the Year 1720, wherein every one's Consent was involved; and whereby Trustees were generally empowered to subscribe Orders and Annuities, &c., and therefore it was argued for the Defendants, the Daughters, that the Loss should fall wholly on the Son; that Lands were of an uncertain Value; and if Lands had been purchased, and they had afterwards increased never so much in Value by discovering of Mines, or otherwise, that the Plaintiff, the Son, would have had the whole Benefit thereof, without any Increase to the Daughters of their Portions: That in Equity an Agreement to purchase is considered as if a Purchase were actually made; and there the Loss ought to fall on the Plaintiff, and the rather, for that if the Stock itself had risen never so high, as it was expected it would and did rise to a very great Price, the Daughters could only have their £2000, and therefore, as the Plaintiff was intitled to all the Advantage in case of a Rise, it was reasonable he should bear the Loss now that a Fall had happened; and therefore the Daughters ought not to be contributory to this Loss. But on the other Side it was argued and decreed, that the Loss should fall in Proportion on the Daughters, as well as the Son; that the Parties had an equal Regard to the Son, as well as the Daughters; that the Son was to sustain the Name of the Family, and was to take first, and more immediately than the Daughters, whose Portions came afterwards by way of Charge only on the Estate; and the Construction contended for was to overthrow one Part of the Settlement; and that if the Loss had been a little more, the Daughters must have had all, and the Son nothing; that the Parties have ascertained the Proportion each were to have; and this is the Measure the Court ought to guide themselves by; and accordingly sent it to a Master to take the Account, and to proportion the Loss between the Parties. *Pasc. 1730, Chambers and Chambers.* (*Vide* 2 Eq. Ca. Abr. 224; Fitzgib. 127.)

An Annuity for Life was given out of leasehold, and the Annuitant was held not to be bound to contribute to the Expence of the Renewal. *Maxwell v. Ashe*, [1] Bro. Chan. Ca. 444.

[117] IN WHAT PROPORTION.

1. If a Mortgagee devises the Mortgaged Lands to A. for Life, Remainder to B. in Fee, and the Mortgagor redeems the Lands, A. shall have one Third, and B. two Thirds of the Mortgage Money; and this *per* Ld. Chan. is the ordinary Rule of the Court in such Cases. *Mich. 1682, Brent and Best*, 1 Vern. 70.

2. So if one devises Lands which are in Mortgage to A. for Life, Remainder to B. in Fee, A. shall contribute one Third towards the Discharge of the Mortgage: Decreed *H. 1. 27 & 28 Car. 2* [1667], *Cornish and Mow*, 1 Chan. Ca. 271. (*Rep. Temp. Finch*, 220, S. C.)

3. But if Lands in Mortgage are devised to A. for Life, Remainder to B. in Fee, and A. takes an Assignment of this Mortgage in a Trustee's Name, though B. might have compelled A. to contribute one Third towards Payment of the Mortgage, in respect of his Estate for Life; yet if A. be dead, and the Bill is brought against his Executor, he shall be obliged to contribute only in Proportion to the Time that A. his Testator enjoyed it: Decreed *Trin.* 1686, *Clyat and Battenon*, 1 Vern. 404.

4. A. devised to B. for Life, and after, one third Part of the Reversion to each of his three Sisters respectively, and their Heirs: The Sisters brought a Bill for Discovery of Incumbrances on the Estate: and to compel the Defendant, Tenant for Life, to bear his Share and Proportion thereof; alledging that their Reversion would be of little Benefit to them, if the Debt were suffered to increase by Non-payment of Interest, &c., and charged, that the Defendant had cut down Timber, for which he ought to be accountable: The Court decreed the Defendant to pay two Parts in five of the Debts, and the Plaintiffs, the Reversioners, the other remaining three *Fifths*, and the Defendant to account for the Timber; and what was raised by it to be taken as so much in Part of what the Reversioners were to pay. *Pasc.* 1692, *Humphreys and Hales*, 2 Vern. 267.

5. If by a Settlement two Estates, the one in *Norfolk*, and the other in *Suffolk*, are subjected to the raising a Portion of £2000 for a Daughter by a Term of a hundred Years, commencing after the Decease of two several Lives: the one upon *Suffolk* Estate, and the other on the *Norfolk* Estate: and the Life on the *Suffolk* Estate falls, and the Daughter brings her Bill for the £2000, and J. S. to whom that Estate was come, pays the £2000. And afterwards the Life on the *Norfolk* Estate falls, by which the Fee-simple thereof descends on the Daughter: J. S. who paid the £2000 shall have Contribution out of the *Norfolk* Estate in Proportion to its Value, only the *Suffolk* Estate shall be valued as an Estate in Possession, and the *Norfolk* Estate as an Estate in Reversion: Decreed *Hil.* 1697, *Henningham and Henningham*, 2 Vern. 355.

A leasehold Estate, held of the Dean and Chapter of W. for three Lives, was devised in Trust for the Testator's Widow for Life, remainder to his Son in tail, &c. One of the Lives expiring, during the Life of the Widow, the Question was at whose Expence the Renewal should be made. And by Lord Hardwicke, Chancellor. Where a legal Estate of this kind is devised to one for Life, with Remainder over, and the Tenant for Life is one of the Persons upon whose Life the Lease is held, there is no reason he should be at any Expence in adding another Life; because he cannot have Benefit from it, for the Lease in being is at least as durable as his Interest. So where it is given in trust in the same manner, and the cestui que trust is one of the Lives named in the Lease, this Court will not compel the Trustees to surrender that Lease, in order for a Renewal at the Expence of the cestui que trust for life. In the present Case the Cestui que trust for Life has a Chance of having a Benefit from the Renewal; and the Son, who has the Remainder in Tail has no more than a Chance of Benefit: therefore it is but reasonable that the Widow should contribute to the Expence of the Renewal: As to the Proportion, the Rule of the Court is, that the Tenant for Life shall pay one Third of the Charge, or keep down the Interest; and that seems reasonable in this Case. The Widow accordingly paid one Third of the Expence. *Verney v. Verney*, Ambl. 88. Vide S. C. [1] Ves. 428, wherein it is mentioned, that the Court has said, the Computation of Tenant for life bearing one Third was a wrong Rule, as being too low.

Where there is no Custom or Direction to compel a Renewal it is in the Discretion of Tenant for Life to renew or not, but if he renews, the Law will not permit him to renew for his own Use, but will make him a Trustee for the Remainder-man; but the Terms of Contribution on which Remainder Man shall be entitled are not on Payment of two Thirds and depend not on any certain Proportion, but they must depend on the Number of Years of the original Lease which remain unexpired. *Semb.* Per Lord Thurlow, Chancellor, *Nightingale v. Lawson*, [1] Bro. Chan. Ca. 440. (Vide *Stone v. Theed*, 2 Bro. Chan. Ca. 243.)

[118] CAP. XIX.

COPYHOLD.

(A) Concerning the Power of Chancery over Copyhold Estates, the Acts of Lords and Tenants, and in what Cases it has been erected.

(B) In what Cases a defective Surrender, or the Want of it, will be supplied in Equity.

(A) CONCERNING THE POWER OF CHANCERY OVER COPYHOLD ESTATES, THE ACTS OF LORDS AND TENANTS, AND IN WHAT CASES IT HAS BEEN ERCTED.

1. If the Lord will turn out his Copyholder, who payeth his Customs and Services, or will not admit him to whose Use a Surrender is made, or will not hold his Court for the Benefit of a Copyholder, or will exact arbitrary Fines, when they are customary and certain, the Copyholder shall have a *Subpoena* to restrain or compel him, as the Case shall require. [Anonymous,] *Cary*, 3, 4.

(Copyholders were formerly Tenants at Will of the Lord, their Lands being Parcel of the Lord's demesnes; but now those Copyholders stand on a surer Foundation, if they perform those Duties which their Tenure requires; for if the Lord turns them out, they may either sue a *Subpoena* out of Chancery to be relieved, or have an Action of Trespass against the Lord; for though they are Tenants at Will of the Lord, yet they are Tenants at Will according to the Custom of the Manor, which the Lord cannot break without Reason. *Co. Lit.* 60 *b.* 61 *a.*; 4 *Rep.* 21; 9 *Rep.* 79. Prescription, and that the Lands are Parcel of the Manor, are incident to, and the very Pillars on which every Copyhold Estate stands. 4 *Rep.* 24; 1 *Inst.* 58 *b.* Custom is the Life and Soul of Copyhold Estates; for if Copyholders break their Custom, they are subject to the Lord's Will; the Customs of Manors are so various, that it is impossible to ascertain them, they must, however be Time out of Mind; they must be reasonable, according to Common Right; they must be upon good Consideration; they ought to be compulsory, not left to the Liberty of the Tenant, to observe or not observe them; they ought to be certain; they ought to be beneficial to the Lord or Tenant; And if there are not Customs to direct Copyhold Estates, they must be directed by the Rules of the Common Law. 1 *Inst.* 58; *Coke's Comp. Cop.* 33.)

2. Equity will oblige the Lord to hold a Court, [Ford *v.* Hoskins,] *Cro. Jac.* 368, for no Action on the Case will lie against him, if he refuses; and therefore there is no Remedy but in Chancery. [Foorde *v.* Hoskins,] 2 *Bulst.* 336.

[119] 3. If an erroneous Judgment be given in a Copyhold Court in a Formedon, or the like, a Bill may be exhibited in Chancery to reverse it. 1 *Roll. Abr.* 373. A Bill may be exhibited, although the King is Lord of the Manor. [Edward's Case,] *Lanc.* 98.

4. The Court of Chancery has exercised a jurisdiction in rectifying and reversing the Judgments given in Copyhold Courts, whenever they appeared unjust and unreasonable; but for any Errors in Matters of Form, Equity will not interpose. *Vide* 1 *Inst.* 60; *Owen*, 63; *Moor*, 68; 4 *Rep.* 30; 1 *Roll. Abr.* 60.

5. A Bill was exhibited to compel the Dean and Chapter of St. Paul's, as Lords of the Manor of —, to receive a Petition in Nature of a Writ of false Judgment, to reverse a Common Recovery suffered in the Manor Court about thirty Years before, whereby a Remainder in Tail was barred, suggesting several Errors in the Proceedings therein; and though in Truth the Errors assigned were such as would be gross Errors in a Freehold Estate; yet Lord Chancellor *Jeffries* dismissed the Bill. *Ash v. The Dean and Chapter of St. Paul's and Lewis's Hospital*, 1 *Vern.* 367, from which Decree of Dismission there was an Appeal to the House of Lords, and there the Decree was affirmed. [*Sub. nom.* Smith *c.* Dean and Chapter of St. Paul's,] *Shear. P. C.* [67]. For Common Recoveries, not being adversary Suits, but common Assurances, Equity ought rather to supply Defects than to assist in the Annulling of them.

6. A Copyholder of Lands in Fee, where, by the Custom of the Manor, the Lord had, as a Profit *appurtenant*, the Cut of the Woods and Underwoods growing on the Copyhold, obtains a Grant from the Lord of all the Woods and Underwoods growing and which afterwards should grow on the said Copyhold Lands, to him and his Heirs; and it was held, that this should not merge in the Copyhold, although it was alledged

to be only a Profit *aprendre* ; and though it was urged, that if a Copyholder pays a Rent to the Lord, and the Lord grants or releases this Rent to his Tenant, that this shall merge in the Copyhold. *Mich.* 1681, *Faulkner and Faulkner*, 1 Vern. 21.

7. If A. Tenant in Tail of a Copyhold, Remainder to himself in Fee, purchases the Freehold of the Lord, and then sells to J. S. and dies ; and after thirty Years quiet Enjoyment, the Son of A. obtaining Possession by marrying the Tenant of J. S. sets up a Title as Issue in Tail, the Purchaser shall hold against him, the Freehold having attracted the other Estate, which was at Will. *Hil.* 1685, *Parker and Turner*, 1 Vern. 393.

8. If a Copyholder in Fee takes an Infranchisement of his Copyhold in the Name of a Trustee, and devises the Land to his younger Son, who sells to J. S., and the Heir at Law recovers in Ejectment, as he might do upon his Ancestor's Admittance, and J. S. the Vendee brings his Bill, he shall be relieved in Equity, and hold against the Heir : Decreed *Hil.* 1685, *Dancer and Evett*, 1 Vern. 392.

9. If a Copyhold is granted to three successively, and there is no Custom proved, that the first Taker had power of disposing of the Whole, nor that the first Taker paid the Purchase-Money ; it shall not go to the Executor of the First Taker, but shall go in Succession. *Vide Rundle and Rundle*, 2 Vern. 264, *Pasc.* 1692.

10. But if by the Custom the first Taker may dispose of the Whole, and he likewise pays the Purchase-Money, it shall not be a Trust for the other Two, but shall go to his Executor. [Clark v. Danvers.] 1 *Chan. Ca.* [120] 310. Although it was objected, that the Heir or Executor cannot be intitled to the Trust of a Freehold for Life : But *vide* [Rundle v. Rundle.] 2 Vern. 264, where it is held *per Cur'*, that an Executor or Administrator is intitled to the Trust of an Estate, *pur auter vie*, whether Freehold or Copyhold, or an Office ; and *vide* the Statute, 4 & 5 Ann.

(There can be no Occupant of a Copyhold Estate *per auter vie*, for the Prejudice it would do the Lord : for upon the Death of the Tenant the Lord shall enter immediately. *Per Holt, C. J.*, 1 Salk. 188.)

It was the Custom of the Manor to grant Copyholds for three Lives successive sicut nominantur. Price being the last Life in an old Copy, was advised by the Lord to renew, whereupon having enquired after two healthy young Persons, he named Harris and Bowles, who were Strangers to him ; a Copy was granted to hold to them successive, for which Price paid the Fine. On the Death of Price the Question was, whether Harris (being the next in nomination) was entitled or whether the Copyhold went to the Representative of Price : and by Lord Hardwicke, Chancellor, Resulting Trusts of Copyholds as well as of Freeholds are within the Statute of Frauds and Perjuries. The Representative of Price is entitled to the Copyhold Estate by Operation of Law. How v. How [1 Vern. 415] is in point. *Withers v. Withers*, Ambl. 151. (*Vide* 29 Car. 2, c. 3, f. 8.)

11. If a Copyholder for Life, where by the Custom there is a Widow's Estate, agrees that J. S. shall hold and enjoy it during his Life and the Widowhood of such Woman as he should leave at his Death, and enters into a Bond for that Purpose ; yet the Widow shall not be bound by that Agreement. Decreed *Pasc.* 1681, *Musgrave and Dashwood*, 2 Vern. 63.

This Case is ill reported and is not a sufficient authority. No state of it appears in the Register's book. Per Lord Hardwicke, vide Hinton v. Hinton, Ambl. 278, 279, and 2 Ves. 631, 638, S. C.

12. The Widow of *Cestuy que Trust* of a Copyhold Estate ought to have her Free Bench, as well as if the Husband had the legal Estate in him. *Otway v. Hudson*, 2 Vern. 585, *per Cur'*.

13. Copyholds cannot be intailed within the Statute *de donis*, but they may by Common Law, and then Surrenders or Plaints in Nature of Fines and Recoveries may bar them, as well in the Court-Baron as at Common Law, if the Custom has been such, which is the Rule in those Cases. *Cary*, 30. That Copyholds may by Custom be intailed ; yet that such intail is not within the Statute *de donis*, *vide* 2 *Chan. Ca.* 174 ; 2 Vern. 585. And if there be no particular Custom for barring the Intail, a Surrender will do it. *Per Cur'*, 2 Vern. 585, 705. (The Stat. 14 G. 2 (c. 20) as to Lifehold Estates, does not extend to Copyholds. By Lord Hardwicke, Ambl. 152.)

Where a Copyholder seised of an Estate tail surrenders to the Use of his Will, if Entails by the Custom of the Manor are not barrable by Recovery or Fine, but by Surrender, the Surrender to the Use of his Will not only effectuates the Will, but operates

as a Bar to the Entail : by Lord Hardwicke, Chancellor, Moore v. Moore, Amb. 279. Vide 2 Ves. 596, S. C.

14. Tenants by Copy shall not pay any uncertain Fines by Change of their Lords by Alienation, but by Death, which is the Act of God ; for otherwise the Lord might oppress the Tenant by frequent Alienations. *Cary*, 9.

(Fines are due by Change of the Lord or the Tenant by Death only and according to Custom ; for if it were by Change of the Lord, upon Alienation, the Copyholder might be oppressed by a Multitude of Fines by the Lord's own Act. 1 Inst. 59, c. 1.)

15. If the Lord insists upon an extravagant Fine for a Renewal, he shall be restrained to what is reasonable, although the Fine is arbitrary and uncertain ; but having demanded ten or twelve Years Value of the Land, the Court decreed him only two. [Morgan v. Scudamore.] 2 Chan. Rep. 134. [Meadows v. Patherick.] 10 Temp. Finch, 154, an arbitrary Fine moderated in Equity.

(If the Fine demanded is unreasonable, the Copyholder is not obliged to pay it, and though he himself only thinks it unreasonable, and afterwards it is adjudged reasonable ; yet it is no Forfeiture, because it is a Matter of Controversy. 1 Hal. Abr. 505 ; 13 Rep. 2. It was said by Lord Hardwicke, Easter 12 Geo. 2 [1739], in the Case of Lord Abergavenny and Thomas, That the Law has fixed what shall be a reasonable Fine for a Copyholder in Fee to pay ; but it has no where fixed what shall be a reasonable Fine for a Copyholder for Life to pay ; therefore if a Copyholder for Life would set up a Tenant-Right of Renewal, he must set forth the Fine in certain. [See will Report 3 Anstr. 668 (n)]. The Duke of Grafton's Case before the Lords was cited as so adjudged. [2 Bro. P. C. 284.]

16. But where a Copyholder in Fee made a conditional Surrender for securing a Sum of Money at the End of six Months ; the Money not being paid, and the Mortgagee willing to continue his Money, they desired the Lord that the old Surrender might be taken up, and a new one made for six Months longer ; but the Lord insisted on an arbitrary Fine of two Years Value, and that the Mortgagee should come in and be admitted ; and the Court being of Opinion, that Equity could not relieve against the Fine, farther than to permit the Plaintiff, if he thought fit, to try the Question at law, whether the Lord was by custom of the Manor bound to renew the Surrender or to accept the second Surrender ; the Matter was ended by Compromise, and a Fine of £10 paid to the Lord, the Estate being £100 per Ann. Mich. 1699, Tredway and Fotherley, 2 Vern. 367.

[121] 17. If an Infant Copyholder is admitted, and the Lord committeth the Custody of him to his Mother, and the Infant's Tenant commits a Forfeiture by cutting down Trees, which being presented and found a Forfeiture, the Lord enters during the Infant's Nonage, and the Land is held by him and his Heirs forty Years ; yet the Copyholder shall have Relief. *Cary's Rep.* 8.

18. A Copyholder for Life had committed a Forfeiture by cutting of Timber Trees, which was found such by a Trial and Verdict at Law, and the Lord entered and admitted the Defendant, who was the Remainder Man ; the Copyholder exhibited his Bill to be relieved against the Forfeiture, offering, if it should appear to be Waste, to make Satisfaction ; and an Issue being directed, to try whether it was primary Intention in cutting the Timber to do Waste ; and it being found for the Plaintiff, it was decreed he should be relieved, and that the Defendant, the Remainder Man, should deliver Possession, and account for the mesne Profits. *Hil. 19 Car. 2* [1668], Thomas and Porter, 1 Chan. Ca. 95.

19. A. having two Copyholds held of the Manor of B. cuts Timber (pretending a Custom for it) on the one, and employs it in repairing the other ; the Lord brought an Ejectment, supposing this to be a voluntary Waste and a Forfeiture ; and upon the first Trial there was a Verdict against the Lord ; but upon a new Trial there was a Verdict against the pretended Custom ; and it being admitted that by the Custom of the Manor, when Timber was wanting on one Copyhold Tenement, the Lord by his Bailiff, might assign Timber for Repairs on any other of the Copyhold Estates : Ld. K. relieved against the Forfeiture on Payment of the Costs of both the Trials at Law, and likewise of this Suit. *Hil. 1705, Nash and The Earl of Derby*, 2 Vern. 537.

20. The Plaintiff brought his Bill to be relieved against a Forfeiture of his Copyhold Estate ; and the Case appearing to be, that he had been guilty of the greatest Disobedience possible to his Lord : that after six several Presentments upon him, to

repair it, and an Entry by the Lord for the Forfeiture, he brought an Ejectment; and when upon the Trial, a Rule was entered into by Consent, and made a Rule of Court, that upon Payment of £4 to the Lord for his Costs (which were not a fourth Part of the Costs he had put the Lord to), and putting the Estate into Repair, he should be admitted to it again; yet he never complied with the Rule, nor made any Offer of Costs to the Lord; but instead of that brought another Ejectment, and was nonsuited; and now after nine or ten Years Time more brings his Bill, and had been several Times amerced for not appearing at the Court, and refused to do Fealty, either upon Oath, or (being a Quaker) upon Affirmance; and upon these Circumstances Ld. K. declared, he ought to have no Relief; or if he were to be relieved, yet it must be upon payment to the Lord of all his Costs, and putting the Estate into good Repair, which would be more Charge to him than his Interest in the Estate would be worth, having only an Estate for Life therein, and dismissed the Bill, but with Costs; and Ld. K. likewise declared, that though this were a voluntary Waste and Forfeiture (against which it was objected this Court never gave Relief); yet he thought the Rules of Equity not so strict, but that Relief might even be given against voluntary [122] Waste and Forfeiture. *Mich. 1710, Cox and Higford, 2 Vern. 664, S. C. confusedly stated.*

(B) IN WHAT CASES A DEFECTIVE SURRENDER, OR THE WANT OF IT, WILL BE SUPPLIED IN EQUITY.

1. If a Man devises a Copyhold Estate to a Charity, it shall be a good Appointment within the Statute of charitable Uses, though there was no Surrender to the Use of his Will. *Hil. 25 Car. 2 [1674], Rep. temp. Finch, 75.*

Equity will supply the Want of a Surrender in favour of a Charity; but not where there are prior Limitations of the Estate devised to the Charity. Vide Attorney General v. Downing, Ambl. 571.

2. If A. contracts with B. for the Purchase of a Copyhold Estate, and pays the Purchase-Money, and B. agrees to surrender the Premises at the next Court, but dies before the next Court, or any Surrender made, Equity will supply the Want of the Surrender. *Decreed Hil. 33 Car. 2 [1682], Barker and Hill, 2 Chan. Rep. 218*

3. A Man seised of a Copyhold Estate, borrowed £400 of the Plaintiff in 1698, and surrendered into the Hands of two customary Tenants the Copyhold in Question to be presented at any Court after Sept. 1699, defeasible on paying the £400 and Interest; the Mortgagor paid Interest for four Years together; but no Care was taken to get the Surrender presented; and in the mean time the Mortgagor became bankrupt, and died intestate and insolvent. After his Death the Surrender was tendered, but the Homage refused to present it; because by the Custom of the Manor, confirmed by Act of Parliament, all Surrenders were to be void, if not presented in twelve Months after they were made; and Ld. Chan. (though he at first doubted) decreed, that the Surrender should be supplied against the Assignees. *Mich. 1706, Taylor and Wheeler, 2 Vern. 564. (2 Salk. 449, Pl. 2, S. C. 1 Will. Rep. 280. Prec. in Chan. 524. Lucas's Rep. 492, 4 & 5, S. C. cited.)*

4. So in a Case where A. lent B. £200 on a Surrender of some Copyhold Lands, which A. neglected to get presented at the next Court, and was therefore void, according to the Custom of the Manor, though B. afterwards sold those Lands to J. S., who took a Surrender, which he presented, and was admitted; yet he having Notice of A.'s Right Ld. Chan. decreed against him, and that A.'s defective Surrender should be made good. *Vide Jennings and Moore, 2 Vern. 609, Pasc. 1708.*

5. A. being Tenant in Tail of the Trust of a Copyhold Estate, with Remainder over, and the Trustees refusing to surrender the legal Estate to him, he brings his Bill to compel them; and pending that Suit he goes to the Lord's Court, and offers to surrender, but is refused, not having the legal Estate; and thereupon he makes his Will, and devises his Estate to his Wife and Children: The Court conceiving the Will sufficient to bar the Intail of a Trust, and he having done all he could, decreed the Estate to go according to the Will. *Hil. 1706, Otway and Hutton, 2 Vern. 583.* Cestuy que Trust of a Copyhold Estate, having an equitable Interest only, may devise it without any Surrender. *[Greenhill v. Greenhill,] Ibid. 680, per Cur.*

6. If a Provision is made by Will for younger Children out of some Copyhold Lands, and there is a Defect in the Surrender, Equity will supply such Defect against the

eldest Son and Heir at Law : Decreed *Hil.* 1682, *Hardham and Roberts*, 1 *Vern.* 132. And many Precedents said to be in Court of the like Nature.

[123] 7. So Equity will supply the Want of a Surrender of a Copyhold, as well for an elder Son as a younger, in case of *wardkind* Copyhold. *Vide* *Bradley v. Bradley*, 2 *Vern.* 163, and several Precedents there cited of Surrenders supplied in Favour of younger Children, Creditors and Purchasers. (Voluntary Conveyance of a Copyhold or other Estate not helped in Equity against the Heir. *Vide* the Case of *Vane and Fletcher*, *Eq. Ca. Abr.* Part 2, p. 231.)

8. But where one devised a Copyhold Estate to his Grandson ; and my Lord *Somers* decreed the Will good, and that Equity ought to supply a Surrender in such Case, as well as in Case of a Son ; yet on Appeal the House of Lords reversed the Decree, and held, that Equity ought not to supply such Defect in Disfavour of the Heir at Law, unless it were in Favour of a Son or Daughter, nor then neither, if it was to disinherit the eldest Son. *Kettle and Townshend*, 1 *Salk.* 187.

9. A Man seised of Lands, which by the Custom of the Manor could only pass by Deed, Surrender and Admittance, and having a natural Daughter, does by Deed, in consideration of £300 therein mentioned to be paid by the said Daughter, grant and convey those Lands to her and her Heirs ; and she was admitted accordingly ; but no Surrender was made of those Lands, as the Custom required ; and at the Foot of the Admittance was a Proviso, that her reputed Father should hold and enjoy these Lands for his Life ; also in the Deed was a Covenant for farther Assurance ; no Money was proved to be paid by her ; and it being agreed that this Conveyance was defective for want of a Surrender ; the Question was whether Equity could supply it in Favour of a natural Daughter ; and it was held, that it could not, that though her Father might be obliged by the Law of Nature to provide for her, yet here she was to be considered as a mere Stranger to him ; that though the Father might have a great Affection for her, yet that was no such Affection as would raise an Use at Law ; that the Covenant for farther Assurance being only auxiliary and depending on the original Conveyance, if that were void the Covenant must be void or repugnant ; and decreed accordingly. *Mich.* 1717, *Fursaker and Robinson*. [*Pre. Ch.* 475 ; *Gilb. Eq. Rep.* 139.]

A Defective Surrender shall be supplied in favour of a Widow and Children, but not in favour of a Cousin, a Grandson, or a natural Child. *Tudor v. Anson*, 2 *Ves.* 582.

10. A Man devised his Copyhold, being *Borough English*, to his eldest Son, and devised Houses to his youngest Son, which Houses were soon afterwards burnt down, and never entered upon by the younger Son ; and as this Case was circumstanced, the Court would not supply the Want of a Surrender in Favour of the eldest Son. *Pasc.* 1692, *Cooper and Cooper*, 2 *Vern.* 265.

* 11. A younger Son brings a Bill ; and surmises that a Copyhold, which his Father had devised to him by Will, was surrendered to the Use of his Will, or however, that being for the Advancement of a Child, it ought to be made good here : He made no Proof of any Surrender, nor that a Court was called for that Purpose, nor any Proof that any of the Court-Rolls were lost (which was pretended) ; and he was well provided for without this Copyhold ; and the elder Brother was in Possession twenty Years by Consent of the Plaintiff ; so the Bill was dismissed, with Costs. *Pasc.* 1700, *James and James*.

* 12. A Man seised of Freehold and Copyhold Land, devises both for Payment of Debts and Legacies, but the Copy was not surrendered to the Use of his Will, and the Freehold was sufficient for the Debts (a) ; and the Question was, whether the Court would [124] supply the Want of the Surrender, and lay the Legacies on the Freehold, and the Debts on the Copyhold, as when there are simple Contract Creditors, and Bond or Judgment Creditors, and Personal Assets not sufficient to pay both ; and the Master of the Rolls held, that the Want of a Surrender could not be supplied for the Sake of the Legatees ; and he said that it was never yet done, especially where they are mere Strangers, as here, and dismissed the Bill. *Hil.* 1699, *Kafer and Stock*.

(a) S. P. in case of Debts ; where the Freehold sufficient. *Vide* the Case of *Mallabar and Mallabar*, *Eq. Ca. Abr.* Part 2, p. 234.

The Testator having Copyholds together with other Real and Leasehold Estates in Huntingdonshire and Cambridgeshire, devised all his Lands, Tenements and Hereditaments in those Counties to his Wife for life, Remainder to his eldest Son in tail, Remainder to his second Son in tail, Remainder to his Wife in fee. The eldest Son, who

lived many Years, never made any Claim to the Copyholds, which were not surrendered to the Uses of the Will. And Sir Lloyd Kenyon, Master of the Rolls, held that, not being surrendered, they did not pass. Milbourn v. Milbourn, 2 Bro. Chan. Ca. 64.

* 13. A Man seised of some Freehold Estate, and also of a Copyhold Estate, devised all his Real and Personal Estate for the Payment of his Debts, and died without any Surrender of the Copyhold Estate; and the Freehold and Personal Estate not being sufficient for the Payment of the Debts, it was urged, that a Surrender should as well be supplied in this Case, as if no Freehold Estate had been devised at all; but *Ld. Chan. said*. He thought the Precedents had not gone so far, and that he could not relieve in this Case, principally, because the Testator's Intention did not appear to him to pass the Copyhold Estate by a Devise of his Freehold, a Copyhold being of the lowest Regard, and looked upon in the Eye of the Law, but as an Estate at Will. *Trin. 1715, Challis and Casborn. Pre. Ch. 407; Gilb. Eq. Rep. 96.*

A general Devise of real Estate was preceded by a Direction to pay Debts. The Testator left no real Estate, but his Copyholds; and Lord Hardwicke, ordered a defective Surrender of the Copyhold to be supplied in favour of the Creditors. Tudor v. Anson, 2 Ves. 582.

The Testator by his Will, specially devised his Freehold Estates, and directed his Copyhold to be sold for Payment of his Debts. Lord Thurlow, Chancellor, decreed the Surrender to be supplied, and the Copyhold Estate to be sold, before applying the Freehold. Vide Bixby v. Eley, 2 Bro. Chan. Ca. 325.

* 14. A Man being seised of several Freehold and Copyhold Lands in *Bereford*, the Freehold being about £72 *per Ann.* and the Copyhold about £16, and being also seised of another Freehold Estate in *Ailsbury* of about £3 *per Ann.* and all the several Estates abovementioned, being in Mortgage for £600, the Mortgagor made his Will, and thereby devised all his Lands in *Bereford* to his Wife and her Heirs, and died without Issue, leaving his Brother, who was his Heir at Law, and whether this Court would supply the Want of a Surrender to the Use of his Will, as to the Copyhold Lands in *Bereford*, was the Question, and the Master of the Rolls was of Opinion, that it ought not; *first*. Because the Words of the Devise are satisfied by the Freehold Lands in *Bereford*, which passed thereby; and therefore it was not certain that he intended to give her the Copyhold likewise; but, *2dly*, if he had so intended, yet the Brother, who was his Heir at Law, would thereby be disinherited of almost the whole Estate, and have nothing but the £3 *per Ann.* in *Ailsbury*; and though the Court will in all Cases supply the Want of a Surrender for Payment of Debts, yet not for the Wife against an Heir at Law, who would be disinherited thereby, or for younger Children against an elder, to make them in a better Condition than the elder. *Mich. 1729, Ross and Ross.*

[125] CAP. XX.

COSTS.

(A) WHO SHALL PAY COSTS, AND IN WHAT CASES.

1. If an Executor is Defendant in Equity, and there is a Decree against him, yet he shall not pay Costs, though an Executor, Defendant at Law, pays Costs in all Cases, for he cannot plead it at Law, in Excuse of Assets. [*Twisleton v. Thelwell.*] *Hard. Rep. 165.*

(The awarding of Costs is a Matter discretionary in the Court, and its Power herein always exercised according to the Circumstances of the Case, and the Litigiousness of either of the Parties: if the Court cannot relieve against a Forfeiture, the Bill will be dismissed without Costs; frequently each Party is to bear his own Costs; the Expence either Party is put to by the Delays, Contempts, &c., of the other, are only remitted or purged by the Payment of Costs, unless the Court order otherwise: Executors, Guardians, Trustees, are usually exempt from Costs, or awarded Costs out of the Estate in their Hands, unless they have greatly misbehaved themselves; also an Heir at Law, in most Cases, is exempted from paying Costs.)

An Executor, having put the next of Kin to prove their Relationship, was ordered to pay the Costs of so doing. Vide Lowson v. Copeland, 2 Bro. Chan. Ca. 156.

The Plaintiff, who was disinherited, brought his Bill to have Inspection of Deeds and Writings; and there appearing to be no Title in the Plaintiff, the Defendant prayed that the Bill should be dismissed with Costs: which Lord Hardwicke, Chancellor, refused: And by him, If the Heir at Law brings a Bill for a Discovery, I would not have it understood that he shall pay Costs; there is no Pretence for it. If a Motion should be made in such Case for Costs, he would move to amend, and pray Inspection of the Deeds, and the Court would permit him to do it, and not give Costs against him. Upon the Proposal of the Defendant's Counsel which was agreed to by the other Side, the Bill was dismissed without Costs, the Defendant being however at Liberty to apply for Costs if the Plaintiff should molest him. *Leman v. Alie, Ambl. 163.*

The Testatrix left to her natural Son, the Defendant, her Household Furniture which should be in her House at W. at the Time of her Death. Bill by Plaintiff, as residuary Legatee, to recover Plate, Linen, Books, China, and Pictures, of which Defendant had possessed himself, under the Bequest to him. The Master of the Rolls, decreed, the Books to the Plaintiff, but the other Articles to the Defendant; but would not give him her Costs out of the Estate of the Testatrix; though it was much insisted on at the Bar, that wherever a Suit is occasioned by the Words of a Will, the Court always gives Costs out of the Estate. *Kelly v. Powlet, Ambl. 605.*

2. A Solicitor prosecuted a Suit in the Name of a Stranger, who not being to be found, the Master of the Rolls declared, that if there were one Precedent in the Case, he would make another, and order the Solicitor to pay Costs. [*Digardine v. Swift, 1 Chan. Ca. 71.*]

* 3. A. brought a Bill *in forma Pauperis*, to which the Defendant put in a Plea and Demurrer, which were both over-ruled; and it was insisted upon, that he should have no Costs, being at none; but my Lord *Sommers*, after long Debate and Inquiry of all the ancient Counsel and Clerks, who agreed that he should have Costs, ordered him his Costs like other Suitors; for though he is at no Costs, but small Costs, yet the Counsel and Clerks do not give their Labour to the Defendant, but to the *Pauper*. *Pasc. 1701, Scatchmer and Foulkard.*

4. If a Bill be brought to call a Trustee to an Account, and he by Answer submits readily to it, though on the Account he be found in Debt, yet he shall pay Interest for the Balance only from the Time of the Account liquidated, and no Costs if he has not misbehaved himself. *Hil. 1705, Parrot and Treby, (Proc. in Chan. 254, S. C.)*

An Account of Rents received having been decreed against the Defendant who was in possession under an Elegit; and it appearing on the Account that the Defendant had received upwards of £90 more than was due to her, it was ordered at the Rolls that she should pay Costs. From this Order the Defendant appealed generally, but the only Reason for the Appeal was the Costs. And Lord Hardwicke, reversed the Decree as to them. *Owen v. Griffith, Ambl. 520. (S. C. Somewhat differently reported. Ves. 250.)*

Whether there shall be an Appeal or re hearing for Costs only. Vide Wirdman v. Kent, [1] Bro. Chan. Ca. 140.

5. If a new Trial, or a second Issue be directed, it must be upon Payment of Costs. *Edwin v. Thomas, 2 Vern. 75.*

Where more Issues than one are directed, if the material Issue be found for the Party who sets the Cause down for further Directions, he must have the Costs at Law. *Blackburn v. Gregson, [1] Bro. Chan. Ca. 420.*

6. A Demurrer was allowed, but without Costs, because it came in by Commission and without any Answer. *Elme v. Shaw, Vern. 282.*

[126] 7. If a Feme Sole exhibits a Bill, and pending the Suit, marries, and the Baron and Feme bring a Bill of Revivor, and obtain a Decree with Costs, they shall have the Costs of the whole Suit, excepting the Bill of Revivor; although it was objected, that the Abatement was the Party's own Act; and that if the Defendant had been in the right, and so to have Costs, yet he could not have compelled the Plaintiffs to revive. *Pasc. 1685, Durbain and Knight, 1 Vern. 318.* That he might have compelled them to revive, *vide* Title Abatement and Revivor, *Letter (A).* [1 Eq. Ca. Abr. 1.]

8. Upon a motion to dismiss a Bill, wherein the Plaintiff had proceeded to an Answer only, with twenty shillings Costs, Ld. K. said that was a Rule made at least fifty Years since; and there is no Reason, if a Defendant has been put to greater Charge, why he should not have his full Costs, and that for the future it should be

referred to a Master to tax Costs in such cases. *Hil. 34 Car. 2* [1683], *Anon. 1 Vern. 116*, *Vide ibid. 334*, where the Lord Chancellor declared, the Defendant should have the Costs he would swear he was out of Purse, specifying the Particulars that the Court might judge of the Reasonableness of them.

Upon the Dismission of a Suit, brought on upon Bill and Answer, which appears to be vexatious, and in which the Plaintiff appears not to have replied to the Answers merely to avoid Costs, the Court will not hold itself bound by the Rule of 40s. costs, but will give the whole Costs of the vexatious Suit. *Mansel v. Bowles*, [1] Bro. Chan. Ca. 403.

An Agreement in writing having been made between the Parties that the Bill should be dismissed, the Plaintiff gave Notice of Motion, and accordingly moved that it should be so dismissed. The Court thought they could not make an Order to dismiss without Costs, but on Consent at the Bar; however they gave a Rule to dismiss, unless Cause should be shewn to the contrary. *Fidelle v. Evans*, Bro. Chan. Ca. 267.

But where the Defendant has destroyed the Subject of the Suit and absconded, unless he find Security for Costs, Plaintiff shall be permitted to dismiss his Bill, without Costs. *Knox v. Brown*, 2 Bro. Chan. Ca. 186.

9. If a second Mortgagee brings his Bill to redeem the first Mortgagee, who had been put to great Charge in foreclosing the Mortgagor; the Costs which the first Mortgagee has been at shall not be taxed, as in the Case of an Adversary Suit, but he shall be allowed all his Costs and Charges, as is done in Case of a Solicitor who lays out Money for his Client; and the Profits of the mortgaged Premises shall be first applied to pay off those Costs, before it goes to sink the Principal. Decreed *Mich. 1690, Lomax and Hide*, 2 Vern. 185.

10. A Bill of Exchange was obtained by Fraud and ill Practice; and the Court declaring it a gross Fraud, ordered the Party Costs to be ascertained by his Oath. *Dyer v. Tymewell*, 2 Vern. 123.

11. If a Copyholder commits a Forfeiture, which is found so at Law, and he afterwards exhibits a Bill to be relieved, it must be on Payment of Costs both at Law and in Equity. *Nash v. Derby*, 2 Vern. 537.

But if it were in such a Case, as that the Court could not relieve, yet they would not decree Costs against him.

12. The Commissioners of charitable Uses cannot decree Costs on the Statute 43 Eliz., but if there be an Appeal from their Decree, Ld. Chan. may decree the Costs, not only of the Appeal, but likewise of the Commission; and though they decree Costs, yet that shall not, upon an Appeal, be sufficient to reverse the Decree; for Ld. Chan. may either increase or lessen the Costs, or exempt the Party from them intirely. *Pasc. 1700, Rockley and Keyly*. (*Prec. in Chan. 111, S. C.*; but not S. P. *Vide this Ca. Eq. Abr. Pt. 2* [1].)

6. On an Assignment of Dower by Commissioners, Costs are not to be given, unless previous Questions are raised, in litigating which, the Party is vexatious. *Lucas v. Calcraft*, [1] Bro. Chan. Ca. 134.

If a Bill be referred as scandalous and impertinent, and be reported to be so, Exceptions being taken to the Report, and allowed, the Plaintiffs shall have the Costs of the Reference; but the Plaintiff shall not have such Costs in the like Event of a Reference for Irregularity. *Vide Bromfield v. Chichester*, Ambl. 464, and the other Cases stated. *Ibid. 465, 466*.

[127] CAP. XXI.

COURTS AND THEIR JURISDICTION.

- (A) Concerning the Jurisdiction of the ordinary and limited Court in Chancery, proceeding according to Law.
- (B) Concerning the Jurisdiction of the extraordinary and unlimited Court in Chancery, proceeding according to Equity.
- (C) Concerning the Jurisdiction of Chancery, in Foreign Parts.
- (D) Concerning the Jurisdiction of the Court of Equity in the Exchequer, and how it interferes with Chancery.
- (E) How far Chancery will exert a Jurisdiction in Matters cognisable in the inferior Courts, as the Ecclesiastical Courts, University-Courts, Chester, Durham, &c.

(A) CONCERNING THE JURISDICTION OF THE ORDINARY AND LIMITED COURT IN CHANCERY, PROCEEDING ACCORDING TO LAW.

1. In Chancery there are two Courts, the one Ordinary, which proceeds according to the Laws and Statutes of the Realm, called the Petty Bag Side, and which has been a Court Time out of Mind : The other is called the Extraordinary Court, and proceeds according to the Rules of Equity. 4 *Inst.* 79, 2 *Inst.* 552.

[128] 2. The ordinary Court hath Power to hold Plea of *Scire Fac.* for Repeal of the King's Letters Patent, *Monstrans de droits*, Traverses of Offices, Petitions in Chancery, of *Scire Fac.* upon Recognizances in this Court, Writs of *Audita Querela*, and *Scire Fac.* in Nature of an *Audita Querela*, Downments in Chancery, the Writ *de dote assignanda* upon Offices found, Executions upon Statute Staple or Recognizances in Nature of a Statute Staple upon the Act 23 *H.* 8, but the Execution upon a Statute Merchant is returnable either into the *K. B.* or *C. B.* 4 *Inst.* 80.

(This Court had heretofore great extent of Jurisdiction and Multiplicity of Business, especially whilst Tenures remained as they were at the Common Law, and before the Erection of the Court of Wards. To this Day there are held in this Court, Pleas of *Scire Facias* for Repeal of the King's Letters Patent, Petitions, *Monstrans de droit*, Traverses of Office, *Scire Facias* upon Recognizances, Executions upon Statutes, and Pleas of all Personal Actions, by or against an Officer or Minister of this Court.)

A *Caveat* having been entered against putting the Great Seal to a Patent for an Invention which bore date 12 August, the Lord Chancellor, upon hearing the Petition took some Time to consider of it and did not make his Order to discharge the *Caveat* till the 27th of August : the Patentee supposing the Patent bore date the Day the final Order was made, did not enroll his Specification until the 18th of December, when understanding that the four Months limited for the Inrolment of Specifications had elapsed, he petitioned the Lord Chancellor to alter the Patent by making it bear date the 27th instead of the 12th of August, but Lord Thurlow, Chancellor, said that though this was a very hard Case, yet he could not make such an Use of his Power as Keeper of the Great Seal, as to alter a Patent in any Degree upon an Application of this Sort. Ex parte Beek, [1] Bro. Chan. Ca. 578.

3. This Court is *Officina Justitiæ*, out of which all original Writs and Commissions, which pass under the Great Seal, do issue ; and for these Ends this Court is always open, so that One from hence may in Vacation have a *Habeas Corpus*, Prohibition, &c., which issue out of other Courts only in Term-time. 4 *Inst.* 80, 81.

4. All Personal Actions, by or against any Officer or Minister, in respect of their Service or Attendance, may be determined in this Court. *Ibid.* 80.

5. This Court cannot hold Plea of Land, but it may of Trespass for Debt. 20 *H.* 6, 32.

6. The Proceeding in this Court are all in Latin, but they are not inrolled in Rolls, but remain in *Filaciis*, 4 *Inst.* 80.

7. If the Parties descend to Issue, this Court cannot try it by a Jury, but the Lord Chancellor delivereth the Records with his proper Hands into the King's Bench, to be tried there ; because for that Purpose both Courts are accounted but one, and after Trial had to be remanded into Chancery (a), and there Judgment to be given : But if there be a Demurrer in Law, it shall be argued and adjudged in this Court. *Ibid.*

(a) But *quære* whether the constant Practice has not been to give Judgment in the

King's Bench, *Vide All.* 16, 17, *Hil.* 84, 94, *Cro. Jac.* 12, 2 *Rol. Abr.* 349, and 2 *Sand.* 27, where it is resolved, that if there be a Demurrer for Part, and Issue for Part, the whole Record shall be transmitted into *B. R.* and the Judgment given there; and 2 *Sand.* 23, *S. P.* and there said that the Books cited 4 *Inst.* 80, do not warrant the Opinion. But if the Issue is to be tried otherwise than by a Jury, as by the Bishop's Certificate, &c., Judgment shall be given in Chancery. 1 *Jon.* 80, *Lat.* 3.

* 8. An Inquisition was taken, and a Forfeiture of the Office of Warden of the Fleet found, and the Defendant pleaded to Issue; and after Issue joined, several other Persons came in by way of *monstrans de droit*, and pleaded; and a Demurrer to them; and the Record was carried into *B. R.* by the Clerks of the Petty Bag, without any Order of the Court, in order to have the Issue tried. And now two Questions were moved; *first*, Whether the Record were well removed, because it was done by the Clerks of the Petty Bag, because it ought to be by the Lord Chancellor *propria Manu*. *2dly*, Whether the Record be entirely removed, there being an Issue as to one, and a Demurrer to the rest. As to the first Point, *Ld. K.* was of Opinion clearly, that the Record was well removed; [129] for what is done by the Hand of the proper Officer of the Chancellor, may be well enough said to be done by him *propria Manu*. And though the Clerk of the Petty Bag carrying the Record without an Order, has committed a Fault to this Court; yet that will not prevent the Record from being well removed: And as to the second he was of Opinion, that the Record was entirely removed, on Consideration of the Cases of *Jefferson* and *Dawson*, 2 *Saund.* 6. *Rex* and *Stoughton*, *Ibid.* 157, and *The Prince's Case*, 8 *Co.* [31]. *Mich.* 1700, *Rex* and *The Warden of the Fleet*.

* 9. In a Cause on the *Latin Side*, on a Motion that the Defendant might stand committed for not vacating his Letters Patent of Reprisals, it was moved that they might be at liberty to bring a Writ of Error in the King's Bench, for which was cited *Dyer* 315, 4 *Inst.* 80, &c. But *Ld. K.* said, All these Books were founded only on the single Opinion of Lord *Dyer*; and though he thought the Jurisdiction of Chancery, even of the *Latin Side*, not subjected unto, nor to be controuled by the King's Bench; and that he would injoin all such Writs of Error. *Hil.* 1682, *Rex* and *Cary*.

(That upon a Judgment given in this Court, a Writ of Error doth lie returnable into the King's Bench. *Vide* 13 *Ed.* 3. 25 *Ass.* 24, *Dyer* 315. *Plow.* 393. And *per Lord Coke*, The Stile of the King's Bench is *coram Rege*, but the Stile of the Chancery is *coram Rege in Cancellaria*, and *Additio probat Minoritatem*. 4 *Inst.* 80.)

(B) CONCERNING THE JURISDICTION OF THE EXTRAORDINARY AND UNLIMITED COURT IN CHANCERY, PROCEEDING ACCORDING TO EQUITY.

Vide Title Bill, Letter (C).

1. The King cannot grant a Commission to determine a Matter of Equity, but it ought to be determined in Chancery, which hath had Jurisdiction Time out of Mind. 12 *Co.* 113.

(That all the Courts of *Westminster*, *viz.* the Chancery, proceeding according to Law, King's Bench, Common Pleas, and Exchequer, have had Jurisdiction Time out of Mind, seems settled by the best Authorities. 9 *E.* 4, 53, *b. Doctor* and *Student*, c. 7, 4 *Inst.* 78, *Hob.* 63. But at what Time the Court of Chancery first exercised an extraordinary Power of acting and decreeing according to the Rules of Equity, seems, from the Distance and Obscurity of the Matter, very doubtful: It is however agreed, that its Commencement is much more modern than any of the other Courts; that neither the *Mirror*, *Glanvil*, *Bracton*, *Britton* or *Plota*, mention any Thing of this Court, as proceeding according to the Rules of Equity. The most probable Opinion is, that the Equity Side of the Court of Chancery began in the Time of *E.* 3. *Lambard*, in his *Archæion*, 62, says, That when the Courts of Chancery and King's Bench ceased to be ambulatory, and became settled Courts in a certain Place, (*which was the 4 E. 3*) that then the King committed to his Chancellor, together with the Charge of the Great Seal, his only legal, absolute, and extraordinary Pre eminence of Jurisdiction, &c., but the Writ or Proclamation, 22 *E.* 3, directed to the Sheriffs of *London*, by them to be made publick, seems to have given it an Establishment, by which the King commanded, that all Business, relating as well to the Common Law of the Kingdom, as to such by special Grace cognizable to him, should be prosecuted before the Chancellor, &c., and this Delegation afterwards received the Sanction of an Act of Parliament, 36 *E.* 3, which Act is thought, by others, to have first given it Authority; *vide* 1 *Lev.* 242, that

this Court did from this time exercise a Jurisdiction in Matters of Equity, seems evident from the Rolls of Parliament; *vide* 1 *Roll. Abr.* 372. And the Complaints made in Parliament of the Exercise of this Power to the Subversion of the Common Law: *vide* *Rot. Parl. Anno 2 R. 2. 7 R. 2.* and this occasioned the Statute 13 *R. 2. c. 6.* which reciting, that People were compelled to come before the King's Council, or in the Chancery, by Writs grounded on untrue Suggestions, enacts, That the Chancellor for the Time being, presently after such Suggestions be untruly found, and proved untrue, shall have Power to ordain and award Damages according to his Discretion, to him who is so untruly troubled as aforesaid, &c., which instead of diminishing, increased the Power and Jurisdiction of this Court.)

[130] 2. A Cause shall not be examined upon Equity in the Court of Requests, Chancery, or other Court of Equity, after Judgment at the Common Law. 1 *Roll. Abr.* 381.

(The Reasons given were, *first*, Because it draws the Matter determinable by the Common Law *ad aliud Examen*, *viz.* a Trial by Witnesses; *2dly*, After Judgment the Parties ought to be at Peace and Quiet; and if it should be otherwise, every Plaintiff would begin in Equity, which would tend to the utter Subversion of the Common Law; *3dly*, A Court of Equity, being no Court of Record, cannot hold Plea of any Thing of which Judgment is given, which is a judicial Matter of Record. 3 *Inst.* 123. But as the allowed Province of Equity is to correct and moderate the Rigour of the Law, and likewise to give Relief in Cases for which human Wisdom was not capable of providing positive Laws; surely it is but reasonable that Equity should have a Power of interposing after a Judgment at Law; especially if it be considered how uncertain the Law is before it be determined; and as this Reasoning has occasioned the contrary Practice, which being now established it will be sufficient only to mention the Authorities on this Head, *viz.* 4 *Inst.* 36. 91; 3 *Inst.* 123; *Dal.* 81; *Moor.* 836. Pl. 1129. 916. Pl. 1300; 1 *Leon.* 241; 2 *Leon.* 115; 3 *Leon.* 18; 2 *Brownl.* 97; *Gualb.* 244; 1 *Roll. Rep.* 71, 72, 252; 2 *Bulst.* 194, 284; 3 *Bulst.* 118, 120; *Lit. Rep.* 37; *Cro. Jac.* 335, 344; *March.* 54, 83; *Cro. Car.* 595, 596; *Stile.* 27; 1 *Sid.* 463; 1 *Mod.* 60; *Hard.* 23, 123; *Bulst.* 301, 302; 3 *Bulst.* 115; 1 *Lev.* 241.)

3. The Chancellor by a Decree cannot bind the Right of the Land, but can only bind the Person; and if he will not obey it, the Chancellor may commit him to Prison till he obeys it. 27 *H. 8.* 15 [1535-36].

(Sequestrations were first introduced by Sir Nicholas Bacon in *Q. Elizabeth's* Reign, before which, Chancery found some Difficulty in enforcing its Decrees; and for some Time after was controuled by the Common Law Courts. *Vide* 4 *Inst.* 84; 1 *Roll. R.* 86; 3 *Bulst.* 34; 1 *Roll. Rep.* 190; *Lit. Rep.* 166. Lord Egerton imposed a Fine on Sir *Tho. Themilthorp*, for not performing his Decree concerning Lands of Inheritance, and estreated the same into the Exchequer; but he was discharged of it; for otherwise, by a Mean he might bind the Interest of the Land, when he had no Power. 4 *Inst.* 84. So where the Lands of one *Waller* were extended by a Process out of Chancery, and he brought his Assise in the Common Pleas, and was relieved. *Ibid.* A Person committed to the Fleet for not performing a Decree made subsequent and contrary to a Judgment at Law, was by *Habeas Corpus* out of the King's Bench admitted to Bail, and afterwards discharged. *Cro. Jac.* 341.)

4. Three Things are to be adjudged in a Court of Conscience: *first*, All Covins, Frauds and Deceits, for which there is no Remedy by the ordinary Course of Law; *2dly*, Accidents, as when a Servant, Obligor or Mortgagor, is to pay Money on a certain Day, and they happen to be robbed in going to pay it, Relief is then to be had against the Forfeiture; *3dly*, Breach of Trust and Confidence; 4 *Inst.* 84.

(It has been held that a Court of Equity could not decree against a Maxim of Law. 1 *Roll. Abr.* 376. And therefore it has been adjudged, that one Executor could not compel the other to account. 1 *Roll. Rep.* 263. And that one Jointenant could not sue his Companion. 1 *Roll. Abr.* 376. And that if an Obligee left his Bond, he was without Remedy in Equity. *Ibid.* 375. Where the Lessor entered upon the Lessee, and suspended his Rent, it was held that he had no Remedy in Equity. *Lit.* 142. So where the Party became remediless by his own Act, as by paying Money without an Acquittance. 1 *Roll. Abr.* 374. So where one made a Promise for valuable Consideration to make a Lease; and it was held that the Party could not sue on this Promise in Equity, because he might have an Action on the Case. *Ibid.* 380. But all these Resolutions in the Common Law Courts have been long since exploded, and the constant Practice otherwise. *Boni Judicis est ampliare Justitiam.*)

5. A bill was brought for a Discovery against an Executor, and the Executor pressed for a Dismission, because the Plaintiff had the Effect of his Suit, *viz.* a Discovery; but *per Cur'*, as to a Dismission to Law, because the Plaintiff hath a Discovery here, when this Court can determine the Matter, it shall not be a Hand-maid to other Courts, nor beget a Suit to be ended elsewhere; and therefore retained the Bill. *Mich.* 26 *Car.* 2 [1674], *Barker and Dec.* 2 *Chan. Ca.* 200. (*Vide Jesus College v. Bloom*, *Ambl.* 54. *Ante*, 75.)

[131] 6. If A. sues in Chancery for certain Lands, and afterwards sues in the Common Pleas for the same Lands, the Court of Chancery will grant an Injunction to stay his Proceedings in the Common Pleas till the Matter is heard in Chancery. [Bill *v. Body*,] *Cary's Rep.* 70.

(The Practice is either to dismiss his Bill, or oblige him to make his Election.)

7. If a Man has his Election to proceed at Law, or in Equity, and the Bill is for Land and mesne Profits, he may elect to proceed in an Ejectment at Law for the Possession; and in Equity upon the Account; because at Law he can recover Damages for the mesne Profits, from the Time only of the Entry laid in the Declaration. *Anon.* 1 *Vern.* 105.

8. Equity will not suffer a Penalty to be demanded, if the Party will perform that for the Non-performance of which the Penalty is given. [Hele *v.* Hele,] 2 *Chan. Ca.* 88.

9. Equity will not assist a Forfeiture (S. P. in the Case of *Brian and Acton*, *Eq. Ca. Abr.* Part 2 [1]). *Vide* 2 *Vern.* 127. When a Parson brings a Bill for Tithes, he must waive the Forfeiture. [Anonymous,] 1 *Vern.* 60.

* 10. The Bill was at the Relation of several Freemen of the Weavers Company, against the Defendants and other Bailiffs, Wardens and Assistants of the said Company, setting forth their Incorporation *tempore H.* 2, but that the Freemen being imposed upon, and abused, by the governing Part of the Corporation, had a further Charter and Rules granted them *tempore Car.* 1, but that the Defendants had been guilty of many Breaches and Violations of their Charters, and had oppressed the Freemen, &c., and mentioned some Particulars; and for a Discovery of the rest, and that they might be decreed for the future to observe the Charters, and to have an Account of the Revenue of the Corporation which the Defendants had mis-spent, &c., was the End of the Bill; to which the Defendants demurred; because as to part of the Bill, it was to subject them to Prosecutions at Law, and to a *Quo Warranto*: And as to the other Parts, the Plaintiffs had Remedy by *Mandamus*, Information, or otherwise, and not here; and of the same Opinion was *Ld. K.*, who said it would usurp too much on the King's Bench; and that he never heard of any Precedent for such a Case as this, and so allowed the Demurrer. *Mich.* 1705, *Attorney General* and *Reynolds & al'*.

* 11. If a Trustee does, by Fraud and Combination with the *Cestuy que Trust*, endeavour to evade any penal Law, as the Statute of Simony, &c., under Pretence that a Trust is only cognizable in Equity, and that Equity should not assist a Penalty or Forfeiture, yet Chancery will aid remedial Laws, and not suffer its own Notions to be made use of to clude any beneficial Law. *Pasc.* 1706, *Attorney General* and *Hindley*. (*Vide Attorney General v. Hesketh*, 2 *Vern.* 549.)

* 12. The Plaintiff brought her Bill to have an Account of the Real and Personal Estate of her late Husband, and to have Satisfaction thereout for Defect of Value of her Jointure-Lands, which he covenanted to be and to continue of such Value; The Defendants insisted it was a Matter properly triable at Law, and she ought to be sent there to try it; for if she were damaged, this Court could not assess Damages; but *Ld. Chan.* said, The Master might inquire into it well enough; and therefore sent it to him to examine and report, and said, if he found there were any Difficulties in it, he could send it to be tried afterwards. *Mich.* 1729, *Hedges* and *Everard*.

[132] * 13. A Devisee of Lands being in Possession of them, brings a Bill to prove the Will, and prays Relief; the Heir brings on the Cause *ad requisitionem Def'tis*, and insists the Bill ought to be dismissed, because no Merit for a voluntary Devisee, where no Debts or Legacies are to be paid, to have a Decree against the Heir; but the Master of the Rolls said, It is the Business of this Court to quiet Possessions; and gave the Defendant a Year to try the Validity of the Will, and then to resort back to the Court. *Hil.* 1702, *Woodgate* and *Woodgate*.

14. The Plaintiff's Father married Sir *James Langham's* only Daughter, and upon the Marriage Articles were entered into between the Defendant and the Plaintiff's

Father, by which the Defendant covenants that he would, within six Months after the Marriage, pay the Plaintiff's Father £10,000, and that his Executrix should pay him £10,000 within six Months after his Death; and the Plaintiff's Father covenanted to make the Wife a Jointure of £1500, but no Covenant for making any Settlement upon the Children: The Marriage took Effect, and the Defendant paid the £10,000 and the Jointure was made, and both the Plaintiff's Father and Mother being dead, and the Defendant being grown very old, and having married a fourth Wife, the Plaintiff, his Grandson, brought this Bill, pretending that the Defendant was grown very weak in his Understanding, and wholly influenced by his Wife, and it was greatly feared would spend or make away his Estate, and not leave wherewithal to pay the £10,000 at his Death; and therefore to have the Money paid presently, the Defendant having an Allowance of the Interest, or at least that he might have better Security to pay it when it became due, was the Bill: The Defendant swore by his Answer, that on the Marriage-Treaty no other Security was insisted upon but the Covenant; and that if there was, he would not have consented to it; and though it was insisted upon, that this was like the Case of Executors, who are every Day compelled to give Security for the Payment of Legacies payable at a future Day; yet *Ld. Chan.* dismissed the Bill, and said, That to do it here would be to alter the Terms of the Agreement; and that though this Court had Authority to compel Executors to give Security, yet it was because they were considered as Trustees for the Legatees, and no Agreement one way or other. *Hil. 1698, Earl of Warrington and Sir James Langham.* But upon an Appeal to the House of Lords the Matter was compromised. (*Prec. in Chan.* 89, S. C.)

*15. The Plaintiff having recovered Judgment against *J. S.* (but no writ of Execution sued out) supposing some particular Effects of *J. S.*'s to be in the Defendant's Hands, brought a Bill to discover them, in order to subject them to his Judgment. The Defendant demurs, because there is no Equity to compel such a Discovery, and no such Bill would lie against the Debtor himself, much less against a third Person. *Ld. K.* seemed to agree it would not lie against the Debtor himself, nor to have a general Discovery from a third Person, but only for particular Things, as this Bill was; and over-ruled the Demurrer. *Mich. 1705, Taylor and Hill.* *Vide* Bills of Discovery, Title Bill [1 Eq. Ca. Abr. 75].

[133] 16. The Court of Chancery may, by a Bill in Equity, set aside Letters Patent obtained by Fraud. *Attorney General versus Vernon*, 1 *Vern.* 277.

17. If a Conveyance be gained indirectly, though it be by Deed and Fine, yet a Court of Equity can relieve against it: Resolved *Mich. 1693, Woodhouse and Brayfield*, 2 *Vern.* 307.

*18. A Bill was brought to have a Will set aside, being obtained by Fraud and Circumvention; and *Ld. Chan.* was clear of Opinion, that a Will may in Equity be set aside for Fraud or Circumvention. *Mich. 1700, Welby and Thornough.* (*Prec. in Chan.* 123, 2 *Eq. Ca. Abr.* 242, S. C.)

*19. But it has since been decreed in the House of Lords, that a Will of a Real Estate could not be set aside in a Court of Equity for Fraud or Imposition, but must first be tried at Law on *devisavit vel non*, being Matter proper for a Jury to inquire into. 28 *July* 1728, *Brinsley and Kerddye.* (*Post* 406, 2 *Eq. Ca. Abr.* 767, S. C.)

(C) CONCERNING THE JURISDICTION OF CHANCERY IN FOREIGN PARTS.

1. If there are two Jointenants of Lands which lie in *Ireland*, and one of them prefers a Bill for an Account of the Profits, and for a Partition of the Lands, the Bill will be good as to the Profits which are in the Personalty, but not so as to the Partition, which is in the Realty; for a Commission to make Partition cannot be awarded into *Ireland.* *Hil. 27 Car. 2* [1676], *Cartwright and Pettus*, 2 *Chan. Ca.* 214.

Chancery will not grant an Issue to try the Validity of a Will of Lands lying in the American Colonies, such a Will is not triable in Westminster Hall. *Pike v. Hoare.* *Ambl.* 428.

2. A. obtains an Annuity or Rent Charge, charged on certain Lands of B's in *Ireland*; B. suggesting some fraudulent Practice here in *London*, in obtaining it, exhibited his Bill against A. who was in *England*, to be relieved; A. pleaded to the Jurisdiction of the Court, the Land lying in *Ireland*; but the Plea was over-ruled, and he was ordered to pay Costs for endeavouring to oust the Court of its Jurisdiction:

Per Nottingham, C. Mich. 1682, *Earl of Arglasse and Muschamp*, 1 Vern. 75.—*Ibid.* 135, S. C. and the former Resolution affirmed by *North, Id. K.*, upon a Rehearing, who said, That the Objection, that the Court could not sequester the Lands in *Ireland*, was of little Weight, for that it did not appear but that the Defendant had other Lands in *England*, which would be subject to a Sequestration. (*Vide* [*Ardglasse v. Muschamp*] 1 Vern. 237.)

3. So where a Bill was exhibited against A. to answer a Contract made of Lands that lay in *Ireland*; and though the Lands lay in *Ireland*, and the Title was under the Act of Settlement there, yet a *Ne exeat Regnum* was granted, and Process against him to answer; and when he afterwards went into *Ireland* without answering, he was sent for by special Order from the King, and made to answer the Contempts, and to abide the Justice of the Court. *Archer and Preston* cited by *Ld. Chan.* [*Ardglasse v. Muschamp*] 1 Vern. 77, 135.

So *Lord Hardwicke* decreed a *Specific Performance of Articles, executed in England, concerning the Boundaries of two Provinces part of the British Colonies in America.* *Penn v. Baltimore*, 1 Ves. 444.

4. If a Trustee lives in *England*, the Chancery here may decree the Trust, though the Lands lie in *Ireland*; although it was objected, *first*, That in this Case there had been two Judgments in the Courts of Law in *Ireland*, and three Bills in Equity; *2dly*, That the Trustee came here occasionally, and that it would be unreasonable to keep him from his Concerns to attend this Suit; *3dly*, That the Case arises upon Facts properly triable in *Ireland. viz.* Whether [134] *Cestuy que Trust* were the same Person who died in Rebellion which was twice tried before in *Ireland*, and found against the Plaintiff; *4thly*, That this Case depends on the Construction of the Act of Settlement in *Ireland*. But these Objections were over-ruled, the Proof being full as to the Identity of the Person; two Chief Justices concur with *Ld. Chan.* that the Judges here were proper Expositors of the *Irish Laws.* Mich. 1686, *Earl of Kildare and Sir Morrice Eustace and Fitzgerald*, 1 Vern. 405, 419.

5. The Bill was, that the Defendant might redeem a Mortgage of the Island of *Sarke*, or be foreclosed; the Defendant pleaded to the Jurisdiction of the Court, that the Island was Part of the Duchy of *Normandy*, and had Laws of their own, and were under the Jurisdiction of the Courts of *Guernsey*; but the Plea was over-ruled, because the Mortgage was of the whole Island, and for that the Defendant was served here; for *Æquitas agit in Personam.* *Pasc.* 1705, *Toller and Carteret*, 1 Vern. 494, *vide* [*Athol v. Derby*] 1 Chan. Ca. 221, where it is said by *Serjt. Maynard*, that Court could not by Decree bind the *Isle of Man*, it being out of the Power of any Sheriff. (But an Appeal lies before the King in Council from a Decree in the *Isle of Man.* *Vide* the Case of *Cristian and Corren*, *Eq. Ca. Abr.* Part 2 [81, 244].)

In the Case of a *Devise of South-Sea Stock to the Provost, &c., of Edinburgh, to be applied to the Maintenance of poor Labourers in Edinburgh, &c., Lord Hardwicke, Chancellor, was of opinion that he could not give any Directions as to the Distribution of the Money, that belonging to another Jurisdiction, that is to some of the Courts in Scotland; and therefore directed the Stock to be transferred to such Persons, as the Provost, &c., should appoint,* to be applied to the Trusts in the Will.* *Provost, &c., of Edinburgh v. Aubery*, *Ambl.* 236.

(D) CONCERNING THE JURISDICTION OF THE COURT OF EQUITY IN THE EXCHEQUER, AND HOW IT INTERFERES WITH CHANCERY.

1. If a Cause has been heard in the Exchequer, and two several Trials directed, *viz. Will or no Will*, and in both a Verdict is for the Plaintiff; and yet the Court dismisseth the Bill, but without Prejudice in Law or Equity; the Plaintiff by an original Bill in Chancery may have Relief for those Matters. [*Anonymous.*] 1 Chan. Ca. 155.

2. A Bill was exhibited in Chancery concerning Tithes and Bounds of a Parish, which proceeded to Answer and Replication; then the Plaintiff exhibited another Bill in the Exchequer, and his Witnesses were examined, and now proceeds again in Chancery, and replies; the Defendant pleaded the Proceedings and Examination in the Exchequer, and ruled good, as to the Examination of the same Matters, which being examined to there, were not to be examined in Chancery. [*King v. Brownlow.*] *Ibid.* 233.

3. A Mortgagee brought a Bill in the Exchequer to foreclose; the Mortgagor

exhibited a Bill in Chancery to redeem, to which the Mortgagee pleaded the former Bill depending in the Exchequer, and the Plea was over-ruled with Costs; though it was urged, that if the Deputy Remembrancer should take the Account one Way, and a Master here should take it another, it would breed Confusion; and that if this Court should be of Opinion, that there ought to be no Redemption, and the Exchequer should decree a Redemption, the Jurisdictions would clash: But *per North*, Ld. K., the Exchequer, though an ancient Court of Equity, yet is but a private Court, and its Jurisdiction properly was only for getting in the King's Revenue, and for the King's Officers, and they ought to keep within their proper bounds; and if there should happen any of the Inconveniences mentioned, there are several Precedents, that Injunctions have gone to the Exchequer in such Cases. *Hil. 1683, Earl of Newburgh and Wren*, 1 Vern. 220. (*Vide Coysgarne v. Jones*, Amb. 613. And Ld. K. said, This Court must deny Justice to none, and a Plaintiff has a Liberty to commence his Suit in what Court he thinks fit; and that Chancery was the highest Court of Equity, and declared his Opinion to be, that in any Case, if the Mortgagor exhibited a Bill to redeem in the Exchequer, that the Defendant there should be at Liberty to exhibit a Bill to foreclose in this Court. *Ibid.* 221, in S. C.)

[135] * 4. A Decree was obtained in the Exchequer against two of the Inhabitants of *Bridgenorth*, to establish a Custom for all the Inhabitants there to grind at the King's Mills; and this Decree was had without any Trial, and afterwards affirmed in the House of Peers; and now this Bill was brought in Chancery by other Inhabitants of *Bridgenorth*, to prevent Multiplicity of Suits, and to examine Witnesses *in perpetuum rei Memoriam*, and to discover Evidences in the Defendant's Hands; and in the Bill they deny that there is any such Custom for Grinding, &c., and alledge, that the former Decree in the Exchequer was obtained by Collusion, and that the Defendants would not bring any Actions at Law, till the Plaintiff's Witnesses were dead; and they likewise pray a Discovery, whether the Inhabitants in new Foundations, as well as old, are obliged to grind at the King's Mills. To this Bill the Defendants pleaded the former Decree in the Exchequer, and Affirmance in the House of Peers in Bar, and also demurred to the Bill, but had not as was affirmed, denied the Collusion charged by the Bill: And the Court held, that the Tenor of the Bill was directly to question the Justice of the former Decree, and that the Charge of Collusion need not be answered, being only inserted to give the Court Jurisdiction; and if there was any Redress, it must be by Application to the House of Peers, *Mich. 1699, Jay & al' and Braine*.

5. The Plaintiffs, as Assignees under a Statute of Bankruptcy, pray an Account of the Estate of *Hind* the Bankrupt, seized by the Defendants on Pretence of Debts owing to the King, by Virtue of several Extents sued out for that Purpose, *viz.* one original Extent for the King, and two other Extents in Aid by the Defendants, who were Farmers of the Excise; it being objected that this Matter was properly cognizable in the Court of Exchequer, which was the King's Court of Revenue; and that this Court would not examine what was the *Quantum* of the Debt due to the King, or how far the Extents were necessary: The Ld. K. allowed the Objection, and dismissed the Bill; and as to the Precedents which had been produced where this Court had held Plea in like Cases, he said they did not come up to this Case; for in the Case of *Capel and Brewer* (1 Vern. 469), the Defendant, who sued the Extent in Aid, confessed by Answer he had sufficient of his own Estate to pay the King's Debt; and in the Case of *Cholmly and Sturt*, it appeared to be a fraudulent Contrivance by an Extent in Aid, to gain a Preference to a Debt of an inferior Nature. *Pasc. 1701. Brown and Trant*, 2 Vern. 426.

The Court of Exchequer, as a Court of Equity, does not seem to give to any Person the Privilege of being sued there. Vide Mitford on the Pleadings in Chancery, 2d ed. 133, in not.

(E) HOW FAR CHANCERY WILL EXERT A JURISDICTION IN MATTERS COGNIZABLE IN THE INFERIOR COURTS, AS THE ECCLESIASTICAL COURTS, UNIVERSITY-COURTS, CHESTER, DURHAM, &c.

1. If A. and B. are made Executors, and both prove the Will, but A. only acts as Executor, and dies, leaving his Wife Executrix, and a Legatee sues B. in the Spiritual Court, he being liable there by his joining in the Probate of the Will; yet [136] *per* Ld. K.

the Judgments of the Ecclesiastical Courts are as well subject to the Equity of this Court as the Judgments at Law ; and he inclined to give Relief in this Case, the Party being without Remedy by Appeal ; for the Delegates are to judge according to the Ecclesiastical Laws. *Pasc. 23 Car. 2* [1671], *Vanbrough and Cock*, 1 *Chan. Ca.* 200.

2. If an Infant Legatee sueth in the Ecclesiastical Court, and afterwards in Chancery, the Suit depending in the Ecclesiastical Court cannot be pleaded in Bar ; for there is no such Security for the Infant's Advantage as here, especially as to Interest and bringing in an Account. *Hil. 33 Car. 2* [1682], *Howell and Waldron*, 2 *Chan. Ca.* 85.

3. A Bill was brought to have Distribution of an Intestate's Estate, according to the Statute 22 *Car. 2.* to which the Defendant pleaded, that the Ordinary is made Judge, and appointed to take Security, and that the Plaintiff ought not to sue here ; but *Ld. Chan.* over-ruled the Plea. *Pasc. 34 Car. 2* [1682], *Pamplin and Green*, *Ibid.* 95. (2 *Vent.* 362, S. P.)

4. The Widow in the Spiritual Court set up a Procurator for her Children, the Infants, and gets her Account passed there, and each Child's Proportion ascertained there, and Distribution decreed ; and on giving new Security, got the old Security discharged ; but the Court without Regard to the Proceedings in the Spiritual Court, decreed an Account of the whole Estate. *Pasc. 1688*, *Bissell and Artell*, 2 *Vern.* 47.

5. If there be Fraud in obtaining a Will relating only to a Personal Estate, let the Fraud be ever so apparent ; yet it is not examinable in Chancery after the Will is proved in the Spiritual Court, and so long as that Probate is in Force. *Archer and Mosse*, *Ibid.* 8.

6. A Will of a Personal Estate obtained by Fraud, and by getting the Party to swear, that it should not be revoked ; yet after Probate in the Spiritual Court is not to be controverted in Equity ; but if a Party claiming under such Will comes for any Aid into Equity, he shall not have it. *Nelson and Oldfield*, *Ibid.* 76.

7. If the Plaintiff exhibits his Bill to be relieved touching some Lands in *Cornwall*, and the Defendant, being Head of *Exeter College* in *Oxford*, pleads the Privilege of the University of *Oxford*, and that he ought to be sued in the Vice-Chancellor's Court in *Oxford* only, his Plea will be over ruled ; for Matters of Freehold are excepted out of their Charter ; and their Court can, at best, have but a lame Jurisdiction as to Lands in *Cornwall*. *Hil. 36 Car. 2* [1685], *Stephens and Dr. Berry*, 1 *Vern.* 212.

8. The Plaintiff sets forth in his Bill a Contract under Seal with the Defendant, for making a Lease of certain Lands in *Middlesex*, and prays an Execution of the Agreement ; to which the Defendant pleaded, that he was Head of a College in *Oxford*, and sets forth the Charters of, &c., empowering the University to inquire and proceed in all Pleas and Quarrels in Law and Equity, &c., and concluded to the Jurisdiction of the Court ; but the Plea was over-ruled ; first, Because the Charter ought properly to be extended to Matters at Common Law only, or to Proceedings in Equity which might arise in such Cases, and not to mere Matters of Equity, which are originally such, as to execute Agreements *in Specie* : 2dly, Conuzance of Pleas is never to be allowed unless the inferior Jurisdiction can give Remedy ; here they can [137] only excommunicate or imprison, but cannot proceed to Sequestration of the Lands in *Middlesex*. *Hil. 36 Car. 2* [1685], *Draper and Dr. Crouther*, 2 *Vent.* 362.

9. A Claim of Privilege cannot be put in by Writing, but it must be by way of Plea, but it need not be on Oath. 1 *Chan. Ca.* 237. The Privilege of any inferior Court cannot be objected to at Hearing, but must be pleaded. *Trelawney v. Williams*, 2 *Vern.* 483.

10. A Man cannot sue in the Chancery at *Chester* for a Thing which in Interest concerns the Chancellor there ; because he cannot be his own Judge, and therefore he may in this Case sue in the Chancery of *England* ; otherwise there would be a Failure of Right. *Sir John Egerton and Lord Derby*, 12 *Co.* 113.

11. If a Man hath cause to complain in Equity of a Matter arising within the County Palatine of *Chester* ; if the Defendant lives out of the County Palatine, he may be sued in the Chancery here, or otherwise there would be a Failure of Justice ; for Proceedings in Equity binding the Person only, if the Person lives out of the Jurisdiction of the Chamberlain of *Chester*, there can be no Relief there. *Ibid.*

12. A Bill was exhibited to have an Account of the Profits of Lands which the Defendant had received on Trust for the Plaintiff during his Minority, and for Money received on Bonds belonging to the Plaintiff, and for Writings, &c. The Defendant

pleaded, that the Lands lay in *Cheshire*, and that he lived in *Cheshire* in the County Palatine of *Chester*, and therefore not within the Jurisdiction of this Court; and though Precedents were ordered to be searched, and on View of them a Master certified, that the Privilege of the Counties Palatine was allowable between Parties dwelling in the same County, and for Lands there; yet the Plea was over ruled. *Hil. 14 Car. 2, Edgworth and Davies, 1 Chan. Ca. 40. (2 Freem. 155, 1 July, 14 Car. 2 [1662]. S. G. and P.)*

13. Bill to bring in one that lived out of the Jurisdiction of *London*, to come in and give Security for the Orphan's Portions according to the Custom of the City: Ld. K. decreed Plaintiffs to try the Custom. *Mayor and Aldermen of London and Slaughter, Ibid. 203.*

Chancery will not entertain a Bill against the Benchers of an Inn of Court, relative to a Renewal of a Grant of Chambers. Such Matters are subject to the Jurisdiction of the Judges. Cunningham v. Wegg, 2 Bro. Chan. Ca. 241, and Vide Hart's Case Dougl. 339.

[138] CAP. XXII.

CREDITOR AND DEBTOR.

- (A) Where there is a Provision by Deed or Will for Payment of Debts, what Debts shall be paid.
- (B) The Order and Manner in which Debts shall be paid, or what Precedence one kind of Debt shall have over another in Equity.
- (C) What shall be a good Payment, to whom and at what Time.
- (D) Where Debts of a different Nature are due, and a general Payment is made, to which Debt shall it be applied.
- (E) What Conveyance or Disposition shall be fraudulent as to Creditors.

(A) WHERE THERE IS A PROVISION BY DEED OR WILL FOR PAYMENT OF DEBTS, WHAT DEBTS SHALL BE PAID.

1. If A. makes a Deed of Trust of Lands for Payment of his Debts, to take Effect after his Death, and the Words of the Deed are, *Monies owing by him*, and a Schedule is annexed to the Deed, wherein Mention is made of £1000 to A. and £500 owing to B. and then there is this *Item, viz. The Sum of £3000 owing to other Persons*; this Deed shall not be construed to charge the Lands with Debts contracted afterwards, though they exceed not the Sum mentioned in the Schedule. Decreed *Hil. 1681, Purefoy and Purefoy, 1 Vern. 28.*

2. A. had a Demand of £500 against B. and had run it up to £2700 and obtained a Decree for it in Chancery, from which B. appealed to the House of Lords, where the Decree was affirmed: It was observed, that B. at the pronouncing this Decree in the House of Lords, fell down in a Swoon, and within a Week afterwards died as supposed, of Grief; but he first got a Petition answered, for a Rehearing, and in his Sickness devised all his Lands for the Payment of his Debts; and Ld. K. said, That this could not be in-[139]-tended a Provision for A.'s Demand, which he denied upon Oath, and in which he died a Martyr; however at length decreed, that after all Debts upon simple Contract were paid, A. should come in and be paid his Debt, if he could find Assets. *Hil. 1682, Norden and Norden, 1 Vern. 142. [Hollis v. Carr.] Ibid. 431, S. G. cited, and said to be adjudged by Ld. K. North, not to lie within the Intent of the Provision for Payment of the Testator's Debts.*

3. A Man devised his Lands for the Payment of his just Debts; the Testator, whilst a Student at *Cambridge* (but of Age), had by Surprise been prevailed upon to give a Covenant for Payment of a Portion to his Sister; but he afterwards contested this Debt; and though he was decreed to levy a Fine to subject Lands for the Payment of it, yet he refused so to do: *Per Carr*, This being a just Debt, shall be paid, though not perhaps within the Intent of the Provision. Decreed *Hil. 1686, Lord Hollis and Lady Carr, 1 Vern. 431.*

4. If one by Will or Deed subject his Lands to the Payment of his Debts, Debts

barr'd by the Statute of Limitations shall be paid : for they are Debts in Equity, and the Duty remains ; the Statute hath not extinguished that, though it hath taken away the Remedy. 1 *Salk.* 154, 2 *Vern.* 141, *Goston v. Mill*, S. P. decreed.

5. A Man borrows a Sum of Money on the Mortgage of a Ship, and covenants, that whatever Money the Mortgagee should advance for Insurance of the Ship in a Voyage she was then about to make, he would repay ; but there was no Covenant for Repayment of the Principal Money itself ; the Mortgagee insures the Ship, and the Mortgagor repaid him that Money ; then the Ship proceeds on her Voyage, and returns home ; and being afterwards to go out on another Voyage, the Mortgagee treated with a Person concerning the Insurance, but could not agree for the Rate, and thereupon the Ship went out and was lost in the Voyage ; and now between the Mortgagee and the Executors of the Mortgagor, the Question was, whether the Mortgagee should come in for his Principal Money as a Creditor by simple Contract ; and it was argued that he ought not, because there was no Covenant for Payment of the Mortgage-Money, so that he must be supposed to rest himself on the Ship only for his Security, and that being lost, so is his Money too ; but on the other Side it was urged, that if he had taken no Security at all for his Money, he had then, without Question, been a Creditor by simple Contract : and surely the taking Security ought not to put him in a worse Condition, especially now that the Security being lost and gone, his Debt rests wholly on the simple Contract ; and of the same Opinion was *Ld. Chan. Harcourt*, and pronounced his Decree accordingly 1713. *Thomas and Terrey (Gillb. Eq. Rep.* 110, S. C. ; *M.* 1 *Geo.* 1 [1714]).

6. If a Man seised in Tail of Lands, of which there is a Term in Trustees to attend the Inheritance, levies a Fine, and by Deed subjects the Land to a Debt of £1000. but declares, that after the Debt paid, the Land should be to the old Uses, and after devises the Land for Payment of all his Debts, the Lands shall be liable to all his Debts in general. Decreed *Mich.* 1682, *Turner and Gwynn*, 1 *Vern.* 99. But the Reporter makes a *Quare*, for it seems he was but Tenant in Tail of the Inheritance, and so could not charge it by his Will, unless it be intended he had still a Power of doing it lodged in him by reason of the Fine, notwithstanding he had de-[140]clared that after the Payment of the £1000 it should go to the former Uses.

* 7. On the Marriage of the Plaintiff with *Edward* Earl of *Warwick*, in 1696, previous thereto a Settlement was made by the Earl to the Use of two Trustees, for ninety-nine Years, if the Earl and Countess should so long jointly live, in Trust, out of the Rents and Profits to pay to the Countess, for her separate and Personal Use, by way of Pin-money, £400 *per Ann.* Quarterly, and subject thereto that and the rest of the Estate was to the Earl for Life ; Remainder as to part to the Countess for Life for her Jointure : Remainder of the Whole, as the said Estates should determine to the Use of the first and other Sons of that Marriage successively in Tail Male, with Remainder in Fee to the Earl ; the Marriage takes Effect, and *July* 1701, the Earl being taken ill makes his Will, whereby he charges, as far as he was able, all his real Estate with the Payment of his Debts, and soon after dies, leaving only one Child, *Edward Henry*, then Earl of *Warwick*. At the Time of his Death there was a Year and three-Quarters of the Pin-money in Arrear, and he was likewise indebted to several other Persons in considerable Sums of Money, which his Personal Estate would not extend to pay and satisfy ; and there being no Executor named in the Will, the Lady *Eliz. Rich.* his Sister, as principal Creditor, took out Administration to him, with the Will annexed ; and nothing but the Reversion in Fee of the whole settled Estate being in his Power to charge with the Payment of his Debts, this Reversion could not be affected or sold during the Continuance of the Estate Tail, as it was liable to be docked by a Recovery by the Tenant in Tail ; Earl *Edward-Henry* attained his Age of twenty-one Years in 1719, and soon after levied a Fine to the Use of himself and his Heirs, and in 1721 died without Issue intestate and unmarried : and upon his Death the Estate descended to the Defendant ; and the Plaintiff the Countess, his Mother, took out Letters of Administration to the said Earl *Edward-Henry* ; and now this Bill was brought by the Countess for a Satisfaction of the said Arrears of Pin-money, and by the other Creditors of Earl *Edward*, for a Satisfaction of their Debts ; and in order thereto, for an Account of the Real and Personal Estate of Earl *Edward* ; and that if the Personal Estate were not sufficient, that the same might be paid out of the Real Estate, which now, by the Failure of Issue Male, was become Assets, according to the Will of Earl *Edward*. It was insisted upon, for the Defendant, that the Earl

and Countess living together, and no Demand being proved to be made of these Arrears of Pin-money, that it was in the Nature of a Present of them to the Earl, or a Waiver of them, and that at most in such Cases, the Court never allowed more than a Year's Arrear; because it was impossible, but that at the Husband's Death some Arrears must be, unless they were always paid punctually at the Day, and therefore a Year has been always held to be as much as was reasonable to allow in those Cases. But in this Case the Court allowed the Whole, as the Whole were proved to be in Arrear; and that between Husband and Wife, who lived well together, three Quarters of a Year made but little Difference. Another Point insisted upon for the Defendant was, that by the Fine levied by Earl *Edward Henry* the Estate Tail was extinguished or consolidated with the Reversion or Remainder in Fee in him, and that the Plaintiff's Title to demand their Debts [141] then attached upon the Estate, and cited 1 *Salk.* 333, *Symonds* and *Scudmore*; and therefore, that the Rents and Profits received by Earl *Edward-Henry*, ought to be applied towards a Satisfaction of the Plaintiff's Demands; and by Consequence that the Plaintiff, the Countess being Administratrix to the said Earl, had Assets in her own Hands for that Purpose: But the Court was Clear of Opinion, that the Rents and Profits received by Earl *Edward-Henry* of his own Estate, whereof he was then owner, should not be applicable for that Purpose before a Demand made, because till then he did no Wrong in receiving the Rents and Profits of his own Estate; and so it had been decreed lately in the Case of *Montague* and *Bord*, in this Court. *Mich.* 1728, *Countess of Warwick* and *Edwards* [S. C. Dick. 51].

The Testator charged his real Estate (which was subject to a Mortgage contracted by his Ancestor) and also all his Personal Estate with his Debts and Legacies. It was decreed by *Ld. Thurlow*, and afterwards in the House of Lords, that the Mortgage should be born by the Estate originally liable, and that the Executrix, having discharged it out of the Personal Estate, should be repaid. *Lawson v. Hudson*, [1] Bro. Chan. Ca. 58.

So, notwithstanding the Testator charged a Term with Payment of his Debts, a Leasehold Estate mortgaged by the Testator's Ancestor, shall bear the Burden of such Mortgage. *Ancaster v. Mayer*, [1] Bro. Chan. Ca. 454.

But where Sir R. W. reciting himself to be seised, subject to Incumbrances, of an Estate, which he had mortgaged, devised another Estate for a Term of twenty one Years in aid of his Personal Estate to pay Bond and Book Debts, and by a subsequent Clause to pay all his Debts; *Ld. Thurlow* decreed, that the Personal Estate and the Term should exonerate the mortgaged Estate. *Tweedale v. Coventry*, [1] Bro. Chan. Ca. 240.

(B) THE ORDER AND MANNER IN WHICH DEBTS SHALL BE PAID, OR WHAT PRECEDENCE ONE KIND OF DEBT SHALL HAVE OVER ANOTHER IN EQUITY.

1. If Lands are devised to Trustees for Payment of Debts; Debts by simple Contract, and Debts by Specialty, shall be paid in Proportion; and though the Trustees are Creditors to the Testator, or Sureties for him, yet they shall not be allowed to prefer themselves. [Anonymous.] 2 *Chan. Ca.* 54. That all Debts, when the Devise is to a Trustee, shall be paid in Average, except those that affect the Land. Decreed, *Vide* [Girling v. Lee] 1 *Vern.* 63.

2. But if the Lands are devised to an Executor, (a) they become legal Assets, and shall be paid in a Course of Administration; and according to the Precedency or Superiority at Law. Decreed *Mich.* 1682, *Girling* and *Lee*, 1 *Vern.* 63; 2 *Chan. Rep.* 262, S. C.

(a) That they become legal Assets in the Hands of an Executor, Resolved [Hixon v. Wytham] 1 *Chan. Ca.* 248; 1 *Rob. Abr.* 920; *Hob.* 265.

3. If one devises Lands to his Nephew and his Heirs, whom he makes his Executor in Trust to sell, for Payment of Debts and Legacies, the Debts and Legacies shall be paid in Average; for he having devised to him and his Heirs, shews that he designed that it should go in a Course of Descent, and he to take as a Trustee. *Anon.* 2 *Vern.* 133. But *quere* whether the Debts should not be preferred; and *vide* in *Grans v. Powell*, *Ibid.* 248, the Case of Sir *John Bowles* cited: where, upon a Trust for Payment of Debts and Legacies, though it was decreed by *Ld. K. Bridgman*, that they should be paid *pari Passu*, and each to bear the Loss in Average; yet Lord *Nottingham* reversed the Decree, and ordered the Debts to be first paid; and said, He would not let a Man sin in his Grave. Note: This has since been the constant Practice with respect to Debts and Legacies; but as to Creditors, they shall be all paid in Average, except

such whose Debts affect the Land. *Vide* [Anonymous] 2 Vern. 405. *In which Case it is said, that if the Trustees are not made Executors the Devise does not become legal Assets.*

4. If on the Estate of *J. S.* there are several Mortgages, Judgments and Statutes ; and he likewise owes several Debts by Bond and simple Contract, and some Parts of his Estate are mortgaged no less [142] than three over ; and in this Manner, *viz.* to *A.* there is a subsequent Mortgage of Lands, on which *B.* had a prior Mortgage of a Moiety of the Lands contained in *A.*'s Mortgage, and also of several other Parcels of Land ; *C.* has a prior Mortgage of the other Moiety of the Lands comprised in *A.*'s Mortgage, and also of several other Lands ; and *J. S.* having subjected his Estate for the Payment of his Debts, it was held by *Ld. Chan.* that to avoid Confusion, the subsequent Mortgages having a Right to Redeem, the real Securities should be first paid, and then the Bonds and simple Contract Debts in Average ; although it was urged, that the subsequent Mortgages &c., should be paid in Average with the Bond and simple Contract Creditors, their Securities not affecting the Lands, the legal Estate being in the first Mortgagee. It being likewise urged, that a Judgment Creditor should have satisfaction before a Second Mortgagee as at Law, *Ld. Chan.* thought it reasonable ; but for the above Reasons left him to get it at law, if he could. Decreed *Mich.* 1682, *Child and Stephens*, 1 Vern. 101.

(An Executor shall discharge a subsequent Judgment before a prior Statute, because of the Notoriety of it. 4 Co. 59. But if the Statute be extended, whether the Judgment-Creditor may enter on the Conusee, *quære* and *vide* 2 And. 157 ; *Cro. Eliz.* 734, 822.)

5. It was decreed at the Rolls, that Mortgages were to be paid in the first place, and then Judgments, and then Recognizances, &c., but upon an Appeal to the House of Lords, it was adjudged, that Mortgages were not to be preferred to other real Incumbrances ; but that Mortgages, Judgments, Statutes and Recognizances should take place according to their Priority, and as they stood in Order of Time. *Mich.* 1705, *Earl of Bristol & al' and Hungerford*, 2 Vern. 524.

6. If Creditors have joined in a Bill, and obtained a Decree for Payment of their Debts out of legal and equitable Assets, none of them shall be permitted to obtain a Preference of the others, by obtaining Judgments by confession against the Executors ; and *per Ld. K.* where there are legal and also equitable Assets, the Creditors who will take their Satisfaction out of the legal Assets, shall have no Benefit of the equitable Assets, until the other Creditors, who can only be paid out of those Assets, have there-out received an equal Proportion of their respective Debts. Decreed *Pasc.* 1702, *Sheppard and Kent*, 2 Vern. 435. (*Prec. in Chan.* 190, S. C.)

7. If the Testator seised in Fee enters into a Statute, and devises a Legacy of £500, and the Conusee takes all the Personal Estate in Execution, so that nothing is left to pay the Legacy, Equity will decree the Real Estate to stand charged with the Legacy. [Anonymous.] 2 Chan. Ca. 4. [*Culpepper v. Aston.*] *Ibid.* 117, S. P. decreed.

8. If there is a Debt owing to the King, Equity will order it to be paid out of the Real Estate, that other Creditors may have Satisfaction of their Debts out of the Personal Assets. *Satigary* [Sagitary] *v. Hyde*, 1 Vern. 455.

9. One died, leaving a Debt by Judgment, and another due by Bond, and the Judgment-Creditor being at a good Understanding with the Heir, levied his Debt out of the Personal Estate ; and *Hutchins*, *Ld. Comm.*, inclined to relieve the Bond-Creditor, and that he should stand in the Place of the Judgment-Creditor, and charge the Land with his Debt ; for as the Heir has often the Assistance of a Court of Equity, in having the Personal Assets applied in Ease of the Real Estate, it is but reasonable that he should do Equity to [143] others : But the Reporter refers to the Order. *Porcy v. Marsh*, 2 Vern. 182.

10. If one dies indebted by Mortgage and simple Contract, and the Executor applies the Personal Assets in Discharge of the Mortgage, the simple Contract Creditor shall stand in the Place of the Mortgagee, and though one of them gets Judgment of Assets *cum acciderint*, yet as their Relief is only in Equity, they shall be paid in Average : Decreed *Mich.* 1718, *Wilson and Fielding*, 2 Vern. 763. (*Lucas Rep.* 426, S. C.)

But it is said in the above Case in 2 Vern. that if there had been Personal Assets, though of such a Nature that the Creditor could not have come at them without the Aid of a Court of Equity, yet they should have been applied in a due Course of Administration.

11. But where *H.* seised in Fee, and indebted by Bonds, by Will gives Legacies to his Children (whom he had otherwise provided for before) and devises his Lands

to his eldest Son in Tail ; and he, being also made Executor, pays the Bonds with the Personal Estate, and the Legatees brought a Bill to come against the Real Estate in the Place of the Bond-Creditors ; the Court seemed to admit, that if the Lands had descended, the Legatees might have been relieved in this Manner ; but since the Testator had devised them, it was resolved, that they ought to be exempted ; for it was as much the Testator's Intention that the Devisee should have the Land, as the others should have their Legacies ; and a specifick Legacy is never broken into in order to make good a pecuniary one ; and the Children being otherwise provided for, are not in the Nature of Creditors. *Per Harcourt*, Ld. Chan., upon an Appeal from a Decree of the Master of the Rolls, who held, that the Real and Personal Estate should be charged, that both the Debts and Legacies might be paid. *Hern and Merick*, 2 Salk. 416 (1 Will Rep. 201, S. C., where it is said, that in the Case of *Clifton ver. Birt*, Mich. 1720, this decretal Order was produced, and it appeared, that this Case was not resolved by Ld. Harcourt, but adjourned for further Consideration. *Vide also ibid.* 678, 681).

12. If Lands are devised in Trust, to pay Mortgages in the first Place, and then Legacies ; and the Trustee is made Executor, who mortgages the Lands to pay other Debts, the last Mortgage shall be paid before the Legacies. *Brent v. Best*, 1 Vern. 69.

13. The Husband in Consideration of his Wife's joining with him in a Fine, and parting with her Jointure of £40 *per Ann.* gives her Trustee a Bond to settle other Lands of £40 *per Ann.* on the Wife for Life, Remainder to the Heirs of his Body by her ; the Husband being indebted in other Bonds dies intestate, and the Wife takes Administration, and confesses Judgment to her Trustee. On a Bill by another Bond-Creditor, decreed the Wife's Bond, as to herself only, to be performed before the Plaintiff is paid ; but the Children to have no Benefit of this Bond preferable to the other Bond-Creditors. *Cottle and Fripp*, 2 Vern. 220.

(The Reason given, why the Children should not be preferred, is that, upon the wording of the Condition of the Bond, the Husband was to have been Tenant in Tail, and might have barred the Settlement, if made, as to the Children. 2 Vern. 221.)

14. If A. purchases Lands of B., and mortgages back these Lands for Part of the Purchase-Money, and gives a Note to B. for £200, the other Part thereof, and A. devises these Lands to be sold for Payment of his Debts ; this £200 Note, though for Part of the Purchase-Money, shall not be preferred to other Debts, nor be a Charge on the Lands in Equity. *Mich.* 1692, *Bond and Kent*, 2 Vern. 281.

15. If a Freeman of London gives a voluntary Judgment payable three Months after his Death, it shall be postponed to Debts by simple Contract, and to the Widow's customary Part ; but will bind the Freeman's legatory Part. *Fairbaird and Bowers*, 2 Vern. 202. (*Prec. in Chan.* 17, S. C., *Rawlinson*, Ld. Comm., said, He thought that the Judgment should be paid before Legacies, if there had been any. S. C. cited by Lord Talbot in the Case of *Cray and Hook*. *Vide Eq. Ca. Abr.* Part 2 [182].)

* 16. A voluntary Bond shall not, in a Course of Administration, take place of Real Debts, though by simple Contract, but shall, notwithstanding, be paid before Legacies. Decreed *per Lord Harcourt, Jones and Powell*.

[144] 17. If a Man recovers a Judgment or Sentence in France for Money due to him, the Debt must be considered here only as a Debt due on simple Contract. *Duplein v. De Rozen*, 2 Vern. 540.

18. The Arrears of Rent incurred in the Life-time of the Testator, shall be paid before Bond Debts, though reserved on a Parol Lease. *Willett v. Earle*, 1 Vern. 490, and *Philipps and Creech*, *cit. Ibid.*

19. If J. S. devises his Lands for the Payment of Mortgages, Judgments and Recognizances that affected the Lands and then other Debts, and there is a Recognizance not inrolled, it shall be taken but as an Obligation, and be paid as a Debt by Specialty. *Hil.* 1716, *Bothomley & al'* and *Lord Fairfax*, 2 Vern. 750.

(The Recognizance not being inrolled, is imperfect ; and although the Court may permit the Inrolment of it after the Time is elapsed, yet it is done with Caution, that it shall not prejudice any intervening Purchaser (to this Purpose see the Case of *F. & Good* and *Kendrick*, 2 Vern. 234), and the Statute of Frauds provides, that Judgment shall not, by having Relation to the first Day of the Term, bind Purchasers, nor affect the Land, but from the time of signing them in the Margin ; but it is silent as to Recognizances and Pocket Securities, which are more dangerous to Purchasers, and therefore more reasonable that this Recognizance should not bind but from the Time of the Inrolment : And it may fairly be presumed, that the Debt was otherwise satisfied

or secured, when the Recognizance was not inrolled. *Per* Id. Chan. *Cowper*, *Ibid.* 751, in S. C. ; 1 *Will. Rep.* 334, S. C. and P. held accordingly.)

20. So where a Recognizance being inrolled by special Order of the Court, after the Time for inrolling of it was elapsed ; and the Conusor betwixt the Date of the Recognizance and the Inrolling of it, borrowed Money of J. S. upon a Judgment, which was now over-reached by the Recognizance ; and the Estate of the Conusor being in Mortgage prior to the Recognizance, so that neither the Recognizance nor the Judgment could reach the Estate without the Aid of Equity ; the Court inclined to give the Preference to the Judgment Creditor. *Fothergill v. Kendrick*, 2 *Vern.* 231. That Bond-Debts and Debts ascertained shall be preferred to Debts which only sound in Damages. *Vide Whitchurch v. Baynton*, 2 *Vern.* 272.

* 21. T. S. entered into a Bond, wherein he bound himself and his Heirs to pay £100 within six Months after his Death, and became indebted to the Plaintiff *Neave* in £45 by simple Contract, and died intestate, not leaving Personal Assets sufficient to pay his Debts ; the Defendant was his Son and Heir, and had Real Assets from him by Descent of the Value of £100, and he took out Administration to his Father ; and six Days before the £100 became due, by the Condition of the Bond, agrees with the Oblige to convey the Freehold Lands descended to him in Satisfaction of the Bond, and the Conveyances were drawn and ingrossed accordingly ; but before the Execution of them, he gives the Oblige thirty Shillings to have the Consideration of the Deed raised, and made to be for so much Money paid instead of the Delivery up of the Bond ; but no Money was paid, but only the Bond delivered up ; *Neave* the Plaintiff demanding his Debt, he insisted he had paid the Bond out of the Personal Assets, and had none left to pay him ; whereupon he brought this Bill, and the Defendant insisted, that he being both Heir and Administrator had a Liberty to pay the Debt out of what Assets he pleased ; that he had not paid the Bond out of the Real Assets, nor ever intended so to do. But upon the whole Matter the Court declared the Bond to be well paid out of the Real Assets, and decreed the Debt and Costs out of the Personal Assets. *Hil.* 1695, *Neave and Alderton*.

22. Upon a special Report it was adjudged, that in relation to other Debts, in Point of Priority of Satisfaction, a Duty decreed should take place before Debts on simple Contract and Bonds, and next to Judgments. *Harding v. Edge*, 1 *Vern.* 143.

23. So where an Administrator paid Money on Specialties, though without Notice of Money due by Decree, and had fully admini-[145]stered the Assets ; yet he was obliged to pay the Money decreed. *Searle v. Hale*, 2 *Vern.* 37.

Note : *Searle v. Lane*, 2 *Vern.* 88, seems to be a rehearing of *Searle v. Hale*, 2 *Vern.* 37.

(A Court of Equity cannot compel an Executor to perform a Decree made against the Testator before a Statute acknowledged by him ; and a Prohibition granted to the Council of *York* accordingly. 1 *Eq. Abr.* 377. An Obligation becoming due after the Death of the Testator, shall be satisfied before a Decree in Chancery. *Styl.* 38. But the Law has been since changed, and Decrees are now held to be equal to Judgments at Law. *Vide Searle v. Lane*, 2 *Vern.* 88, and *The Bank of England and Morrice*, *Eq. Ca. Abr.* Part 2, by which this Point seems to be now fully settled.)

(C) WHAT SHALL BE A GOOD PAYMENT, TO WHOM, AND AT WHAT TIME.

1. If J. S. a Scrivener, lends the Money of A. to B. and takes Security by Mortgage, in Trust for A., and A. has the Security always in his Possession, and B. pays the Money to the Scrivener, who becomes insolvent, such Payment will not discharge B., for he having paid the Money without taking up his Security, is an Evidence that he trusted the Scrivener more than A. Decreed on View of Precedents. *Hen and Conishy*, 1 *Chan. Ca.* 93.

2. So if Money is paid to one who usually received Money for the Oblige, yet if such Receiver has not the Custody of the Bond, Payment to him will not be good. *Gerrard and Baker*, *Ibid.* 94.

3. A Man intrusts a Scrivener to put out his Money, he takes Bond for it, and afterwards delivered the Bond to the Oblige, but received the Interest from Time to Time, and afterwards called in the Principal ; and the Obligor paid the Principal to the Scrivener, and took a Note from him to deliver up the Bond (he having it not when the Money was paid in) ; then the Scrivener writes to the Oblige to send him

the Bond, which he accordingly does, but takes the Scrivener's Note, either to deliver back the Bond, or to pay the Money; before the Money paid the Scrivener breaks, and the Obligee for a little Money gets back the Bond from the Scrivener's Clerk, and puts it into Suit; and this Bill was brought by the Obligor to be relieved, and have the Bond delivered up; which was decreed accordingly, with Costs; for the Court held, that from the Time the Bond came into the Scrivener's Hands, he was Trustee for the Obligor (the Money being paid); and it is plain the Obligee trusted the Scrivener, not only with putting out his Money, but with the Custody of his Security. *Pase, 1691, Abbington and Orme.*

4. The Interest-Money of a Mortgage being paid to a Scrivener, who became insolvent; the Question was, who should bear the Loss. It was admitted, *first*, That if the Scrivener be intrusted with the Custody of the Bond, he may receive either Principal or Interest: *2dly*, That if the Scrivener be intrusted with the Mortgage-Deed, but not the Bond, he hath only an Authority to receive the Interest, but not the Principal, because the giving up the Deed is not sufficient to restore the Estate; but there must be a Reconveyance; whereas the giving up a Bond is in Law an Extinguishment of the Debt: *3dly*, That though the Scrivener has neither the Custody of the Mortgage nor Bond, yet if the Mortgagee agrees that the Mortgagor shall pay the Interest to the Scrivener, the Interest may be well paid to the Scrivener, as long as the Mortgagee lives: *4thly*, That if his [146] Executor receives Interest from the Scrivener, which became due after the Mortgagee's Death, he thereby renews the Agreement, and the Mortgagor shall not bear the Loss, if the Scrivener breaks, which was the principal Point in this Case. Decreed at the Rolls, and affirmed by *Cooper* Ld. Chan. on a Rehearing. 7 Ann. [1708-9]. *Whitlock and Waltham, 1 Salk. 157.*

5. If A. and B. being Trustees of Money, for the separate Use of a Feme Covert, lend it to C., who gives Bond to the Trustees, and the Trust is declared in the Condition, and the Bond is kept by the Feme; and B. having received Money for C. they settle an Account, and B. gives C. a Receipt for £100, as received for the Use of the Feme, and B. becomes insolvent, C. shall not be discharged of this £100, the Trust being declared in the Condition, and the Feme having the Bond in her Custody. Decreed *Hil. 1705, Baldwin and Billingsley, 2 Vern. 539.*

6. If there are two Executors, and one of them is decreed not to receive any more of the Testator's Estate, and a Creditor, by Mortgage to the Testator, being present at the pronouncing the Decree but not a Party to the Suit, pays Money to the Executor, against whom the Decree was, he shall pay it over again. Decreed *Trin. 34 Car. 2 [1682], Harvey and Mountague, 1 Vern. 57, 122, S. C.*

7. If an Obligor pay the Money to the Obligee after Assignment of the Bond, and Notice thereof, such Payment will not discharge him. *Per Lord Keeper, 2 Vern. 150.*

8. If a Feme Mortgagee, on her Marriage, settles the Estate on herself for Life, Remainder to the Issue of that Marriage, and the Mortgagor brings a Bill to redeem, and she omits setting forth the Settlement in her Answer, and the Mortgagor has a Decree to redeem, and he pays her the Mortgage-Money; and afterwards the Issue of the Mortgagee brings an Ejectment on the Settlement, and recovers the mortgaged Premises, the Mortgagor shall be relieved, having paid his Money pursuant to the Decree, and having been in no Fault; for if the Issue was cheated, it was by his own Mother. Decreed 1690, *Chapman and Duncomb, 2 Vern. 142.*

* 9. The Plaintiff was indebted to the Defendant upon two Notes, and the Defendant obtained Judgment at Law against him for the Money; and then desiring the Defendant's Forbearance, he told him, that if he would procure one *Defoy* to give him his Note for the Money, he would accept of it, and acknowledge Satisfaction on the Judgment, and deliver up the Plaintiff's Notes; and being to go forthwith out of England, he left the Plaintiff's Notes with his Agent here, to be exchanged for *Defoy's* in case the Plaintiff procured them, and the Plaintiff accordingly procured two Notes payable to the Defendant, which he delivered to the Defendant's Agent, and took up his own Notes; and the Attorney at Law staid all further Proceedings, but would not acknowledge Satisfaction on the Judgment, having no Orders for it from his Client; and before *Defoy* paid any of the Money, he failed, and then the Defendant proceeded at Law on the Judgment; whereupon the Plaintiff brought this Bill to be relieved, and suggested, that he had discounted the Money with *Defoy*, and made him Satisfaction; but he made no Proof of any such Thing, and therefore at the Hearing, his

Bill was dismissed by the Master of the Rolls ; and this Decree was affirmed by Ld. K. on Appeal. *Hil.* 1700, *Girbarr* and *Gairand*.

[147] 10. If a Mortgagee by Will remits Part of the Mortgage-Money, provided the rest be paid within three Years after his Death, and the Devisee fails to pay the Money, he shall lose the Benefit of the Devise. [Glover v. Portington.] 1 *Chan. Ca.* 52.

11. So if a Creditor agrees with his Debtor to take a Sum of Money less than his Debt, so that it be paid precisely at such a Day, and he fails of Payment, and afterwards brings his Bill, suggesting some equitable Excuses, why he did not precisely pay at the Day, and that he tendered the Money within a Day or two afterwards ; yet his Bill will be dismissed ; for *cujus est dare ejus est disponere*. *Sewell v. Musson*, 1 *Vern.* 210. But if the Security was bettered, as by another's becoming bound with him, *quære & vide* [Delamere v. Smith] 1 *Chan. Ca.* 110.

12. But if a Deed of Trust is erected for Payment of such Creditors as come in within a Year ; a Creditor will not be excluded, though he doth not come in till after the Year. *Dunch v. Kent*, 1 *Vern.* 260, 319, S. C. but a Bill may be exhibited, after the Expiration of the Year, to compel the Creditors, who stand out, to come in, or to renounce the Benefit of the Trust. *Ibid.*

(D) WHERE DEBTS OF A DIFFERENT NATURE ARE DUE, AND A GENERAL PAYMENT IS MADE, TO WHICH DEBT SHALL IT BE APPLIED.

1. If A. is indebted by Security, carrying Interest, and also on simple Contract, and he pays Money generally, it shall be taken to be paid towards Discharge of the Debt which carried Interest ; for it is natural to suppose, that a Man would rather elect to pay off the Money for which Interest was to be paid, than the Money due on Account. *Mich.* 1681, *Heyward* and *Lomas*, 1 *Vern.* 24. But *quære*.

2. For if A. indebted by Specialty, and also on simple Contract, pays several Sums, and enters them in his Book on account of what was due by Specialty, this Entry shall not be sufficient to make the Application ; for although the Rule of Law is, that *quicquid solvitur, solvitur secundum modum solventis* ; yet this Rule is to be understood when the Person, at the Time of Payment, declares on what Account he pays the Money ; but if the Payment is general the Application is in the Person receiving. *Per* Ld. Chan. *Hil.* 1707, *Manning* and *Westerne*, 2 *Vern.* 606.

3. If A. is indebted to B. by Bond, in which J. S. is bound as Surety, and also by simple Contract ; and A. states an Account of both Debts with B. and makes a Bill of Sale for securing the Balance, which proves deficient ; the Bill of Sale shall be applied towards the Discharge of both Debts in Proportion ; and *per* Ld. Chan. solely for this Reason, that both Debts had been cast into one stated Account, and the Bill of Sale made towards Satisfaction of the whole Debt. Decreed *Hil.* 1681, *Bevis* (In the Book, *Perris*) and *Roberts*, 1 *Vern.* 34.

4. If a Creditor by Judgment, and also by Bond, receives £200 in Part, of the Purchaser of the Estate of the Debtor, but gives no Notice that he would apply it to the Bond-Debt, it shall be applied towards Satisfaction of the Judgment, being Part of the Purchase-Money. Decreed *Trin.* 1687, *Bret* and *Marsh*, 1 *Vern.* 468.

[148] (E) WHAT CONVEYANCE OR DISPOSITION SHALL BE FRAUDULENT AS TO CREDITORS.

1. The Wife joined with her Husband in a Mortgage, and levied a Fine with Intent to bar her Dower ; and in consideration thereof the Husband agreed the Wife should have Redemption of the Mortgage ; and the Husband afterwards mortgaged the Estate twice more ; the subsequent Mortgagees brought their Bill to set aside the Agreement as fraudulent against them, which was decreed : But the Wife had her Dower secured to her. *Dolin v. Coltman*, 1 *Vern.* 294.

(By the 13 *Eliz. c.* 5. All fraudulent Conveyances of Lands, &c., Goods and Chattels, to avoid the Debt or Duty of another, shall (as against the Party only, &c., whose Debt or Duty is so endeavoured to be avoided) be utterly void, and every of the Parties to such fraudulent Conveyance, &c., being privy thereunto and justifying the same, shall forfeit one Year's Value of the Goods, &c., provided this Act shall not extend to Grants made *bona fide*, and upon good Consideration, to Persons not privy to such Collusion, or having no Notice or Knowledge thereof.)

2. The Father makes a voluntary Settlement on Trustees, on Trust, to raise Money to pay his Debts therein mentioned, and Portions for his younger Children, reserving £50 *per Ann.* to himself for Life, Remainder to his Son, &c., and the Father continues in Possession, and twelve Years after contracts Debts by Bond: And *per Hutchins* Ld. Comm. the Settlement is fraudulent as to the Plaintiffs, who are Bond Creditors, the Trustees having never entered; and a Deed, though not fraudulent at first, may afterwards become so by being concealed, or not pursued; but the other two Commissioners doubting, it was sent to be tried at Law. *Pasc.* 1692, *Hungerford and Earle*. 2 *Vern.* 261. (2 *Freem.* 120, S. C.)

(If A. makes a Bill of Sale to B. a Creditor, and afterwards to C. another Creditor, and delivers Possession, at the Time of Sale, to neither; after C. gets Possession of them, and B. takes them out of his Possession, C. cannot maintain Trespass, because the first Bill of Sale is fraudulent against Creditors, and so is the second; yet they both bind A., and B.'s is the elder Title, and the naked Possession of C. ought not to prevail against the Title of B. that is prior, where both are equally Creditors, and Possession, at the Time of the Bills of Sale, is delivered over to neither. *Trin.* 1700, *Baker and Loyd, Per Holt, C. J.* But as to fraudulent Conveyances and Bills of Sale, see the following Authorities, which are the most remarkable Cases in the Books on this Subject: *Yelv.* 196; *Cro. Jac.* 270; 1 *Brownl.* 111; 6 *Co.* 18; 3 *Co.* 80; *Moor.* 638; 2 *Bulst.* 226; 1 *Roll. Abr.* 779; *Palm.* 214; 2 *Leon.* 223; *Co. Lit.* 3 b; *Cro. Eliz.* 810; 11 *Co.* 48; *Dyer*, 351; 5 *Co.* 60; *Moor.* 615.)

3. If A. conveys Lands to the Use of himself for Life, with Power to mortgage such Part as he shall think fit, Remainder to Trustees to sell to pay all his Debts, and afterwards becomes indebted by Judgments, Bonds and simple Contracts; this Conveyance is fraudulent, as against the Judgment-Creditors, they having no Notice of the Settlement; for he having reserved a Power to mortgage what Part he pleased, it amounted, in Effect, to a Power of Revocation, and therefore fraudulent, as against Creditors by Judgment. *Trin.* 1705, *Tarback and Marbury*, 2 *Vern.* 510.

4. J. S. by a Bill of Sale made over his Goods to a Trustee for the Defendant, who lived with him as his Wife, and was so reputed; he also purchased a Lease of the House wherein he dwelt, in the Name of Trustee, and declared the Trust thereof to himself for Life, then in Trust for the Defendant during the Residue of the Term; and the Court held the Bill of Sale to be fraudulent as to the Plaintiffs, who were Creditors; but as to Declaration of the Trust of the Term, that it was good, and not liable to his Debts, the whole Term [149] never being in him; and it being so settled on the Purchase; and that he might have given the Money to the Defendant to have purchased the Lease herself. *Hil.* 1701, *Fletcher and Lady Lilley* (In the Book, Sidley). 2 *Vern.* 490.

5. The Plaintiff had brought his Action against M. for lying with his Wife; and 13 *Jan.* 1689, M. made a Conveyance of his Land to Trustees, in Trust, to pay his Debts mentioned in a Schedule annexed to the Deed, and such other Debts as he should appoint, within ten Days in *Hilary* Term following; the Plaintiff recovered £5000 Damages against M. and brought this Bill to be relieved against the Deed, as fraudulent against him, and made to defeat him of his Debt. *Per Cur.* This Deed is not fraudulent, either in Law or Equity, for such Debts as are named in the Deed; for the Plaintiff was no Creditor at the making of the Deed; and though it were made with an Intent to prefer his real Creditors before this Debt, when it came afterwards to be a Debt; yet it was a Debt founded in *Maleficio*, and therefore it was conscientious in him to prefer the other Debts before it; but the Plaintiff may come in upon the Surplus after the Debts mentioned in the Schedule, or appointed within ten Days, pursuant to it, are satisfied. *Mich.* 1699, *Leckner and Freeman*. (*Proc. in Chan.* 105, S. C. in *totidem Verbis*; 2 *Freem.* 236. *Hil.* 1699, *Leckner and Freeman*, S. C. Held the Deed was not fraudulent; the Reporter says the Master of the Rolls cited a Case, where a Man made a Settlement for Payment of his own proper Debts in the first Place, and to prefer them before, if not exclude, such Debts, for which he was bound as a Surety only; and that was held to be a fraudulent Deed; only because he kept it in his Custody, and the Creditors had no Notice of it. But here it doth not appear where the Deed was kept, and so shall be presumed to be in Trustees Hands, and not in M.'s, there being no Proof touching that Matter; and a Deed shall not be presumed fraudulent, unless it appear so, or be so proved. *Ibid.* 237.)

* 6. A Man binds himself and his Heirs in a Bond, and dies, leaving a Real Estate

to descend to his Heir, and the Heir having aliened the Real Estate, the Obligee brought a Bill against the Heir and Purchaser to be relieved, on the Statute against fraudulent Devises (*act*); and Id Chan. relieved him. *Easter 1702, Bateman and Bateman.* Note: It was objected, that the Statute being introductive of a new Law, the Relief on it ought to have been at Law.

(a) By the 3 d 4 W. d M. All Wills concerning Lands, or any Rents, Profits, Term, or Charge out of the same, whereof the Devisors shall be seised in Fee simple, in Possession, Reversion or Remainder, shall be deemed to be fraudulent, and void against Creditors upon Bonds or other Specialties, their Executors, Administrators, &c., and such Creditors shall have their Actions of Debt against the Heir at Law, and the Devisees, jointly, &c.

* 7. Though by the Statute against fraudulent Devises, a Man is prevented from defeating his Creditors by his Will; yet any Settlement or Disposition he shall make in his Lifetime of his Lands, whether voluntary or not, will be good against Bond-Creditors, for that was not provided against by the Statute, which only took Care to secure such Creditors against any Imposition which might be supposed in a Man's last Sickness; but if he gave away his Estate in his Life-time, this prevented the Descent of so much to the Heir and consequently took away their Remedy against him, who was only liable in respect of the Lands descended; and as a Bond is no Lien whatsoever on Lands in the Hands of the Obligor, much less can it be so, when they are given away to a Stranger. *Deereed Trin. 1718, Parslowe and Weedon.*

(*Vernon* always grumbled at the Determination of this Case, and never forgave it the Lord *Macclesfield*, saying it was contrary to the constant Practice of the Court: *Per Talbot, C. Hil. 1734, in the Case of Jones and Marsh, Ca. in Eq. Temp. Talbot, 64.*)

If a Devise for Payment of Debts do not make a sufficient Provision for them, it will not take the Case out of the Statute against Fraudulent Devises. *Hughes v. Doublen, 2 Bro. Chan. Ca. 614.*

[150] CAP. XXIII.

CUSTOMS OF LONDON AND YORK.

- (A) What shall be deemed a Freeman of London's Estate and subject to the Custom.
- (B) What Disposition made by a Freeman of his Estate shall be good or void, being in Fraud of the Custom.
- (C) Persons intitled to the Benefit of the Custom, and subject to it.
- (D) Concerning the Custom with respect to the Children of a Freeman; and here of Advancement, bringing into Hotchpot, Survivorship and Forfeiture.
- (E) Concerning the Widow of a Freeman, and what shall be a Bar of her Customary Share.
- (F) Concerning the Legatory or dead Man's Share, what shall go out of it, and how it shall be distributed.
- (G) Concerning the Custom of York.

(A) WHAT SHALL BE DEEMED A FREEMAN OF LONDON'S ESTATE, AND SUBJECT TO THE CUSTOM.

1. If a Freeman of *London* has a Mortgage in Fee, this shall be counted Part of his Personal Estate, and will be subject to the Custom. [*Thornborough v. Baker,*] 1 *Chan. Ca. 285, per Cur.*

(When this Custom first began, the Citizens of *London* had no Regard at all to a Real Estate; for they did not suppose any Freeman of *London* would purchase such Estate, but would employ his whole Fortune and Stock in Trade, and for the Benefit of Commerce; which is the Reason that neither Estates of Inheritance, nor Freeholds in Houses, Lands, &c., are within the Custom. *Mich. 1710, Clavell and Littleton, arguendo.*)

2. But a Lease for Years, waiting on the Inheritance of a Citizen, shall not be reckoned a Chattel, to be divided among the Children [151] by the Custom; agreed by Counsel, and admitted by the Court. [*Rich v. Rich,*] 2 *Chan. Ca. 160.*

3. A Citizen and Freeman of *London*, possessed of a Lease worth £1500, bought the Reversion and Inheritance thereof in the Name of Trustees, for £150 and died; and whether this Lease, being Assets at Law, should be Part of his Personal Estate, subject to the Custom of *London* (there being no Declaration that it should attend the Inheritance) was the Question; and it was decreed, that though this Lease would be Assets at Law to pay Debts, yet it should attend the Inheritance, though there was no Declaration of Trust that it should do so, and not be liable to the Custom; *per Nottingham, Ld. Chan.*, and this Decree was confirmed on a Rehearing by *North, Ld. K. Hd.* 1683, *Dowse and Derivall*, 1 *Vern.* 104. The Custom of *London* shall not prevent the Attendance of a Term on the Inheritance, *per Nottingham, Ld. Chan.*, in *Tiffin v. Tiffin*, [1] *Vern.* 1.

* 4. On a Marriage of *B.*'s Daughter with *A.*, a Freeman of *London*, *B.* the Father, settles a Term for Years in Trust, that *A.* the Husband, should receive the Rents and Profits till such Time as *D.* and *E.* or the Survivor of them, should otherwise appoint, and then such Person as they should appoint; and for want of such Appointment, for such Persons as the said *A.* by Will should appoint; and for want of such Appointment, then in Trust for the Executors and Administrators of *A.* The Trustees having made no Appointment, the Question was, whether this Term should go according to that Appointment, or be looked on as Part of *A.*'s Personal Estate, who was a Freeman of *London*, and so go according to the Custom; and *Ld. K.* was of Opinion, that it was not to be looked upon as Part of *A.*'s Personal Estate, because it was never in him, but was settled by his Wife's Father, and therefore not subject to the Custom. *Hd.* 1702, *Grice and Gooding*.

5. If a Freeman of *London* is made both Executor and residuary Legatee, and he dies before he has made his Election, whether he will take as Executor or Legatee; yet the Legacy must be considered as such, and will be subject to the Custom of *London*. [*Civil v. Rich.*] 1 *Chan. Ca.* 310, *per Ld. Chan.*

6. A Citizen of *London*, having been a great Chymist, and spent great Part of his Estate in that Study, had given to the Defendant, who had married one of his Daughters, a little before his Death, several Receipts for making of Strong Waters, which the Plaintiff, who had married the other Daughter, and who had only £400 Portion given him, alledged were worth £500 *per Ann.* certain Profit; and to induce the Court to think they were of Value, he offered the Defendant £500 for his Interest in them, and prayed, that upon his bringing his £400 into Hotchpot, the Defendant might be obliged to account for them; but *Ld. Chan.* said, That he would not so far countenance these Receipts (which is only a Piece of Quackery, and serves only to cheat the People) as to put a Value on them in Chancery; and the Plaintiff refusing to bring his £400 into Hotchpot, the Bill was dismissed. *Mich.* 1682, *vide Jenks and Holford*, 1 *Vern.* 61.

[152] (B) WHAT DISPOSITION MADE BY A FREEMAN OF HIS ESTATE SHALL BE GOOD OR VOID, BEING IN FRAUD OF THE CUSTOM.

1. If a Freeman of *London* is possessed of a Term for Years, and he voluntarily assigns it as a Provision for his Child, and dies; yet his Wife shall have her customary Share (*a*) therein; so found by a Jury on an Issue directed out of Chancery, and tried before *Hale, C. J.*, *City and City*, 2 *Lev.* 130.

(*a*) Though the Father cannot dispose of the customary Part from his Children; yet he may by his Will appoint, that if one dies before Twenty-one, another shall have his Part. 1 *Lev.* 227. But *quære, & vide* [*Pate v. Hatton*] 1 *Chan. Ca.* 199, *cont.*

2. If a Freeman of *London* makes a Deed of Trust of a Term for Years to the Use of his Will, and he by Will declares it to *J. S.*, this Deed and Declaration will be void, being against the Custom. Decreed 10 *Car.* 1 [1634-35], *Nott and Smithies*, 1 *Chan. Rep.* 84.

3. A Citizen of *London*, being possessed of a Term for Years, assigns the same in Trust for himself for Life, paying £20 *per Ann.* to his Son by his first Wife, Remainder to his said Son during the Residue of the Term; and it was made a Doubt, whether this Assignment was good within the Custom of the City of *London*, so as to bind the other Children; and it was referred to the Recorder to certify. *Pasc.* 1689, *Clark and Leatherland*, 2 *Vern.* 98.

4. A Freeman of *London* having three Bastards by *T. J.* confesses a Judgment

to her in £1000 deferred for Payment of £500 in three Months after his Death ; and it was held, that this Judgment being voluntary, should not prevail against Debts by simple Contract, nor against the Widow of the Freeman, but that she must have her Share according to the Custom of the City, without any Regard had to this Judgment ; but his Debts being paid, the Judgment will bind the legatory Part. Deceased *Hil.* 1690, *Fairclerk* and *Barbers* (*In the Book*, Bowers), 2 *Vern.* 202. (*Ante* [1 Eq. Ca. Abr.] p. 143 ; *vide Prec. in Chan.* 17, S. C.)

5. A Freeman of *London*, by Deed in Nature of a Will (the Words of which were, *I give and devise*, but it was sealed and delivered) gave several Goods to his Children, but kept them in his Possession ; and it was held *per Cur.* in Favour of the Widow, that if Goods are absolutely given away by a Freeman in his Life-time, this will stand good against the Custom ; but if he has it in his Power, as by keeping of the Deed, &c., or if he retains the Possession of the Goods, or any Part of them, this will be a Fraud upon the Custom. *Mich.* 1692, *Hall* and *Hall*, 2 *Vern.* 277 ; *vide Turner v. Jennings*, 2 *Vern.* 612, S. P.

6. A Freeman of *London* having one Daughter, and three Grandchildren by a Son deceased, by Deed assigns over several Leases in Trust, to pay any Sum not exceeding £1000 as he should appoint ; and by Deed and Will he appoints £500 to his Daughter, and the Residue to his Grandchildren ; and it was held, that this was in Fraud of the Custom, and void as to the Moiety which the Daughter was intitled to. Deceased *Trin.* 1712, *Turner* and *Jennings*, 2 *Vern.* 685.

7. But if Money be given by a Freeman of *London* to be laid out in Land, and settled on his eldest Son for Life, Remainder to his [153] first and other Sons in Tail ; this shall not be reckoned any Part of the Personal Estate ; neither is the Son obliged to bring it into Hotchpot, to intitle him to a Share of the Personal Estate. *Per Id.* *Chan.* *Mich.* 1685, *Annard* and *Honeywood*, 1 *Vern.* 345. (2 *Chan. Ca.* 117, 129 ; 2 *C. Rep.* 180 ; 2 *Freem.* 56.)

8. A Freeman of *London*, who was a Widower, and had several Children, being possessed of a considerable Leasehold Estate, on a second Marriage conveys these Leases, in consideration of £2000 Portion, in Trust for himself for Life, Remainder to his Wife for Life, in Lien and Bar of all Dower, customary Estate, &c., Remainder to the first Son of that Marriage, and so to every other Son ; and in the Settlement there was an Agreement, that the Trustees should sell these Leases, and invest the Money in the Purchase of Lands of Inheritance, to be settled to the Uses aforesaid ; but the Husband dying before any Purchase made, it was held, *first*, That the Wife was barred from claiming any other Part of the Personal Estate ; *2dly*, That the Children by the first Venter could have no Right to those Leases ; neither would this Settlement prevent the Children of the second Marriage from coming in for a Share of the rest of the Personal Estate ; for by the Agreement these Leases are now to be considered in Equity, as if a Purchase had been actually made, and the Freeman had paid the Money out of his Pocket. Deceased *Mich.* 1700, *Hancock* and *Hancock*. (*Gillb. Eq. Rep.* 95, S. C. cited, says, The Children by the first Venter brought their Bill for an Account of the Personal Estate, and insisted it wholly belonged to them, and that the second and her Issue ought to be excluded from any Share thereof, by reason of the Provision made for them ; that it was decreed, that this Composition with the Wife bound her ; but her Children being Infants, were left to make their Election when they came of Age, whether they would abide by that Provision made for them by that Settlement, or relinquishing that, come in for their customary Shares only : And afterwards, on a Rehearing, what should come of the Customary Part, it was held to fall into the Husband's Share ; and in case no Disposition was made thereof by him, it must go according to the Statute of Distributions. *Vide* [1 Eq. Ca. Abr.] p. 157, Pl. 4 & 5 ; 2 *Vern.* 605, 665, S. C.)

(C) PERSONS INTITLED TO THE BENEFIT OF THE CUSTOM, AND SUBJECT TO IT.

1. If an Heir or Co-Heir has a Real Estate settled on him by his Father, he shall notwithstanding come in for his Share of the Personal Estate according to the Custom of *London* (a), certified to be the Custom. *Hil.* 1683, *vide Cecil* and *Rick*, 1 *Vern.* 216. [*Percival v. Crispe*], 2 *Jon.* 204, S. P. *per Cur.*

(a) In *London* there hath been a Court of Orphans Time out of Mind, and there hath been a Custom, that, if any Freeman or Freewoman dies, leaving Orphans under Age, unmarried, they have had the Custody of their Body and Goods, and that the Executors

and Administrators have used to exhibit true Inventories before them: and if there appeared to be any Debt, to be bound to the Chamberlain, to the Use of the Orphans, in a reasonable Sum, to make a good Account thereof upon Oath after they have received them; and if they refused, to commit them till they were bound; this is a good and reasonable Custom: and if the Ecclesiastical Court will compel them to make an Account there against this Custom, a Prohibition lies. *Hob. 247.*

2. If a Freeman of *London* leaves *London*, and resides in the Country, yet on his Death his Personal Estate shall be liable to the Custom. *Webb v. Webb, 2 Vern. 110.*

(Shall be liable though he did not inhabit or die in *London*. 1 *Idol. Rep.* 316; 1 *Sed.* 250. All the Children of a Freeman, though he dies, and they were born out of *London*, shall be Orphans. 1 *Vent.* 180; 1 *Mol.* 80. If a Legacy be given by one Freeman to the Children of another, it shall be subject to the Custom. *Hutt. 30.* If an Orphan is taken out of the Custody of a Person to whom the Court of Orphans have committed him, they may imprison the Offender till he produces the Infant, or is delivered by Course of Law. 1 *Sed.* 250; *Raym.* 116, S. C. adjudged; 1 *Ler.* 162, S. C. adjudged. So if any one (though not a Freeman) without the Consent of the Court of Aldermen, marry such Orphan under the Age of Twenty one, though out of the City, they may fine him, and imprison him for Non-payment thereof: for if the Custom should not extend to Marriages out of the City, their Power would be but in vain. *Hil. 23 & 24 Car. 2. The King and Harwood, 1 Vent.* 178; 1 *Ler.* 32, S. C. adjudged; 1 *Mol.* 79, S. C.)

[154] 3. A citizen of *London* dies, leaving a Widow and no Children, but has several Grandchildren living at the Time of his death: and the Question was, whether they were within the Custom of the City of *London*, or not: and *Ld. Chan.* taking Time to consider the Case, and consulting the Recorder and several of the Aldermen, delivered his Opinion, that his Grandchildren were not within the Custom of the City of *London*. *Pasc. 1686, Fowke and Hunt, 1 Vern. 397.* (*Vide Northey v. Strange, and Northey v. Burbage, S. C. 2 Eq. Ca. Abr.* 291, 331.)

4. But an after-born Child shall come in with the rest of the Children for a customary Share of a Freeman of *London's* Personal Estate. *Decreed Trin. 1718, Walsam and Skinner.* (*Prec. in Chan.* 499, S. C., says it was so agreed by the Counsel on both Sides. *Gilb. Eq. Rep.* 153, S. C. *in totidem Verbis* with *Prec. in Chan.*)

(D) CONCERNING THE CUSTOM WITH RESPECT TO THE CHILDREN OF A FREEMAN: AND HERE OF ADVANCEMENT, BRINGING INTO HOTCHPOT, SURVIVORSHIP, AND FORFEITURE.

1. Any Provision made by the Father, in his Life-time for his Children, is an Advancement within the Custom, unless it be declared by Writing, that they are not sufficiently advanced: and for some Time it was held, that in such Writing there must be Mention made, what Sum they received from their Father, because of bringing it into Hotchpot. *Per Curiam, Fowke v. Leven, 1 Vern. 88.* But whether there be any Difference in giving a Portion before or after Marriage, or whether Presents at Christenings or Lyings-in are to be reckoned an Advancement, *quære, & vide Jenks v. Hulford, Vern. 61.*

2. By the Custom of the City of *London*, where a Child is married with the Father's Consent, and there is a Portion given in Marriage, such Child is debarred from claiming any Benefit of the Orphanage Part, unless the Father shall by Writing under his Hand and Seal, not only declare, that such Child was not fully advanced, but likewise mention in certain, how much the Portion given in Marriage did amount unto, that so it may appear what Sum is to be brought into Hotchpot. *Civil and Rich, 1 Vern. 216.* But this Matter seems to be well settled by the following Case and Certificate.

3. Sir *Ralph Box*, a Freeman of *London*, had two Sons and two Daughters, both the Daughters were married in his Life-time: and upon the Marriage of one of them with the Plaintiff, Sir *Ralph* entered into Articles to give £2000 with her for her Portion; and there being an Expectation that her Grandmother would leave her something considerable at her Death, which the Plaintiff's Friends were not willing to rely on: Sir *Ralph* covenanted to pay the further Sum of £400, for what the Grandmother should leave her: the Marriage took Effect, and Sir *Ralph* paid the £2000 and £400, and the Grandmother died, and left the Plaintiff's Wife nothing: and now Sir *Ralph* being dead, the Plaintiff and his Wife brought this Bill, suggesting that she was not fully advanced, though Sir *Ralph* had declared by his Will, that she was, and therefore

ought to have an Account of his Personal Estate, and her Portion ought to be made up to her a full customary Part; the Court desired the Re [155]-corder of *London* to certify what the Custom of the City was in such Cases, who certified, &c. (a), and Ld. Chan. said, that the Certificate being the proper Trial in this Case, and being against the Defendant; for when the Certainty of the Advancement appears, the Father's declaring or not declaring her fully advanced, does not avail; therefore an Account must be taken of the Estate, and the £2000 must be made up her full customary Part, and the £400 paid for the Grandmother's Legacy must not be taken as any Part, that being paid on a Bargain only. Decreed *Trin.* 1699, *Chace and Box* [1 Ld. Raym. 484].

(a) To——, May it please your Lordship, whereas by an Order of his Majesty's High Court of Chancery of the 14th of *May* last, in a Cause there depending between *James Chace* and *Elizabeth* his Wife, Plaintiffs, and Sir *Ralph Box*, Knt. Defendant, the Lord Mayor and Aldermen are required to certify the Custom of *London* by the Mouth of the Recorder, in the Points following, *viz.* Whether if a Citizen of the said City hath, in his Life-time, advanced any of his Daughters in Marriage with a Portion of Money, and shall, by any Writing under his Hand and Seal, declare such Daughter was by him fully advanced, such Daughter, by the Custom of the said City, is not excluded from having or demanding any further, or other Part of her Father's customary Estate, as an Orphan of the said City; or whether she shall, after her Father's Decease, have a Share of his Customary Estate, bringing what she received on her Marriage into Hotchpot: We, the Lord Mayor and Aldermen of the said City of *London*, having heard the said Parties, and their Counsel learned in the Law, do humbly certify your Lordship, that by the Laws and Customs of the City, if any Freeman's Child, Male or Female, be married in the Life-time of his or her Father, by his Consent, and not fully advanced to his or her full Part or Portion of his or her Father's personal or Customary Estate, as he shall be worth at the Time of his Decease; then every such Freeman's Child so married as aforesaid, shall be excluded and debarred from having any further Part or Portion of his or their said Father's personal or customary Estate, to be had at the Time of his Decease, except such Father by his Last Will and Testament, or some other Writing by him written, and signed with his Name or Mark, shall declare or express the Value of such Advancement; and then every such Child, after the Decease of his or her said Father, producing such Will or other Writing, and bringing such Portion so had of his or her Father, or the Value thereof, into Hotchpot, shall have as much as will make up the same a full Child's Part or Portion of the customary Estate his or her said Father had at the Time of his Decease; *notwithstanding* such Father shall, by any Writing under his Hand and Seal, declare such Child was by him fully advanced. Dated, &c.

4. A Freeman of *London* having advanced his Daughter with a Portion, and intending to exclude her from any further Share (on some Displeasure taken against her) made his Will, and thereby recites, that he had advanced her with £300 and upwards, gives her five Shillings, and no more, and died; and after his Death the said Daughter brought a Bill to have the said £300 made up a Moiety of his Estate (he having no other Child, and the Custom not extending to Grandchildren), and had a Decree accordingly; for the Words *and upwards*, are *certum in incerto*, and not to be regarded, though it was objected, it might be £1000 or £2000, or any other Sum above £300. Decreed *Hil.* 1704, *Bright and Smith*. (2 *Freem.* 279, S. C. decreed, that the Daughter should come in for her Share, bringing the £300 in Hotchpot: This reporter says in a Note, that it was supposed that the Word *upwards* was inserted purposely to make it uncertain, which made it look like a Trick; but if he had taken Notice, that he had advanced his Daughter, and not said what, she had been barred. *Ibid.* 280.)

5. A settlement of a Real Estate on a Child is no Advancement, nor to be brought into Hotchpot. 1 *Chan. Ca.* 160. Neither does a Devise of a Real Estate bar the Child of its customary Share of the Personal Estate. *Vide Stanton v. Platt*, 2 *Vern.* 753. (*Vide Cox and Belitha*, *Eq. Ca. Abr.* Pt. 2, p. 270.)

6. If a Freeman of *London* advances a Child in Part by a Portion which is to be brought into Hotchpot, such Portion or Advancement must be brought into the Orphanage Part only. *Per* Ld. Chan. *Mich.* 1685, *Beckford and Beckford*, 1 *Vern.* 345; 2 *Vern.* 281, S. C. decreed, *viz.* that the Estate left by the Testator shall be first divided into three Parts, *viz.* the Widow's third Part, the Orphanage Part, and the Legatory or Testamentary Part, and then what the Children in Part advanced had received, shall be brought into the Orphanage Part only, and not to increase the whole Estate: And therefore,

[156] 7. If there be an only Child in Part advanced in the Father's Lifetime, *such Child shall not bring her Part into Hotchpot*, there being none in equal Degree with her; agreed between *Fane and Bence*, 2 Vern. 234. *Ibid.* 629, 630, S. P. *Dorn and Lord Delaware*: And though there be a Widow, yet she is to have her Third exclusive, *Stanton v. Platt*, *Ibid.* 753, 754, S. P., for if it were to be brought in, it must fall again into the Child's Part.

(*Vide* S. P. *Cleaver and Spurling*, *Eq. Ca. Abr.* Pt. 2, p. 270; *Mosel*, 179; 2 P. Wms. 526, S. C.; S. P. *Garon v. Trippet*, *Ambl.* 189.)

8. If a Freeman of *London* dies, leaving two Daughters and a Wife, and one of the Daughters dies, though after a Division and Partition of the Personal Estate, yet the surviving Sister shall have the Whole of the Orphanage Part. *Per* Ld. Chan. *Trin.* 1713, *Leoffes and Lewen*. (*Gillb. Eq. Rep.* 32, 33, *Leoffes and Lewen*, S. C. and P.; *Prec. in Chan.* 370, 372, S. C. and P.)

9. If a Child intitled to an Orphanage Share dies before Twenty one, and unmarried, her Orphanage Share will survive to the rest of the Children, though she makes a Will, and devises it away at seventeen Years of Age. *Wilcocks v. Wilcocks*, 2 Vern. 558.

10. But if a Man marries an Orphan, who dies under twenty-one, her Orphanage Part shall not survive to the other Children, but shall go to the Husband. *Looke and Lewen*, 1 Vern. 88. (*Vide* [Anonymous] *Prec. in Chan.* 537.)

11. If a Man marries a City Orphan, and her Portion is in the Chamber of *London*, and he dies before her Age of twenty-one, this shall not be looked upon as a *Depositum* for the Husband, but as a *Debitum* or *Chose in Action*, which he not having taken out, or reduced into Possession, must survive to the Wife. *An. Pheasant's Case*, 2 Vent. 340. 1 *Chan. Ca.* 181, S. C. *cit.* Vern. 89.

12. If the Daughter of a Citizen of *London* marries in his Life time against his Consent, unless the Father be reconciled to her before his Death, she shall not have her Orphanage Share of his Personal Estate; and it would be unreasonable to take the Custom to be otherwise. *Hil.* 1 & 2 Jac. 2, *Foden and Howlett*, 1 Vern. 354, *Per* Ld. Chan.

(E) CONCERNING THE WIDOW OF A FREEMAN, AND WHAT SHALL BE A BAR OF HER CUSTOMARY SHARE.

1. If a Freeman of *London* dies without Issue, his Widow shall have her Widow's Chamber, and a Moiety of the rest of the Personal Estate; and as to the other Moiety, she may plead herself Administratrix to her Husband, and a Proviso in the Act of Distributions, that it should not prejudice the Custom of *London*, and the Plea will be allowed. *Hil.* 1682, *Matthews and Newby*, 1 Vern. 133. But *quære* as to this last Point, for the Proviso in the Act extends only to the customary Share; and therefore the dead Man's Share must be divided according to the Statute of Distributions.

2. A Freeman of *London* having no Children, made his Will, and thereby devised a Chattel-Lease to one, and all his Books to another, and as to all the rest of his Estate, consisting in Money, Goods, Mortgages and Credits, he gave the yearly Profits and Benefit thereof to the Plaintiff, his Wife, for Life, by quarterly Pay-[157]ments; and directed his Executors out of the Estate, to pay the Plaintiff's Funeral Charges after her death, and devised to her the Use of his Plate, &c., during her Life, and directed that his Stock and Estate in the Hands of one J. C. should remain there during his Wife's Life, and the Product paid to her for her Maintenance, and devised several particular Legacies; and after the Death of his Wife, devised over the Surplus and Residue to his Brother's Children; on a Bill brought by the Widow it was decreed at the Rolls, that by the Custom of *London* she should have her Widow's Chamber, and one entire Moiety of the Personal Estate, after Debts paid, as well of the Lease and Books which were specifically devised away, as of all the Rest and Residue of his Estate by the Custom of the City of *London*, and should have the Benefit of the other Moiety for Life, by the Will; and decreed an Account accordingly; which Decree was confirmed upon an Appeal to the Lords Commissioners. *Mosh.* 1689, *Webb and Webb*, 2 Vern. 110.

3. J. W. a Freeman of *London*, on a Treaty of Marriage with M. P. a Widow, who had a considerable Fortune and several Children, agrees that she should have only £600 of her Fortune, and the Residue to be settled for her separate Use, and after her Death, for the Benefit of her Children; and accordingly an Indenture was prepared and executed before Marriage, whereby she, with his Assent, assigns over her Fortune to Trustees, in Trust, that she should receive the Profits of it for her own

separate Use during her Life, and after her Death, that the same should go and be divided equally amongst her Children ; and *J. W.* in Consideration of the intended Marriage and Marriage-Portion of £600, makes a Settlement on her and at the End of the Deed covenants, that if the said *M. P.* should survive him, then his Executors should pay and deliver to the said *M. P.* £600 out of his Personal Estate : The Marriage takes Effect, *J. W.* dies without Issue ; and it was insisted upon, that the Widow was intitled to this £600 in the first Place, pursuant to the Marriage-Agreement, and to a full Moiety of the Personal Estate, as his Widow, by the Custom of *London* ; but the Master of the Rolls held, that the Agreement mentioning him a Citizen of *London*, shews that the Custom might well be in View at that Time, and that this Compounding for £600 in all Events, exempted her out of the Reason of the Custom ; and decreed accordingly. *Hil.* 1711, *Whithill* and *Phelps*, vide Letter (B) Case 7th (*Qu.* 8th), *S. P.* (*Proc. in Chan.* 325, *S. C.* and Decree ; *Gilb. Eq. Rep.* 81, *S. C. in totidem Verbis* with *Proc. in Chan.*)

* 4. A Widower and a Widow being about to intermarry, and having only Personal Estate, by Articles made before Marriage agreed, that in case the Husband survived, he should have £2000 only out of his Wife's Personal Estate and the rest to be at her Disposal, &c., and in case the Wife survived, then she was to have £2000 out of the Husband's Personal Estate, without saying *only*, or *no more* : The Husband, being a Freeman of *London*, died, and his Wife brought her Bill for an Account of his Personal Estate, over and above the £2000, and to be let into her customary Share thereof ; but it was decreed, that the equal Construction of these Articles must be to exclude the Wife from any further share out of the Estate ; and though the Words were not so full to exclude her ; yet the Intent of the Articles appearing to be a mutual reciprocal Agreement between them for settling each other's Claim, ought not to be extended larger on one Side than on the other ; and therefore the Wife must have only the £2000. Decreed *Mich.* 1714, *Pott* and *Lee*. (*Gilb. Eq. Rep.* 95, *S. C.* cited in the following Case by the Name of *Pitt* and *Lee*, *in totidem Verbis*.)

5. On a Treaty of Marriage between the Defendant and her late Husband, *Edmund Waterson*, deceased, Indentures of Lease and Release, by way of Settlement, were executed ; whereby, in Consideration of the intended Marriage, and £2000 Marriage-Portion, Lands to the Value of £200 *per Ann.* were limited to the Defendant for Life, for her Jointure, and in full of all Dower and Title of Dower to any Lands, Tenements, or Hereditaments, whereof or wherein her said intended Husband was or should be seised of any Estate of Inheritance during the Coverture between them ; and in the Release, *William Waterson*, Father of *Edmund*, covenanted, that [158] in case *Edmund* survived him, then all his Real and Personal Estate, whereof he should die seised or possessed, should descend and come to *Edmund*, his Heirs, Executors and Administrators : The Marriage takes Effect, *William Waterson* dies ; whereby some Real Estate and a considerable Personal Estate came to *Edmund* ; then *Edmund* makes his Will, and having no Issue, devises £500 to his Wife, and some other Legacies, and devises the Residue of his Personal Estate to be laid out in a Purchase, to be settled on the Plaintiffs, *Bonnells*, who were his Nephews, and makes the Plaintiff, *Atkins*, his Executor, and dies ; and the Bill was brought against the Widow for a Discovery and Account of the Personal Estate, and that it might be laid out in a Purchase, and settled pursuant to the Directions in the Will. The Widow insisted by her Answer, that her Husband was a Freeman of *London*, and that he dying without Issue, she, as his Widow, was intitled to a Moiety of his Personal Estate, as her customary Share ; and whether she were so intitled, or not, was the single Question. For the Plaintiffs it was urged that she was not, for that by this Settlement she was provided for already ; and by the Custom of *London*, where the Widow is compounded with, as they call it, she cannot be let in to any other Part of her Husband's Personal Estate ; that this was founded on very good Reason, that the Wife might not depend for Subsistence on the Casualties of Trade and other Contingencies, whereto the Personal Estate might be liable ; and therefore, since she had in all Events secured herself of a Provision, and taken out so much from the Husband's Power of disposing of, she ought to rest satisfied with that Provision ; that if this had not been intended in full of her customary Part, there would have been negative Words, or some Proviso in the Settlement, that it should not extend to exclude her of her customary Share ; that the Personal Share was under Consideration, as appears by the Covenant concerning the Disposition of it, in case the Husband survived his Father ; and therefore the Provision being general,

must be intended to be compleat, and to exclude her from any other; and on this Side were cited several Cases, wherein a Composition with the Wife has been held a Bar of her customary Share. On the other Side it was argued, that she ought not, by this Settlement, to be excluded from her customary Part; that if no Settlement had been made, she would, on her Marriage, have been intitled to her Dower at Common Law, out of the Real Estate, and to her customary Share out of the Personal Estate; that this Jointure came only in lieu of Dower of the Real Estate, and that by the Act of Parliament [159] 27 H. 8, and therefore could be no Recompence for her customary Share of the Personal Estate; that she was intitled to one by the Common Law, and to the other by the Custom; and a Recompence provided for one of them only, could be no Recompence for the other, which she claimed by a distinct independent Title; that there being no negative Words in the Deed, made it the stronger; that they did not intend to exclude her of her customary Share; and therefore it was tied up barely in Bar of her Dower and Title of Dower; and suppose by the Settlement there had been a Provision for her out of the Personal Estate only, and that had been expressed to be in full of her Share of the Personal Estate, would that have excluded her from her Dower of the Real Estate? no more ought this Jointure, which goes only in Bar of her Dower of the Real Estate, be construed to exclude her from her customary Share of the Personal Estate; and the Entries in the City Books must be intended where the Composition (as they call it) was only out of the Personal Estate; and as to the Cases which have been in this Court, they are all to this Purpose. Ld. Chan. said, He thought the Reason of the Case very strong for the Defendant, but that this Point might be settled in a proper Way, desired to have the Custom certified, whether such Jointure before Marriage being limited to be only in Bar of her Dower, should preclude her likewise of her Customary Share; afterwards the Custom was certified to be, *That where a Freeman, before Marriage, makes a Settlement on his intended Wife, and the same is thereby declared to be in full Lieu and Bar of her Share of his Personal Estate, that she is thereby barred to claim any of his Personal Estate after his Death; but if the same were expressed to be in Bar only of Dower, or Thirds of Lands, Tenements and Hereditaments, they said the same had never been in Controversy in this Court, nor had they any Custom concerning it.* It was afterwards decreed to be no Bar of the customary Share. *Pasc. 2 Geo. 1, Atkins and Waterson. (Gilb. Eq. Rep. 94, S. C., but the Certificate and Decree do not appear. Vide the Case of Babington and Greenwood, Eq. Ca. Ab. Pt. 2, p. 721, S. P.)*

6. In this Case the Custom of *London* was certified to be, that if a Woman, before her Marriage with a Freeman, accepts a Settlement out of his Personal Estate, without any Notice taken of the Custom, this bars her of any customary Share of his Personal Estate after his Death, if she survives; but note, this means only, that she cannot singly and merely, by virtue of the Custom, claim any other Part; not that she is thereby debarred from the Benefit of any Gift or Devise he thinks fit to make her. *Trin. 1727, Lewen and Leuen. (Select Ca. in Ch. 14, May 4, 1725, S. C. but no Decree. 3 Will. Rep. 15, S. C. Mich. 1727, determined on the Certificate, that the Wife was in this Case barred of her customary Part.—The Reason of the Custom in the present Case seems to be, for that the Wife does not here trust to the Custom for her Provision. By King, C., Ibid. 17.)*

(F) CONCERNING THE LEGATORY OR DEAD MAN'S SHARE, WHAT SHALL GO OUT OF IT, AND HOW IT SHALL BE DISTRIBUTED.

1. A Citizen of *London* devised £700 for Mourning; and the Question was, whether it should come out of the whole Estate, or only out of the Legatory Part; for it was insisted, that if there had been no Directions by the Will, or if the Will had only directed, that the Expences of the Funeral shall not exceed such a Sum, then the Deduction must have been out of the whole Estate: But *per Cur'*, Mourning devised by the Will must come out of the legatory Part, and not lessen the Orphanage or customary Share. *Mich. 1691, Deakins and Buckley, 2 Vern. 240.*

2. If a Freeman of *London* dies intestate, leaving a Wife and Children, one Third of his Personal Estate, and the Widow's Chamber, must go to the Wife, and one other Third to the Children, and the dead Man's Third must go according to the Statute of [160] Distributions, *viz.* two Thirds to the Children, and the other Third to the Wife,

and that this dead Man's Third was not at all under the Controul of the Custom ; agreed as an undoubted Rule. *Trin.* 1718, *Walsam and Skinner*. *Vide Wilcocks v. Wilcocks*, 2 *Vern.* 559, S. P. (*Vide ante* (C), pl. 4 [1 *Eq. Ca. ABR.* 154].)

3. If a Freeman of *London* devises Legacies more than the legatory Share comes to, the Legatee shall abate in Proportion ; and if a Legacy be given to a Child, though this shall go out of the legatory Part, and cannot go in Part of Orphanage ; yet if the legatory Part is not sufficient, the Legatee must abate in Proportion. *Vide Stanton v. Platt*, 2 *Vern.* 753. *Vide Webb v. Webb*, 2 *Vern.* 110.

4. A Citizen of *London* being possessed of a Personal Estate to the Value of £18,000, and having made a competent Jointure to his Wife on his Marriage, it was agreed, that he might dispose of two Thirds of his Personal Estate by his Will, *viz.* one third Part, which would have belonged to his Wife, had he not made a Settlement on his Marriage in lieu thereof, by which Means her customary Part comes to be at his Disposal ; and one other third Part, which is the legatory Part, which every Citizen may dispose of by his Will ; and having two Sons and two Daughters, he makes his Will, and by it devises two Thirds of his whole Estate to his Daughters, and one Third to his Sons ; hereupon the Chamber of *London* would have distributed his Estate in this Manner ; *first*, To make an equal Division of the customary Part, *viz.* of £6000 amongst all the four Children, which was £1500 a piece, and then allot two Thirds of the Residue to the Daughters, and one Third to the Sons ; so that by this Division each Daughter should have only £5500, and each Brother should have £3500. But *Ld. Chan.* declared, that the Intent of the Testator did to him plainly appear to be, that his Daughters should have two intire Thirds of his whole Estate, which is £6000 a-piece ; and it was decreed accordingly. *Pasc.* 1681, *Love and ———*, 1 *Vern.* 6.

5. In this Case it was held that where a Freeman of *London* made his Will, and devised Legacies to his Children more than their Orphanage Part would amount unto, without taking any Notice whatsoever of the Custom, that these Legacies shall be a Satisfaction of their Orphanage Shares, to which they were entitled by the Custom in the Nature of a Debt, and that the Legacies shall not come out of the Testamentary or dead Man's Part, because it is held in this Court, that they shall not take both by the Will and the Custom too ; but where such Legacies are less than their Orphanage Shares, whether they shall be *pro tanto* in Satisfaction, he was in great Doubt, and sent it to the City to certify ; though he seemed rather to think they should, in that Case, take both, especially if none of the Devises in the Will were thereby disappointed. *Trin.* 1729, at the Rolls, *Nicholls and Nicholls*.

(G) CONCERNING THE CUSTOM OF YORK.

1. If a Freeman of *London* dies in the Province of *York*, seised and possessed of a Real and Personal Estate, the Custom of the City of *London* for the Distribution of his Personal Estate shall [161] prevail, and controul the Custom of the Province of *York*. *Cholmley v. Cholmley*, 2 *Vern.* 47.

2. So if a Freeman of *London* dies in *York*, his Heir shall come in for a share of the Personal Estate, though by the Custom of *York* he is debarred thereof ; for the Custom of *London*, which follows the Person, shall be preferred to that of *York*, which is only local. *Mich.* 1688, *Cholmley and Cholmley*, 2 *Vern.* 82.

3. If a Man within the Province of *York* dies intestate, leaving a Wife and no Child, the Wife shall have one Moiety of the Personal Estate by the Custom, and the other Moiety being without the Custom, shall be distributed according to the Act of Distributions. Decreed *Trin.* 1687, *Stapleton and Sherrard*, 1 *Vern.* 134, 305, 314, 432, 465, S. C.

4. A man who lived in the Province of *York* died intestate, having advanced all his Children in his Life-time ; and it was held, that the Personal Estate which he died possessed of should be settled according to the Act for settling Intestates Estates. *Mich.* 1683, *Goodwin and Ramsden*, 1 *Vern.* 200 ; cited (as it seems) 1 *Vern.* 305, by the name of *Ramsden v. Gudgeon*. *Vide Benson v. Benson*, 2 *Vern.* 263, where a Person who was an Inhabitant of the Province of *York* died intestate, having before his Marriage made a Settlement on his Wife in Bar of her customary Share, and leaving Children ; the Question was, how Distribution should be made ; but there is no Resolution.

5. The Intestate being an Inhabitant in the Province of *York*, left Issue a Son and

a Daughter only, and no Widow ; the Daughter had a Portion given her in Marriage in Lieu and full Satisfaction of what she might claim by the Custom of the Province of *York* ; the Son was also advanced by a Settlement of Lands ; the Question was how the Estate should be distributed. For the Heir it was insisted, that now the Custom of the Province of *York* is to be quite laid out of the Case, and the same Distribution made of the Estate, as of any other Intestate's Estate, and by Consequence the Daughter to bring her Portion into Hotchpot, but the Heir to have a full Share, without regard to what Lands had been settled upon him : But *per Cur.* the Daughter must not bring back her Portion into Hotchpot, for that came in Lieu of her customary Part, and was the Price the Father thought fit to give her for the same. *Trin.* 1692, *Gudgeon and Ramsden*, 2 *Vern.* 274.

6. An Inhabitant of *York* having on his Marriage settled his Real Estate on himself for Life, Remainder as to Part on his Wife for a Jointure, Remainder of the Whole to his first and other Sons in Tail, Remainder to his own right Heirs ; the Ques[161]tion was, whether the Son was thereby excluded by the Custom of the Province of *York* from having any share of his Father's Personal Estate ; which Point being directed to be tried on an Issue at Law ; and it being found that he was thereby debarred, the same was decreed accordingly. *Trin.* 1700, *Constable and Constable*, 2 *Vern.* 375.

[162] CAP. XXIV.

DECREE.

- (A) Concerning the Drawing up and Inrolling of Decrees.
- (B) Who are bound by the Decree.
- (C) Concerning Error in the Decree.
- (D) Concerning the Performance and Execution of a Decree.

(A) CONCERNING THE DRAWING UP AND INROLLING OF DECREES.

1. In the Drawing up a Decree, it is not sufficient for the Register to recite the Bill and Answer, and then add, that upon the Reading of the P^{roofs}, and hearing what was alledged on either Side, it was decreed so and so ; but the Facts which were proved, and allowed by the Court as proved, must be particularly mentioned in the Decree ; otherwise if a Bill of Review be brought, those Facts shall be taken as not proved ; for else a Decree could not be reversed by a Bill of Review. [Brend v. Brend,] 1 *Vern.* 214. [Broad v. Broad,] 2 *Chan. Ca.* 161, S. P.

2. A Decree being pronounced in *Michaelmas* Term, and the Defendant dying soon after, on a Motion to have it inrolled, it was held by Ld. Chan. to be a Thing often done ; and that it was like a Judgment at Law, which, if pronounced before, may be entered after the Party's Death ; and the Decree was inrolled accordingly. [Anonymous,] 2 *Chan. Ca.* 227. [Clapham v. Phillips,] *Nel. Chan. Rep.* [Rep. Temp. Finch], 169, S. P. [Yeavely v. Yeavely,] 3 *Chan. Rep.* 73, S. P.

3. So where a former Decree of Dismission being pleaded in Bar to a second Bill, it was objected, that the Dismission and Decree could not be pleaded in Bar, because the Decree was not signed and inrolled ; and if the Defendant would have it, that it was a Suit still in Being, then the Plea was a Plea in Abatement only : But *per Cur.* Either that Suit was for the same Matter as the present, or not ; if not, you ought to have moved to have had the Plea re[163]ferred ; but if it is, then that Suit is either depending or determined, and either way is pleadable. *Hil.* 1684, *Pritman* and *Pritman*, 1 *Vern.* 310.

4. But if an Administrator obtains a Decree, that he, his Executors or Administrators, may redeem a Mortgage, and he dies intestate before Inrolment of the Decree, such Decree shall not afterwards be inrolled for the Benefit of his Administrator, for the first Administrator's Title is gone. [Warren v. ———,] 2 *Chan. Ca.* 248.

(B) WHO ARE BOUND BY THE DECREE.

1. All original Parties to the Suit, and likewise all those who come in *pendente Lite*, and are made Parties thereto by Process, are bound by the Decree. [Venables v. Foyle,] 1 *Chan. Ca.* 3, 153.

2. If there are two Executors, and one of them by Decree is prohibited to receive any more money, or meddle farther with the Testator's Effects, and a Mortgagor to the Testator, who was present at the Hearing and Pronouncing the Decree, afterwards pays the Mortgage-Money to the Executor who had the Decree against him, he must pay it over again. *Vide Harvey v. Montague*, 1 *Vern.* 57, 122, S. C. But for this *vide* Title Notice [1 *Eq. Ca. ABR.* 330], and what shall be a *Lis pendens*.

3. An Agreement by some Tenants of a Manor to inclose or stint a Common, will be decreed in Equity, and such Decree will bind two or three humourous Tenants who oppose it. [Thirveton v. Collier,] 1 *Chan. Ca.* 48. (*Vide Delabeere v. Beddingfield*, 2 *Vern.* 103, *acc. as to stinting, but cont. as to enclosing*.)

* 4. So where a Bill was brought by some few Tenants of *Greystock* Manor against the Lord, to settle the Customs of the Manor as to Fines upon Deaths and Alienations; and an Issue was directed to be tried at Law, and found, that upon the Death of the Lord or Tenant, there was due an uncertain Fine, but not exceeding a Twenty-penny Fine, that is, twenty Years old Rent; and upon Alienation of the Tenant, a Fine altogether uncertain and arbitrary; and it was insisted upon, that there being but some of the Tenants Parties to this Bill, the rest would not be bound by this Trial: but Ld. K. held they would; and he said he remembered the Case of *Nether Wiersdale*, between Lord *Gerard* and some few Tenants, and Lord *Nottingham's* Case in the Dutchy, concerning the Customs of *Daintree* Manor, for Grinding and Baking at the Lord's Mill and Bake-house, and said in these and a hundred others, all were bound, though only a few Tenants Parties; else, where there are such Numbers, no Right could be done, if all must be Parties; for there would be perpetual Abatements; and it is no Maintenance for all the Tenants to contribute, for it is the Case of all; and in the Exchequer and Dutchy it would certainly be so, and no difference when it is here; and he cited Sir *William Boothby's* Case in the Dutchy last Michaelmas Term, where a Bill concerning the Custom of Grinding at the Lord's Mill was amended and made to be on Behalf of the Plaintiffs and all the rest of the Tenants; and as to the Objection, that the Courts of Exchequer and Dutchy are Courts of Revenue, and go by other Rules than ordinary Courts of Equity, he said that was of no weight, and held, that all must be bound here as well as there. *Mich.* 1701, *Brown and Howard*.

[164] 5. The Plaintiff, being Vicar of the Parish of *Wirksworth* in *Derbyshire*, brought a *Subpœna* in the Nature of a *Scire Facias*, against the Defendants, to enforce the Performance of a Decree made 5 *Car.* 1, by which (amongst other Things) it was decreed, that all the Miners within the said Parish, as well for the Time being, as to come, should pay the *tenth Dish* of Lead Ore cleansed, &c., to the Vicar of the said Parish for the Time being, for Tithes, &c. The Defendants appeared to the *Scire Facias*, and set forth, that they claimed not in Privity under any of the Parties to that Decree, and that some of them were seised of Mines not then found out or opened, and that there had not been any Performance or Execution of the Decree, and other Matters in Avoidance. The Court held that the Decree extends to all Miners within the Parish, for the Time being, or to come; so the Defendants are within the Letter, and expressly bound by the Decree, and as long as the Decree stands in Force must obey. *Mich.* 1690, *Brown and Booth*, 2 *Vern.* 184.

6. If a Devisee obtains a Decree to hold and enjoy the Lands against the Heir, who it was supposed had suppressed the Will, and pending this Suit a third person gets an Assignment of a Mortgage made by the Testator, and then purchases the Equity of Redemption of the Heir, having Notice that there was such a Will, the Purchaser shall not be admitted to dispute the Justice of the Decree, nor to try at Law, whether the Will was not cancelled by the Testator. *Finch v. Newnham*, 2 *Vern.* 216.

7. But if a Mortgagee, after ten Years Suit, four Reports, and two Trials at Law, obtains a Decree to foreclose, and an Account is taken, &c., yet such Decree, &c., will not hinder a subsequent Incumbrancer from redeeming the first Mortgagee, neither

shall he be concluded by the Account taken in the first Suit. *Morrel v. Westerne*, 2 Vern. 663.

(C) CONCERNING ERROR IN THE DECREE.

1. Matters assigned for Error in a Decree, must appear in the Decree itself; for being inrolled, it is such a Record as must be tried by itself; but if a Fact be mistaken at the Hearing and decretal Order, that may be rectified upon a Rehearing. [Combs v. Proud.] 1 Chan. Ca. 54; vide Bills of Review and Reversal, Title Bill [1 Eq. Ca. Abr. 81].

2. If a Feme Sole exhibits a Bill, and during the Proceedings marries, and no Notice is taken of it, but the Cause proceeds, and there is a Decree for the Defendant; this will not be sufficient Cause to reverse the Decree, being no Error appearing in the Decree, but a Matter which should have been pleaded in Abatement, and of which the Defendant alone might have taken Advantage. [Cramborne v. Dalmahoy.] 1 Chan. Rep. 231.

3. So if a Mortgagor has a Decree against the Mortgagee to have a Redemption, and pending a Reference the Suit abates by the Death of one of the Parties, Defendants; but the Account goes on, and the Master is attended by the Executor of the Party dying, and makes his Report, which is confirmed and decreed; this after twenty Years shall not be sufficient Error, so as to intitle the Devisee of the Mortgagor to a new Account. 30 Car. 2 [1678-79], *Slingsby and Hale*, 1 Chan. Ca. 122.

[165] * 4. Sir George Downing brought an Appeal in the House of Lords from a Decree made in the Court of Chancery, by Consent, suggesting, that though the Register in drawing up the Order had drawn it as a Decree by Consent (and the Minutes were so too); yet he never did consent to such Decree, nor his Counsel neither; or if they did, it was without his Authority, and made Affidavit of it; but the Appeal was dismissed. Hil. 1699, *Downing and Cage*.

* 5. *John Grice*, by Will, devises his Real Estate to his Wife for Life, and after to *Thomas* his Son, for ninety-nine Years, if he should so long live, charged with the Payment of £500 a-piece to *John* and *Thomas*, the two eldest Sons of his Son *Thomas*, at their Age of twenty-one Years, and dies; afterwards *John* the Grandson dies in 1694, an Infant, and Intestate; after, in 1698, *Thomas* the Father dies, without taking Administration to *John* his Son; and this Bill was brought to have an Account and Distribution of the Personal Estate of *John Grice* the Grandfather, *Thomas* the Father, and *John* the Son; and on hearing the Cause the Court had decreed the £500 Legacy, devised to *John* the Grandson, to be distributed among his Mother, Brother and Sisters, equally; and a Bill of Review being brought to reverse this Decree, the first Error assigned was, that on the Death of *John* the Grandson, in the Life of *Thomas* his Father, his £500 Legacy vested in his Father by the Statute of Distributions, though he took not Administration to him, and therefore ought not to have been distributed as the Personal Estate of *John* the Grandson, but as the Personal Estate of *Thomas* the Father, and then the Mother would be entitled to a Third of it; and it was admitted that it ought to have been so; but it was insisted, that this Error did not appear in the Body of the Decree, as drawn up; for though it was laid in the Bill, that the Grandson died in 1694, and the Father in 1698; and that it is confessed in the Answer, they died about the Times in the Bill; yet the Defendants being Infants, their Admission is not sufficient, unless proved; and it shall be supposed it was not proved, because if it had, the Court could not make such a Decree, and the Proofs cannot now be referred to. On the other side it was said, taking the Facts to be, as it appears on the Decree, as drawn up and inrolled, it is a plain Error, and it must be so taken now; and the Question is not at present, whether an Infant's Admission be good, or not. Id. K. held it an Error appearing in the Body of the Decree; so the Decree was opened. Trin. 1706, *Grice and Goodwin*. (S. C. *Proc. in Chan. cit.* 2 Eq. Ca. Abr. 281.)

6. There having been a Decree made for a very liberal Allowance for the Maintenance of an Infant out of a Trust Estate, and not according to the Trust; upon a Rehearing it was endeavoured to set aside the Decree: But *per Cur'*, where an Infant recovers by Decree of the Court, the Court may by the Approbation of the Infant's [166] Relations, allot him a Maintenance, though no Provision in the Trust for that Purpose; and this founded on natural Equity; and though in this Case the Decree went beyond natural Equity, yet a Decree being made in it, we will not reverse it, though possibly we would not have made the Decree. Trin. 1691, *Englefield* and *Englefield*, 2 Vern. 26.

(D) CONCERNING THE PERFORMANCE AND EXECUTION OF A DECREE.

1. The Lord Chancellor for the Time being will inforce the Execution of Decrees, though made by a prior Lord Chancellor; and though they are alledged to be unreasonable, yet will assist with the utmost Process of the Court, till they come regularly before him to be reversed. 29 *Car.* 2 [1677-78], *Lawrence and Berney*, 2 *Chan. Rep.* 127.

2. If by Decree Mortgage-Money is to be paid at a certain Time, yet in case of inevitable Necessity the Court may enlarge the Time, though the Decree be signed and inrolled. [Knight *v.* Bevis,] 1 *Chan. Ca.* 64.

3. The Court had decreed, that either the Defendant should pay a Sum of Money by a Time therein for that Purpose limited, or in Default thereof, the Plaintiff should hold and enjoy the Lands charged therewith; and a Writ of Execution of the Decree had issued, and an Attachment for Non-performance thereof; and upon the Return of the Attachment, the Defendant moved he might appear and be examined; and it was insisted he ought to be admitted thereto, for that he might shew that the Process issued not regularly, or that he had paid the Money, or had a Release, &c. But the Master of the Rolls ordered the Process to go on, and would not admit the Defendant to appear to be examined, unless he would give Security to perform the Decree. *Mich.* 1688, *Roper and Roper*, 2 *Vern.* 91.

* 4. The late Lord *Allington's* Estate was decreed to be sold for Payment of his Debts and Legacies, and that all Parties interested should join in the Sale; and accordingly the Estate (being about £2000 *per Ann.*) was sold to *J. S.* and Conveyances executed, in which there was a Covenant for farther Assurance; afterwards *J. S.* sold away £1600 *per Ann.* of the Estate to another Person and was constrained to deliver all the Deeds to him, so that he had none left to make out any Title to the £400 *per Ann.* that remained unsold; and therefore moved the Court, that the Parties to the Conveyance to him might be ordered to execute a Duplicate of the Conveyance to be kept by him, they refusing to do so on the first Motion; *Ld. K.* said, He looked upon it to be within the Covenant for further Assurance; and ordered that a Duplicate should be executed, but that it should be indorsed on it, that it was only a Duplicate; but the Matter being moved again by the other Side, the Order was discharged; for that the Decree being once executed, the Court had no more to do in it. *Mich.* 1700, *Napper and Lord Allington*.

That a Decree is equal to a Judgment, and to be paid accordingly in a Course of Administration, *vide* Title Creditor and Debtor [1 *Eq. Ca. Abr.* 138]; that the Benefit of it survives to the Wife, *vide* Title Baron and Feme [1 *Eq. Ca. Abr.* 57].

[167] CAP. XXV.

DEEDS, AND OTHER WRITINGS.

- (A) Who is obliged to produce them, to whom and upon what Terms, and how they are to be kept.
- (B) Of suppressing and cancelling Deeds and Writings, and the Consequence thereof.
- (C) Deeds, and other Instruments entered into by Fraud, &c., in what Cases to be relieved against.
- (D) Defect in a voluntary Deed, in what Cases aided in Equity.

(A) WHO IS OBLIGED TO PRODUCE THEM, TO WHOM, AND UPON WHAT TERMS,
AND HOW THEY ARE TO BE KEPT.

1. The Plaintiff was a Remainder-Man in Tail in a voluntary Settlement, and the Bill was for a Discovery of the Deed; but it appearing to the Court, that the Intail was discontinued, the Court would not relieve the Plaintiff. *Hil.* 1688, *Kelley and Berry*, 2 *Vern.* 35; *vide* Bills of Discovery, Title Bill [1 *Eq. Ca. Abr.* 75].

2. So where a Bill was exhibited to discover an ancient Deed of Intail, alledged to

be in the Defendant's Hands, and the Defendant pleaded a Conveyance made to himself of the Estate in Question; and that, if there was any such Intail, the same was discontinued: the Court allowed the Plea, and said, they would not aid the Issue in Tail against a Discontinuance, though by a voluntary Conveyance. *Pase*, 1688. *Bunce and Phillips*, 2 *Vern.* 50. Where Affidavit must be made, that the Party who prays a Discovery of a Deed, &c., has it not in his Possession, *vide* Title Affidavit, Letter (A) [1 Eq. Ca. Abr. 13].

3. If an Heir at Law brings a Bill for Deeds and Writings against the Widow of his Ancestor, he must establish her Jointure, though it was made after the Marriage, and not pursuant to any Marriage-[168]-Articles, but purely voluntary. *Towers v. Darius*, *Vern.* 479. *Per Curiam*, *vide* [Anonymous] 2 *Chan. Ca.* 4.

4. A. brought a Bill against one who was Assignee of a Lease: and charged, that the Defendant knew that the Lease was expired, and that the same did appear by Writings in his Custody. The Defendant pleaded, that he was Purchaser of the Lease, and that at the Time of the Purchase he was informed, that there were fifty-seven Years to come in the Lease, and therefore gave after the Rate of nineteen Years Purchase for it; and the Plea was allowed; and a Demurrer also. *Worcester v. Parker*, 2 *Vern.* 255.

5. A Bill was exhibited for a Discovery, whether in a Mortgage made by A. to B., which had been assigned to the Defendant, there was not some Trust declared for the Benefit of the Plaintiff. The Defendant by Answer denied there was any Trust declared for the Plaintiff; and the Answer being replied to, the Question at the Hearing was, whether the Defendant should be obliged to produce the Deed; and Ld. K. said, He would not oblige him; for by this Method all Purchasers might be blown up. But the Reporter adds a *Quære tamen*. *Hall v. Adkinson*, 2 *Vern.* 463. For this *vide* how far Purchasers without Notice are favoured Title Purchase [1 Eq. Ca. Abr. 353].

6. If there be a Deed of Settlement, under which two Persons claim, the Court will order it to be brought into Court for its safer Custody, and both Parties to use it as they have occasion, and take Copies of it, if they please. [Banbury v. Briscoe.] 2 *Chan. Ca.* 42.

(If a Man seised of Lands in Fee hath divers Charters, Deeds, and Evidences, and maketh a Feoffment in Fee, either without a Warranty, or with Warranty only against him and his Heirs, the Purchaser shall have all the Charters, Deeds, and Evidences, as incident to the Lands & *ratione Terræ*, to the End he may better defend the Land himself, having no Warranty to recover in Value: for the Evidences are as it were the Sinews of the Land, and the Feoffor not being bound to Warranty, hath no Use of them; but if the Feoffor be bound to Warranty, so that he is bound to render in Value, then is the Defence of the Title at his Peril; and therefore the Feoffee in that Case shall have no Deeds that comprehend Warranty, whereof the Feoffor may take Advantage; also he shall have such Charters as may serve him to deraign the Warranty Paramount; also he shall have all Deeds and Evidences which are material for the Maintenance of the Title of the Land: but other Evidences which concern the Possession, and not the Title of the Land, the Feoffee shall have them. *Co. Lit.* 6 a; 1 *Co.* 1, 2.)

* 7. A. on the Marriage of his Son, settled several Lands in this Manner, *viz.* as to Part, to the Use of himself for Life, and after to the Use of his Son for Life, then to his first and other Sons in Tail, and for Want of such Issue, to the Use of the Plaintiff, who was his Brother, and his Heirs; and as to the other Part of the Lands, to the Use of the Son for Life, and after to the Use of the Wife for her Jointure, then to the first and other Sons in Tail; and for want of such Issue, to the Plaintiff and his Heirs; the Son and Wife died without Issue in the Life-time of A., and after their Deaths A. got the Settlement, and cut it in Pieces; but the Counter-part [169] was intire, and in the Hands of A., and the Bill was brought to discover it, and to have it preserved; and the Counter-part being confessed in the Answer, the Plaintiff obtained an Order at the Rolls to have it brought into Court; and a Motion was made to have that Order discharged, for that the Remainder to the Plaintiff was merely voluntary, and therefore he ought not to have any Aid from a Court of Equity; but the Court would not discharge the Order, but made the Deed be brought into Court, there to remain, and thereby hinder A. from selling the Estate from the Plaintiff. *Tree* 1694. *Brookbank and Brookbank*.

(B) OF SUPPRESSING AND CANCELLING DEEDS AND WRITINGS, AND THE CONSEQUENCE THEREOF.

1. The Defendant suppressed a Marriage-Settlement, by which a Remainder in Tail Male was limited to the Plaintiff's Father; and all the prior Estates being spent, upon Proof made, that the Settlement came to the Defendant's Hand, and that he had confessed it in Answer to a former Bill, though now he denied it; the Master of the Rolls decreed the Plaintiff should hold and enjoy the Estate, and this Decree was confirmed by Ld. K. *Trin.* 1700, *Eyton and Eyton*, 2 *Vern.* 380. (*Prec. in Chan.* 116, S. C. *Vide Dalston and Coatsworth, Eq. Ca. Abr. Pt. 2, 287; 1 P. Wms. 731.*)

2. So where a Person confessed, that he in a Passion had burnt his Marriage-Articles; but it being made appear, that he produced them at the Execution of a Commission subsequent in Time to the Day on which he pretended to have burnt them, he was committed to the *Fleet*, until he should produce them; and although he afterwards made Oath he had them not, and could not produce them, and that it was insisted for him, that although the Burning of the Articles was a great Misdemeanor, yet a Man was not to suffer perpetual Imprisonment, because he could not do what was impossible for him to do; yet he could not be discharged until he had consented to admit the Articles were to the Effect in the Bill. *Trin.* 1706, *Sampson and Ramsey (In the Book, Sanson v. Rumsey)*, 2 *Vern.* 561; *vide* [*Gartside v. Ratcliff*] 1 *Chan. Ca.* 292, 293, S. P.

3. If A. on his Marriage with B. settles Lands on her for a Jointure, which were subject to an Intail, and C. the Brother of A. is privy to the Intail, and ingrosses the Jointure Deed, and has the Deed of Intail in his Custody, and owns that he concealed it, being under an Apprehension that A. would dock the Intail, and A. devises the Inheritance to J. S. and dies without Issue, though C. recovers in Ejectment on the Deed of Intail; yet Equity will decree the Widow her Jointure; but J. S. being a voluntary Devisee, can have no Relief. *Mich.* 1691, *Raw and Pole*, 2 *Vern.* 239. decreed, and affirmed in the House of Lords. *Vide* Title Notice [1 *Eq. Ca. Abr.* 330]. (*Prec. in Chan.* 35, *Raw and Potts*, S. C., *Mich.* 1691.)

(C) DEEDS AND OTHER INSTRUMENTS ENTERED INTO BY FRAUD, &C., IN WHAT CASES TO BE RELIEVED AGAINST. (*For this vide* Title Agreements [1 *Eq. Ca. Abr.* 16].)

1. A. for £300 granted to the Defendant B. a Rent-Charge of £300 *per Ann.* out of Lands in *Ireland* of £1000 *per Ann.* to hold to B. and his Heirs, to commence from the first *Michaelmas* or *Lady Day*, after the death of A. without Issue Male, with a Proviso, if the said A. had any Issue Male, who should attain the Age of twenty-one Years, the Grant should be void: A. died without Issue; and on a Bill to be relieved against this Rent Charge, the Court decreed a Reconveyance or Lease thereof on Payment of £300 and Interest: it appearing in the Cause by Proof, that A. was young and necessitous, and had lived an idle dissolute Life, and that the Debaucheries, in which B. was often a Companion with him, would soon end his Days; that he made this Bar-[170]-gain without the Advice of any Friends or Counsel of his own; and that he was utterly incapable of getting Children, as appeared by the Oaths of his Surgeons. *Pasc.* 1684, *The Earl of Ardglass and Muschamp*, 1 *Vern.* 237.

2. But where A. had an Inn in *Newcastle* descended to him which was let at £64 *per Ann.* but subject to a small Mortgage, and A. being very poor, was inveigled to sell it for £80, and afterwards brought a Bill to be relieved, it was dismissed: Ld. Chan. declaring, that though the Bargain was not a fair one, yet as it was not attended with strong Badges of Fraud, there could be no Relief against it. *Mich.* 1702, *Wood and Fenwick. (Prec. in Chan.* 206, S. C. accordingly. S. C. but not S. P. *post*, 270.)

3. If a Bond be entered into by Force and Terror, but so as not to make it *Duress*, the Court may relieve against it, at least not suffer it to be carried into Execution in Equity. *Vide* [*Att.-Gen. v. Sothon*] 2 *Vern.* 497, *per Cur.*

4. A Man possessed of a Lease for three Lives of a Rectory, devised the Rectory by his Last Will; but that being void, it came to his three Daughters, as Coheirs and special Occupants: There being a Suit in Chancery, the Husband of one of the Daughters, fearing to be in Law, and being made to believe that he should be forced to pay the Costs, released the Arrears that should be coming to him for his Share of the Rectory to the other Sisters, who were to bear the Charge of the Suit; and his

Share of the Arrears amounting to £1000 the Release was set aside, it being a Misapprehension in him. *Hil.* 1681, *Gee and Spencer*, 1 *Vern.* 32; *vide Ibid.* 20, where it is declared by Ld. Chan. to be the constant Rule in Equity, to avoid a Release, where there is *Suppressio Veri*, or *Suggestio Falsi*. (*Vide Broderick and Broderick, Eq. Ca. Abr.* Part 2, 244, 480.)

(A. had a Judgment of £6000 against B. B. gave A. a Legacy of £5 and died: A. on Receipt of this £5 gave the Executor of B. a Release in this Manner: *I acknowledge to have received of C. £5 left me as a Legacy by B., and do release to him all Demands which I against him, as Executor of B. can have, for any Matter whatsoever*; and it was adjudged, that the Generality of the Words, *All Demands*, should be restrained by the particular Occasion mentioned in the former Part thereof, *viz.* the Receipt of the £5 Legacy, and should not be a Discharge of the Judgment. *Pasc.* 1 *W. & M. Knight and Cole*, 1 *Lev.* 101, adjudged.)

(D) DEFECT IN A VOLUNTARY DEED, IN WHAT CASES AIDED IN EQUITY.

1. A. having two Nephews, who were his Heirs at Law, by Conveyance executed in his Life-time, settled all the Lands to the Use of himself for Life, Remainder to his Issue, if he should happen to have any, Remainder to his Nephews; but in the Enumeration of the Particulars of the Lands, a Mistake was made; but the Conveyance being merely voluntary, the Court refused to amend it, but left the Lands to descend equally between them. *Hil.* 1681, *Lee and Herley (In the Book, Henley & al')*, 1 *Vern.* 37.

2. But if a Man makes a voluntary Settlement as a Provision for his younger Children, and for their Maintenance, such voluntary Conveyance shall be supplied and made good in Equity. *Thompson v. Attfield*, 1 *Vern.* 40; *vide Clavering v. Clavering*, 2 *Vern.* 473. That if there are two voluntary Deeds or Conveyances, the first shall prevail; and *vide Title Agreements, Letter (C)* [1 *Eq. Ca. Abr.* 23].

[171] CAP. XXVI.

DEVISES.

- (A) Of Devises, by whom and to whom.
 - (B) Of what Estate or Interest in the Devises may he dispose.
 - (C) What Words pass a Fee in a Will.
 - (D) What Words pass an Estate-Tail, and for Life.
 - (E) Of executory Devises of Lands of Inheritance; and here of Contingent Remainders and Cross Remainders, as far as they relate to this Place.
 - (F) Of executory Devises of Leases for Years; and here of the Limitation of the Trust of a Term, as far as it relates to and agrees with the Devise thereof.
 - (G) Of Terms for Years and incertain Interests by Devise.
 - (H) Of Devises by Implication.
 - (I) Of Devises of Lands for Payment of Debts.
 - (K) Of Devises of Things Personal, as Goods, Chattels, &c., by what Description, and to whom good.
 - (L) Where a Devise shall be in Satisfaction of a Thing due.
 - (M) Of void Devises.
- 1st, By devising what the Law already gives, or what the Policy of the Law will not admit.
- 2dly, By Uncertainty in the Description of the Thing devised.
- 3dly, By Uncertainty in the Description of the Person to take.
- 4thly, By the Devisee of Lands dying in the Life-time of the Devisor.
- What Circumstances are necessary by the 32 & 34 *H.* 8 and 29 *Car.* 2. What shall be a Revocation and a new Publication, *vide Title Will.*

(A) OF DEVISES, BY WHOM AND TO WHOM.

1. A Wife, whose Husband is banished for his Life by Act of Parliament, may make a Will, and in every Thing [172] act as a Feme Sole, as if the Husband was dead. *Trin.* 1689, *Countess of Portland and Proctors*, 2 *Vern.* 104, and the Legatees

under the Lady *Sandys's* Will, whose Husband was so banished, were decreed their Legacies.

(By 34 & 35 *H. 8.* it is declared in express Words, that a Devise of any Manors, Lands, &c., by a Feme Covert, Infant, Idiot, or *Non compos*, is not good ; that such only who have a sound and disposing Memory, can devise, *vide 6 Co. 23 a ; Cro. Jac. 497*, and that it is not sufficient that they be able to answer to familiar and usual Questions. If a Man makes a Will in his Sickness by the over Importunity of his Wife, to the end he may be quiet, this shall be said to be a Will made by Restraint, and shall not be good. *Styl. 427.*)

2. A Feme Covert Executrix cannot devise any of the Goods, which she hath as Executrix, without the Assent of the Husband, or his Agreement after. 1 *Rol. Abr. 608.*

(The Husband may bind himself by Covenant or Bond to permit his Wife by Will to dispose of Legacies, &c., and this will be such an Appointment as the Husband will be bound to perform. *Cro. Eliz. 27 ; Cro. Car. 219, 376, 597.* But it does not operate as a Will, neither ought it to be proved in the Spiritual Court. 1 *Mod. 211, 212.* For the Property passes from him to her Legatee, and it is his Gift. *Ibid. 211, per Curiam.* If he once assents, he cannot after dissent ; and where he is bound by Agreement to let her make a Will, his Consent shall be implied till the contrary appears ; and what shall be a sufficient Evidence to an Assent, *vide 2 Mod. 172, 173.* What religious Persons were disabled from making a Will, *vide Rol. Abr. 608.*)

3. If a Feme Covert makes and publishes her Will, and devises Land by it, and her Husband dies, and then she dies, the Devise is void, because the Consummation is founded upon the Making and Publishing, which are void Acts. [Brett v. Rigden.] *Plow. 344.*

4. So if one, being under the Age of twenty-one Years, makes his Will, and thereby devises his Lands, and after attains the Age of twenty-one Years, and dies without making any new Publication thereof, this Devise is void. (For this *vide And. 182 ; Dyer, 143 ; Raym. 84.*) *Mich. 15 Car. 2 [1663], Herbert and Forbale, 1 Sid. 162, agreed per Curiam, upon a Trial at Bar.*

5. But an Infant Male at the Age of fifteen, or Female at twelve, if proved to be of Discretion, may make a Will of their Personal Estate, and it shall be good ; agreed by Counsel, and admitted by the Court. [Bishop v. Sharp.] 2 *Vern. 469.*

(Some Books mention the Age of seventeen, others that an Infant may make his Testament, and constitute his Executors for his Goods and Chattels at eighteen. *Co. Lit.* But as the Common Law hath appointed no Time, it therefore depends wholly on the Spiritual Court, 2 *Mod. 315, per Curiam* ; and it was said, that they sometimes allowed Wills made by Persons of fourteen Years of Age ; but however it being a Matter within their Jurisdiction, the Courts of Law will not intermeddle. *Ibid. 2 Jones, 210.*)

6. Tenant in Tail to him and the Heirs of his Body, with the Reversion expectant in Fee, cannot devise the Land in Fee to another, though he dies without Issue. 31 *Ass. 3* adjudged. *Quære Rationem.*

(Because at Common Law it was only a Possibility, and not grantable, or deviseable ; but whether such a Reversion could be devised by Parol within the Custom, *vide Styl. 409, 410. Dubitatur.* and there said, that the Statute of *Westm. 2* helped not the Custom.)

7. Tenant in Tail may devise Lands to a Charity, and such Devise shall be good, though there was neither Fine levied, nor Recovery suffered of the Lands. *Duke's Char. Uses, 110.* [Att.-Gen. v. Rye.] 2 *Vern. 453, S. P. decreed.*

8. If there be two Jointenants of Lands, and one of them devises that which belongs to him, and dies, this is a void Devise, and the Devisee takes nothing, because the Devise does not take Effect till after the Death of the Devisor ; and then the surviving Jointenant takes the Whole by a prior Title, *viz.* from the first Feoffment ; but in this Case, if the Devisor survives the other Jointenant, then the Devise is good for the Whole, because he being the surviving [173] Jointenant has the Whole by Survivorship, and then the Words of the Will are sufficient to carry the whole Estate ; besides at the Time of making the Will, though he was not sole Tenant of the Land, yet he was seised *per moy & per tout* ; and it is impossible to fix upon any Particular Part which he meant to devise, because he could not then call one Part of the Land more his own than another ; and the most genuine Construction seems to give the whole Land, since he was seised *per tout* of it at the Time of the Devise. *Lit. Sect. 287. Perkins, Sect. 500.*

9. A Wife may be a Devisee, though not a Grantee to the Husband; for as the Grant had been void, because the Husband and Wife are but one Person in Law, so the Devise is good, because it does not take Effect till after the Death of the Husband, and then they are no more one Person. *Co. Lit.* 112; 1 *Roll. Abr.* 610.

10. A Devise to the Principal, Fellows, and Scholars of *Jesus College* in *Oxford*, and their Successors, for Maintenance of a Scholar is good by the Statute of charitable Uses, though such Devise had been Mortmain by the Statute of Wills. *Hob.* 135, *Flood's Case*. *Vide* Title Charity [1 *Eq. Ca. Abr.* 94].

11. A Man might have devised to an Infant *in Ventre sa Mere*, though the Devisor died before the Infant was born; for he was *in Esse* in some Respect, and the Freehold shall be in the Heir in the mean time: *Dubitatur*, 11 *H.* 6, 13 [1432-33].

(Whether a Devise to an Infant *in Ventre sa Mere per Verba in presenti*, be good, has been much doubted, because it is not to take Effect at the Time of the Death of the Devisor; and since by the Devise he is to take immediately after the Death of the Devisor, the Freehold cannot be in Abeyance by the Act of the Parties; but as the better Opinion seems to be that such a Devise is good, it will be sufficient barely to mention the Authorities *pro* and *con.*, as *Dyer*, 303; 2 *Mod.* 9; 1 *Ler.* 135; *Moor*, 177, Pl. 312, 220; *Raym.* 163; 1 *Keb.* 851; 2 *Bulst.* 273; 1 *Roll. Rep.* 110, 137; 2 *Roll. Rep.* 335; *Raym.* 83; *Carter* 5, 87; 2 *Mod.* 292. And by *Finch*, Ld. K., the Doubt arises upon the Statute of Wills, which enacts, That it may be lawful to devise to any Person or Persons, &c., but that at Common Law without Question it was good. 2 *Mod.* 9. But a Man cannot surrender a Copyhold to an Infant *in Ventre sa Mere*. 1 *Roll. Rep.* 109, 137, 254; 2 *Bulst.* 272.)

12. A Devise to an Infant *in Ventre sa Mere*, when he is born, is undoubtedly good, and the Freehold shall descend in the mean time. 1 *Ler.* 135; 1 *Roll. Abr.* 609.

13. So is a Devise to an Infant *in Ventre sa Mere*, with a new Publication of the Will after his Birth. [*Fuller v. Fuller*,] *Cro. Eliz.* 423.

14. So if Lands be devised to A. for Life, the Remainder to a posthumous Child, this is a good contingent Remainder, because there is a Person in Being to take the particular Estate; and if the contingent Remainder vests during the Continuance of the particular Estate, or *eo instante* that it determines, it is sufficient. *Moor*, 637; *vide* 3 *Ler.* 408; 4 *Mod.* 259, 282, the Case of *Rice* and *Long*; and *vide* 10 & 11 *W.* 3, *cap.* 16, whereby Provision is made for preserving Remainders for the Benefit of posthumous Children.

15. If Lands are devised to two Men, and the Child with which the Devisor's Child is *enseint*, the Child shall take by the Devise, but whether jointly or in common, *quære*. *Moor*, 177.

16. A Bastard may be a Devisee of Land, but a Monk cannot. *Dyer*, 323.

[174] (B) OF WHAT * ESTATE OR INTEREST IN THE DEVISOR MAY HE DISPOSE.

1. If the Father devises Lands to his youngest Son, and the eldest Son knowing thereof enters into the Land, and disseises the Father, and so continues till the Death of the Father, by which the Will is† void; yet because it was made void by Deceit and Covin, it shall be made good in Chancery: *Per* Ld. Chan. in *Rossell* and *Emry's Case*, 1 *Roll. Abr.* 378.

2. If A. articles for the Purchase of Lands; but before any Conveyance executed, he devises all his Lands to be sold for the Payment of his Debts and Legacies; these

* By the Common Law no Lands or Tenements were deviseable by any Last Will or Testament, neither could they be transferred from one to another, but by solemn Livery and Seisin, Matter of Record, or sufficient Writing. *Co. Lit.* 111, *b.* The Reason of this is owing to the Nature of the old Feuds and Tenures; for if this were permitted, the Lord would be disappointed, not only of the Profits of Ward, Marriage, and Relief; but likewise it would be in the Power of his Tenant by devising to a Stranger, to put on him a Person, who had neither Ability of Mind, or Strength of Body; though the one was requisite to assist him in his Courts, and the other to defend his Person in the Field.

† If a Stranger disseises the Devisor, if he dies before Reentry, the Devise is void, 39 *H.* 6, 18 *b.* but if he re-enters, the Devise shall be good, for he was seised *ab initio*. 1 *Salk.* 238.

Lands will pass, although he was not seised at the Time of the Will, and though there was no new Publication. So if a Man devises all his Lands for Payment of his Debts, and afterwards purchases Land, Equity will decree a Sale of the purchased Lands, although there were no precedent Articles. *Trin. 35 Car. 2* [1683]. *Prideux* and *Gibbon*, 2 *Chan. Ca.* 144. S. C. cited *Lucas's Rep.* 529, *Mich. 10 Geo. 1* [1723], *in Canc.*

(If a Man devise Lands in which he has nothing and after purchases them, such a Devise is void, not being within the Statute of Wills, for he is not a Person having. *Plow.* 348. So where a Man devised to his Wife all such Sums of Money, Lands, Tenements, and Estate whatsoever, whereof at the Time of his Decease he should be possessed; and after the making of the Will, he purchased Lands of the Custom of Gavel-kind, and died without making any Publication; and it was held, that these purchased Lands did not pass, for they were not *sua* at the Time of the Making of the Will; and the constant Form of Pleading is, that the Testator was seised, and that being so seised, &c., which at least is an Evidence of the Law; and there is no Difference as to Lands deviseable by Custom or by Statute; but such Devise of Things Personal is good, though the Testator had them not at the Time of making his Will, because they go to the Executor, and pass not by the Will, but by the Assent of the Executor, to whom the Will is only directory: Adjudged *Mich. 6 Ann. in B. R.* on a Writ of Error out of the *C. B.* and confirmed also on a Writ of Error in the House of Lords, between *Bunter and Cooke*, 1 *Salk.* 237, 238.)

3. If A. purchases Copyhold Lands, and dies before Admittance, having first devised all his Copyholds to *T. S.*, the Copyhold Lands contracted for will pass by the Will; or in any Case, if there are Articles for a Purchase, and the Purchaser makes his Will, and dies before any Conveyance executed, yet the Lands shall pass in Equity. *Trin. 15 Car.*, *Davie* and *Beadsham*, 1 *Chan. Ca.* 39. (*Vide Eq. Ca. Abr.* Part 2, *Woodier* and *Greenhill*, S. P.)

4. A. employs B. to article for the Purchase of Lands, which B. did, and the Articles were made in *April*, but the Possession was not to be delivered till the *Michaelmas* following; A. before *Michaelmas*, or a Conveyance executed, but after Payment of the Purchase-Money, devised by sufficient Words to *J. S.*, and afterwards A. takes a Conveyance of the Lands so article for, to him and his Heirs and died; and it was held, and affirmed upon a Rehearing, that the Land passed by the Will, and that an equitable Interest is as well deviseable as a legal Estate. *Hil. 1711, Greenhill* [175] and *Greenhill*, 2 *Vern.* 679. The Reporter adds a *Quære*, Whether the Testator after the Date of the Will, having taken a Conveyance to himself and his Heirs, it did not amount to a Revocation. (*Precedent in Chan.* 320, S. C.; *Gillb. Eq. Rep.* 77, S. C. *in totidem Verbis* with *Precedent in Chan.* *Vide Lucas's Rep.* 528.)

(2 *Wils. Rep.* 631, S. C. cited by the Master of the Rolls; to have been so determined; but he took a Difference where the Purchase was before the Will made, and where after; for in the last Case Testator had no equitable Interest in the Land, and so having no Title, could devise nothing. *Vide* the Case of *Pitt* and *Langford*, *Eq. Ca. Abr.* Part 2, p. 297.)

5. On a Treaty of Marriage, Articles were entered into, whereby the Sum of £700 being the Wife's Portion, and £700 more added to it on the Part of the Husband, in all £1400 was agreed to be laid out in the Purchase of Lands, to be settled on the Husband for Life, Remainder to the Wife for Life, Remainder to Trustees, to support contingent Remainders, &c. The Marriage takes Effect, the Husband dies without Issue, and before any Purchase made pursuant to the Articles, having first devised all his Personal Estate to the Defendant, who was his Wife, and all his Real Estate to the Plaintiffs, who were his Nephews, and one of them his Heir at Law, and made his Wife Executrix, but took no Manner of Notice of the £1400. On a Bill brought by the Plaintiffs to have this £1400, as they would have the Land, if the Purchase had been made pursuant to the Articles; for the Wife took more by the Devise, than she would have been intitled to under the Settlement, had it been made; and therefore it was, that if it were to be considered as Lands, she could not have both, the Devise of the Personal Estate being more than an Equivalent, and therefore a Satisfaction. And it was held by *Ld. Chan.* that as this Case is, if a Purchase had been made, even after the Making this Will, though at Law such Lands would not pass, yet in this Court there could be no Question, but the Plaintiffs would have the Benefit thereof by the Relation to the Articles; and though no Purchase was made, yet by the Agreement the £1400 is to be looked upon in a Court of Equity as a Real Estate, and as such

must go to the Plaintiffs; and decreed accordingly *per Harcourt*, and affirmed by Lord Cowper. *Pasc.* 1715, *Lingen and Souray*. (*Lingen and Souray*, S. C. accordingly. *Proc. in Chan.* 400; *Gilb. Eq. Rep.* 91, S. C. *in totidem Verbis* with *Proc. in Chan.* 1 *Will. Rep.* 172, S. C. and Decree; 10 *Mod.* 528.)

6. A Man seised in Fee devised his Lands in Trust, to sell Part for Payment of his Debts, and till his Debts were paid, to pay £100 *per Ann.* to his natural Daughter *M.*, and after the Debts paid £300 for her Life; and if she have Children, to convey successively to those Children; but if she die without Issue, then to convey to the eldest Son and Heir of *J. C.* his Nephew, and the Heirs of his eldest Son, but if he claim any Thing during the Life of *M.* then both Father and Son to be excluded from having any Thing out of his Estate. The eldest Son of *J. C.* was *A.*, who had two Sisters, *B.* and *T.* *A.* died leaving Issue *J.*, who in the Life of *M.* devised the Lands in Question to *J. S.* and died without Issue; and after the Death of *M.* without Issue, the Trustee conveyed to the Sisters of *A.* and their Heirs; and the Question being between the Sisters and the Devisee of *J.* it was decreed by the Lord Keeper, *Tredg.* Chief Justice, and Baron *Powell*, that this being but a mere Possibility during the Life of *M.* the Devise was void, and the Lands well conveyed to the Sisters *B.* and *T.* *Trin.* 7 W. 3, *Bishop and Fountain*, 3 *Lev.* 427, 428.

* 7. *J. S.* who was to have had a considerable Advantage by a Will, was drawn in by Fraud and false Suggestions, to make a Composition for his Interest, and to give a Release; afterwards *J. S.* being sensible of the Fraud, makes his Will, and thereby (after other Legacies) he devises all the rest of his Goods and Chattels whatsoever to his Wife, upon Condition that she paid all his Debts, and [176] made her sole Executrix; and it was held, that his Right to set aside the Release was deviseable, and the Words proper for that Purpose: Decreed *Trin.* 1791, *Drew and Merry*.

(C) WHAT WORDS PASS A FEE IN A WILL.

1. If *A.* devises Lands to *B.* to give, sell, or do what he pleases with it, these Words by the Intent of the Devisor, convey a Fee to *B.* or if the Words were to *B. & Sanguini sui*, they would pass a Fee, because the Blood runs through the Collateral, as well as Lineal Line. *Co. Lit.* 9 b; *Bendl.* 11; 1 *Rol. Abr.* 834.

(Though a set Form of Words, and the Word *Heirs* particularly, are necessary in Deeds to convey an Inheritance, yet may they be dispensed with in Last Wills, at which Time it is presumed, that the Testator is *inops Consilii*; and therefore, if a Man devises Lands to another *in perpetuum*, or *in Feodo simplici*, or to him and his Assigns for ever, or to him and his; or that such a one shall be universal Heir; in all these Cases a Fee passes by the Will; for it is evidently the Devisor's Intention, that the Gift should continue beyond the Life of the Devisee. *Co. Lit.* 6 b; 1 *Bulst.* 222; *Bendl.* 11; *Moor.* 57.)

2. A Devise to a Man and his Successors carries a Fee; for by the Word *Successors* is intended Heirs, *quia Heires succedunt Patri*. [Webb v. Herring, 6 *Co. Jur.* 416; 1 *Rol. Abr.* 835.]

3. If a Devise be in these Words, *I release all my Lands to A. and his Heirs*; *A.* has a Fee-simple: for where the Intention of conveying appears, the Law dispenses with the Form in a Will. *Bendl.* 34.

4. I appoint that *J. S.* shall have my Inheritance, if the Law allows it, or that *J. S.* shall be Heir of my Lands; these Words are sufficient to convey a Fee. *H. 1.* 2.

5. If a Man devises Land to his Wife for Life, and after her Death to his three Daughters, equally to be divided; and if one dies before the other, then one to be Heir to the other, equally to be divided; this last Clause gives a Fee to the Daughters; for the Word *Heir* is *Nomen operationis*, and chiefly in a Will shall be taken in its full Extent; and then it reaches the most remote Heir. 1 *Rol. Abr.* 833.

6. *A.* devises Land to his Son and Heir; and if he dies before his Age of twenty-one Years, and without Issue of his Body then living, the Remainder over, he survives the twenty-one Years, and sells the Land; and the Sale was adjudged good; for he had a Fee-simple presently, the Estate Tail being to commence upon a subsequent Contingency. *Collenson and Wright*, 1 *Sid.* 148.

7. If a Man devises Lands to *A.* for Life, and after his Decease, the whole Remainder of these Lands to *B.* these Words pass a Fee in the Remainder to *B.* *Norton and Ladd*, 1 *Lut.* 762.

8. If Lands are devised to Trustees, without any Words of Limitation to support the Trust of Estates of Inheritance, they by Implication must have an Estate of Inheritance sufficient to support the Trust : for there is no Difference between a Devise to a Man for ever, and to a Man upon Trusts, which may continue for ever : Adjudged in the Case of *Shaw and Wright, Pasc. 1 Geo. 2 in B. R.*

9. If A. devises Land to B. for Life, the Remainder to C. paying several Sums in Gross : C. hath a Fee, though all the Sums together do not amount to the annual Rent of the Land, for the Devise shall be intended for his Benefit ; and if he had only an Estate for Life, he might die before he would receive the Legacies out of the Land, and consequently be a Loser ; for where there is a Sum [177] in Gross to be paid, there the Devisee hath a Fee, though the Sum be not to the Value of the Land. *Collier's Case, 6 Co. 16 ; Cro. Eliz. 378 ; Cro. Jac. 527 ; Cro. Car. 158 ; Co. Lit. 9 b ; 5 Co. 21.*

10. So if A. devises Lands to B. in consideration that B. will release £100 due to him, to the Executors of A. B. has a Fee-simple upon his Release of the Debt ; for the Devise shall be intended for his Benefit, and an Estate for Life might be determined before he could receive £100 out of the Land. *Bendl. 15.*

11. If a Man devises £100 in Legacies, to be paid within a Year, to several Persons, out of Land to the Value of £10 yearly, and then devises the Land to another, the Devisee has a Fee in the Land ; for though the Devise be not to him paying £100, yet since he must take the Land subject to the Charge of the Legacies, he must have a Fee to have any Benefit by the Devise. *2 Lev. 249, vide 2 Salk. 985, S. P.*

12. But if A. devises Lands to B. paying so much, or such Sums out of the Profits of the Lands, the Devisee takes but an Estate for Life ; for although he takes the Land charged, yet he is to pay no farther than he receives, and so can be no Loser. *6 Co. 16 ; 2 Mod. Rep. 25.* (Whether the Word *Paying* out of Lands in general, and not mentioning any certain Time, so that a Loss may appear, passes a Fee-simple, *quare, & vide 2 Vern. 106 [Hawker v. Buckland].*)

13. So if the Devise had been to B. paying an annual Sum to another, this had been an Estate for Life ; for he may pay this out of the yearly Profits, without any Loss to himself. *Vide Cro. 158 ; 1 Jon. 211 ; 1 Bulst. 194 ; Cro. Car. 416 ; Cro. Jac. 527.*

14. If a Man devises to his younger Brother all his Lands, Tenements and Hereditaments, and all his Personal Estate, and whatever else he had in the World, and makes him Executor, desiring him to pay his Debts and Legacies ; the Devisee has a Fee-simple by these Words : Adjudged on a special Verdict in *C. B. Hil. 1713. Ackland and Ackland, 2 Vern. 687.* (*1 Salk. 239 ; Hil. 8 Ann., Hopewell and Ackland. I take to be the S. C. and P.*)

15. If a Man devises £50 to be paid in three Months, and all the Rest and Residue of his Real and Personal Estate whatsoever he gives to his dearly beloved Wife, whom he makes sole Executrix ; by these Words the Wife has a Fee-simple in the Lands. Decreed *Mich. 1706. Murray and Wise, 2 Vern. 564.* (*Prec. in Chan. 264, S. C. and Decree, upon Time taken by Ld. K. to consider of this Point.*)

16. So where the Testator, being seised of Copyhold and Freehold Lands, devised all the rest of his Estate, whether Freehold or Copyhold, to his Wife and Children, equally to be divided amongst them ; and it was held, that the Word *Estate* must signify the Interest he had in the Land, and so pass a Fee. *Carter and Horner, 4 Mod. 89.* For this *vide Stile 281 ; 2 Lev. 91 ; 1 Mod. Rep. 100 ; 2 Chan. Ca. 262.*

17. A. devised in the following Words, *I give certain Lands to J. S. and I to give to John Earl of B. my Son-in-Law, £5000 and all my Mines, all which I give to my said Son-in-Law, his Executors and Assigns, together with my Plate and Jewels, and all other my Estate Real and Personal, not otherwise disposed of by this my Will, for to be given by him to his Children, as he shall think convenient, I solely trusting to his Honour and Discretion, that he will give them such Provision as will be necessary ; and another Clause was, Whereas I have contracted for the Sale of my Fee-farm Rents, my Will is, That if my Debts shall not be satisfied out of my other Estate, my Executors (whereof the Earl was one) shall and may sell some Part, or all of them, for Payment of them, notwithstanding the Rents are not devised by this my last Will ; and the Question was, whether his Fee-farm Rents should pass to the Earl of B. and for what Estate : Et per Holt, C. J., who delivered the Resolution of the Court, the Rents pass by these Words, *All my Real and Personal Estate*, for the Word *Estate* is *Genus**

generalissimum, and includes all Things Real and Personal, and the Fee of the Rents passes, [178] at least the whole Estate of the Devisor, for all his Estate is a Description of his Fee. *Countess of Bridgewater and Duke of Bolton*, 1 *Salk.* 236. S. C. cited 2 *W. M. Rep.* 524, *per* Master of the Rolls, *Easter* 1729, in the Case of *Barry and Edgeworth* as a Resolution given on great Consideration, in which the Id. *Comper* when a Counsel discouraged a Writ of Error in Parliament. S. C. cited by *Talbot*, C. *M. J.* 1755, *Ca. in Eq. Temp. Talbot*, 162.)

18. *J. B.* a young Lady, being in eight Days Time to be married to the Defendant, being taken ill, made her Will, and after several specifick and pecuniary Legacies, devises in these Words, *Item, I give and bequeath all my Lands and Estate in Upper Catesby in Northamptonshire, with all their Appurtenances*, to William Edgeworth of St. Margaret, Esq. and made him and Mrs. *Rudge* Executors and Residuary Legatees, and died seised of a Real Estate of the Value of £200 *per Ann.* and possessed of about £3000 Personal Estate, and the Plaintiff's Wife was her Sister and Heir; and the only Question was, whether the Defendant had an Estate in Fee, or only for Life; and it was agreed, that a Devise of all her Estate would have passed a Fee; but a Difference was endeavoured between such a Devise of all her Estate generally, and a Devise of all her Estate at such a Place; that this was only a Description, of the Place where the Estate lay, and no Devise of the Interest which she had in that Estate farther than for Life; and it was agreed clearly, that a Devise of all her Lands would pass only an Estate for Life, and not the Estate in Fee, which she had in those Lands. But the Master of the Rolls was clear of Opinion, that he had an Estate in Fee, because the Lands passed by the first Words, and the Interest in those Lands by the second; and if the Word *Estate* meant nothing more than the Lands, it would be useless; but if the Devise had been of all her Lands or Estate at such a Place, he thought that would not have passed the Fee, but would have been taken, according to the common Acceptation, for her Lands at such a Place; but as this was, it must be a Fee; and decreed accordingly at the Rolls. *Pasc.* 1729, *Barry and Edgeworth*. (2 *Will. Rep.* 523, S. C. and Decree. The Master of the Rolls said, That the Law seemed settled in this Point, by the Case of *Countess of Bridgewater and Duke of Bolton*, above.)

19. But where a Man seised of *Black Acre* in Fee by Mortgage, which was forfeited, and of *White Acre* as his own Inheritance, devised *White Acre* to his Brother, and then devised all the Residue of his Goods, Leases, Mortgages, Estates, Debts, Ready Money; and other Goods, whereof he was possessed, after Debts and Legacies paid, to his Wife, and made her Executrix, and died; it was held, that this was no Devise in Fee to the Wife of the mortgaged Land, for the Word *Estate* is coupled here with Chattels, which intended that he meant only Estates for Years; and the rather, because the Words, *whereof he was possessed*, shew that he intended only to give her Chattels and the Mortgage Money, and not the Inheritance of the Land. *Willinson and Merryland*, *Cro. Car.* 447; 1 *Rob. Abr.* 834.

[179] (D) WHAT WORDS PASS AN ESTATE TAIL, AND FOR LIFE.

1. If Lands are devised to one, and if he die before Issue, or if he depart not having Issue, or if he die not having a Son or, all these Limitations (*b*) create an Estate Tail. [*Pinbury v. Elkin*,] 2 *Vern.* 766.

(*a*) *Son* is *Nomen collectivum*, 1 *Vent.* 231; vide p. 181, Pl. 14. (*c*) Here it must be observed, that the Intent of the Devisor will supply those Words which are necessary in Conveyances at Common Law; As if Lands are devised to a Man and his Heirs Male, the Law will give him an Estate Tail, and supply the Words of *his Heirs*; so a Devise to one and *Semini suo*, creates an Estate-Tail; but a Devise cannot direct an Inheritance to descend against the Rules of Law; and therefore if A. devises to B. and his Heirs Male, though this is an Estate-Tail, yet if B. has Issue a Daughter, who has Issue a Son, he shall never inherit; for the Rule is, whoever claims as Heir in Tail Male, must convey his Descent wholly by Heirs Male. *Ca. Lat. 9 b.* 25, 271; *Hob.* 33; 1 *Vent.* 228.

2. So if a Man devises in these Words, *And if it please God to take my Son R before he shall have Issue of his Body, so that the Lands descend to his Brother*, this is an Estate Tail in R. *Owen* 29.

3. If A. devises to the eldest Son J. S. and the Heirs Male of his Body, for the Term of 500 Years; provided, if he or any of his Issue Male alien the Premises, then to

remain over, this is an Estate Tail, and the Limitation for 500 Years void ; for though generally a Devise to a Man and the Heirs of his Body, for 1000 Years, is a Term, and not an Inheritance ; yet here the Testator's Intent was, that it should be an Inheritance ; because by the Proviso he took Care to advance the Issue of *J. S.* But if it should be a Term, then by the Descent of the Inheritance on *J. S.* the Term would be merged, and the Issues would be unprovided, for *J. S.* might alien the Estate. 10 *Rep.* 78 ; *Moor.* 772, S. C.

4. *A.* having two Sons, *B.* and *C.*, devised *Black Acre* to *B.* and his Heirs, and *White Acre* to *C.* and his Heirs, and further willed, that the Survivor of them should be Heir to the other, if either of them died without Issue ; though the first Words were sufficient to pass an Estate in Fee, yet the subsequent Words correct them, and pass only an Estate-Tail, and the Remainder in Fee was not contingent, but executed, each Son being Tenant in Tail, of the Part to him devised, with Remainder to the other. [*Chadock v. Cowley*,] *Cro. Jac.* 695.

5. If a Man devises Lands to his Wife, for Life and after to her Son *J. S.* and if he dies without Issue, having no Son, then the Remainder over : *J. S.* the Son, by this Devise, takes an Estate in Tail Male ; for though the Devise to the Son, and if he dies without Issue, had been a good Tail general, yet when the Devisor went further, and said, having no Son, he thereby explained what Issue he intended should inherit the Land, and Limited it to the Issue Male. 1 *Rol. Abr.* 837.

6. *A.* seised of Lands, devised them to his Wife, if she did not marry ; and if she did, then his eldest Son presently after her Decease to enter and hold the Land to him and the Heirs Male of his Body, the Remainder to his other Sons in Tail Male ; the Wife did not marry, yet the Court resolved that the Lands were entailed by the Will, taking the Intention of the Devisor to be, that the Intail should be created in all Events ; but that the eldest Son should not enter till after the Decease of the Wife, unless in case of her Marriage, and then to enter presently. *Luxford and Cheek*, 3 *Lev.* 125.

[180] 7. But where *A.* devised all his Land to his Wife, until his Son should be twenty-four, and then to his Heirs for ever ; and when he came to twenty-four, she should have the third Part for her Life ; and if he dies before twenty-four, then she to have all for her Life ; and after her Decease ; if the Heir has no Issue, the Remainder to *B.* the Remainder to the right Heirs of the Devisor ; the Heir came to twenty-four, but no Estate-Tail was created by the Will ; for the Fee-simple descended to him, and the Limitation was to take place, if he died before the Age of twenty-four, which he did not. *Dyer* 124 a ; 1 *Rol. Abr.* 839.

8. A Man devised all his Fee-simple Lands to his Wife for Life, and after her Death to *A. B.* and *C.* his three Daughters, equally to be divided ; and if any of them die before the other, then the others to be her Heirs, equally to be divided ; and if they all die without Issue, then to others named in the Will ; and it was adjudged, that the Daughters had an Estate-Tail. *Cro. Jac.* 448 ; 1 *Rol. Abr.* 836.

9. So where the Devise was to a Man and his Heirs, and if he die without Issue, that then the Land shall go to *A.* and *B.* or the Survivor of them ; adjudged an Estate-Tail in the first Devisee ; for in these Cases the Extent of the Word *Heir* is confined to the Descendants, or Issue of the Devisee, since otherwise the Limitation over cannot vest according to the Intent of the Devisor, for they will not allow a Limitation of a Fee upon a Fee. 1 *Rol. Abr.* 836 ; *Moor.* 864 ; *Hob.* 75 ; *Poll.* 487 ; *Cro. Jac.* 448.

10. *A.* having Issue *B.* and *C.* devised some of his Land to *B.* his eldest Son, and the Heirs of his Body, after the Death of his Wife ; and if *B.* died, living his Wife, then to *C.* his Son, and devised other Lands to his other Son, and the Heirs of his Body ; and if he died without Issue, then to remain over ; *B.* died in the Life of the Wife, and yet it was adjudged that *C.* could not enter into the Land while any Issue of *B.* remained ; for the Words of the Devise, *that if B. died, living the Wife*, did not abridge the Estate-Tail which was given by the former Words, because the Testator could not be supposed to intend to prefer the younger Son before the Issue of the eldest, especially when he had in the former Part of the Will settled it on the eldest, and made the same Provision of other Lands the same Way for the younger Son. 1 *Bulst.* 230, 231.

11. *B.* devised Land to *B.* his Son, and if *C.* his Daughter survived *B.* and his Heirs, then she should have the Lands ; and it was adjudged that *B.* had but an Estate-Tail, for the Word *Heirs* must be intended Heirs of his Body, for he could not die without Collateral Heirs while his Sister was alive ; but if the Will had said that if *J. S.* a Stranger, survives *B.* and his Heirs, then he should have the Land, there *B.* had a

Fee-simple, and then the intended Remainder must be void, for it is to vest on a Contingency of *B.*'s dying without Heirs, which is too distant to expect; and the whole Fee-simple being in *B.* there can be no present Interest to vest in a Stranger. *Webb and Herring, Cro. Jac.* 415, 416. 1 *Salk.* 233.

(The Difference here taken is right; and the Reason of it is, that in the latter Case there is no Intent appearing to make the Words carry any other Sense than what they import at Law; but in the former it is impossible, that the Devisee should be without an Heir while the Remainder Man or his Issue continue; and therefore the Generality of the Word *Heirs* shall be restrained to *Heirs of the Body*; since the Testator could not but know, that the Devisee could not die without an Heir, while the Remainder-Man, or any of his Issue, continued. *Per Talbot, C. Mich.* 1733. *Ca. in Eq. Temp. Talbot* 2. *Vide the Case of Tyte and Willis, Eq. Ca. Abr.* Part 2.)

12. So where *A.* devised to *B.* for his Life, and to his Heirs; and for want of Heirs of him, to *C.* in the same Manner, and for want of Heirs of him, to *D.* and his Heirs for ever; the Jury found that *B.* and *C.* were Brothers, and that *D.* was next Cousin and Heir to [181] them, though not mentioned in the Will; and the Court held, that they had but an Estate-Tail, and the Remainder in Fee to *D.* good; for *D.* being Cousin and Heir to them, proves that he intended Heirs of the Body; also Want of Heirs of him, are to be taken for Want of Heirs of his Body. *Parker and Thacker, 3 Lev.* 70, 7 *Co.* 4.

13. A Devise to *J. S.* in *perpetuum*, and after his Decease, Remainder to his Heir Male in the singular Number, is an Estate-Tail, for *Heir* is *Nomen collectivum*, 1 *Bulst.* 219.

14. If *A.* devises to *B.* for his natural Life, and after his Decease he gives the same to the Issue of his Body lawfully begotten on a second Wife; and for Want of such Issue to *J. S.* and his Heirs for ever; provided that *B.* may make a Jointure of all the Premises to such second Wife, which she may enjoy during Life; this is an Estate-Tail in *B.* for the Word *Issue* is *Nomen collectivum*, and takes in the whole Generation. *King and Melling, 1 Vent.* 225; 2 *Lev.* 58, S. C. (In this Case the Case of *Spalding and Spalding*, p. 188, pl. 9, was cited by *Hale, C. J.*)

15. But where Lands were devised to *A.* and his Wife, and after their Decease to their Children, they having then a Son and a Daughter; it was adjudged, that *A.* and his Wife had but an Estate for Life, for no greater Estate had passed at Common Law; and the Intent of the Devisor must plainly appear, or they will never admit of a Construction different from what they would allow in Conveyances executed in the Life-time of the Party; and for that Reason, when the Devise is to *B.* and his Children or Issue, *B.* having Issue at the Time of the Devise, it must take Effect according to the Rules of the Common Law, and *B.* can have but an Estate for Life jointly with his Children; but if *A.* had devised his Lands to *B.* and his Children or Issues, and *B.* had none at the Time of the Devise, then he takes an Estate-Tail; for it is plain, by the Intent of the Devisor, that the Children shall have the Land, and they cannot take as immediate Devisees, for they were not *in Esse*, nor by way of Remainder, for the Devise was immediately to *B.* and his Children, and they shall be taken as Words of Limitation, viz. as Children of his Body. *Wild's Case, 6 Co.* 17 b.

(If Lands are devised to one without more Words, this passes but an Estate for Life; So if the Devise had gone further, to him and his Assigns, these Words of themselves had not enlarged the Estate. *Co. Lit.* 9, b. But though an express Estate for Life is given to the Ancestor, with a Limitation to the Heir, or Heirs of his Body, or his Issue; yet regularly the Ancestor takes an Estate Tail, according to the Rule laid down in *Shelly's Case, 1 Co.* 99, viz. That where the Ancestor takes an Estate of Freehold, a Limitation to his right Heir or Heirs of his Body, are Words of Limitation, and not of Purchase; but the Exceptions to this general Rule will best appear by the Cases themselves.)

16. If a Man devises to *A.* for Life, and afterwards to the next Heir Male, and to the Heirs of the Body of such next Heir Male, this is only an Estate for Life in *A.* for the Inheritance is limited or grafted on the Estate of the Heir in the singular Number, and therefore he shall take by Purchase. *Archer's Case, 1 Co.* 66.

17. But where a Man devised Land to his Son for ever, and after his Decease the Remainder to his Heir Male for ever, with other Remainders over; this was held an Estate-Tail in *A.* for though the first Devise being to him for ever, would give him a Fee-simple, [182] yet the subsequent Words, *to his Heir Male*, shew what sort of

Inheritance the Devisor intended him; and the Word *Heir* being *Nomen collectivum*, is sufficient in a Will to create an Inheritance. 1 *Bulst.* 219; 1 *Rol. Abr.* 836.

18. If Lands be devised to A. and B. equally to be devised, they have but an Estate for Life, for this can mean no more than that they should severally occupy the Land. [*Dickins v. Marshall.*] *Cro. Eliz.* 330; 1 *Rol. Abr.* 834.

19. A. seised in Fee of a House and Land belonging to it, devises the Moiety of the House to his Wife for her Life. *Item*, He devises the other Moiety of his House to his second Son. *Item*, He devises the said House, and all the Land belonging to it, to his second Son; yet the Son took but an Estate for Life, for the second Devise to the Son had its Effect, by conveying a Moiety of the House and Land which he had not by the first Devise; and there are no Words in the Will to create a larger Estate. 1 *Rol. Abr.* 834.

20. If a Man devises Lands to his three Daughters, equally to be divided between them, and if one of them die before the others, that then the others shall be her Heirs; these Words give them no Intail, but for Life only, because it is not to them and their Heirs, or Heirs of their Bodies; wherefore they have only an Estate for Life, with cross Remainders of each one's Part to the Survivors, for Life. *King and Rumbal, Ibid.* 836.

21. A Copyholder in Fee surrenders to the Use of his Will, and by Will devises his Copyhold Lands to his Wife; and if she hath Issue by the Devisor, that the Issue shall have it at his Age of twenty-one Years; and if the Issue die before that Age, or before his Wife, or if she hath no Issue, then she shall chuse two Attornies, and she to make a Bill of Sale of my Lands to her best Advantage; and *per Curiam*, she hath only an Estate for Life, and having no Issue, hath no Interest to dispose, but an Authority only to nominate two who shall sell, and the Vendee shall be in by the Will. *Beal and Shepherd, Cro. Car.* 199.

22. A Man seised in Fee made a Settlement of his Lands on G. his Son for Life, Remainder to his first, &c., Son in Tail Male, Reversion in Fee to himself; and afterwards he made his Will as followeth: As touching my Lands and Tenements, my Will is, that if my Son's Wife die, during the Life of her Husband, without Issue Male, that then he shall have Power to make a Jointure to any other Wife; and for Want of Issue of his said Son, then the Lands shall be and remain to his Son by any other Wife, and his Granddaughter shall have £4000, and in Case of Failure of Issue Male by his Son G. then all his Lands shall go to his Grandchildren and their Heirs, Share and Share alike: And the Court held, that it could not be made an Estate-Tail, by tacking the Estate by the Will to the Estate for Life in the Settlement, on purpose to support the contingent Remainder, because the Settlement and Will are two distinct Conveyances; and therefore Judgment was given, that this was not an Estate-Tail. *Moor and Parker, 4 Mod.* 316. (*Skin. Rep.* 558, S. C.)

23. One by Will devises Lands to A. for Life, without Impeachment of Waste, and in case he shall have Issue Male, to such Issue Male and his Heirs for ever; and after the Death of A. in case he leave no Issue Male, to B. and his Heirs for ever, and dies; A. suffers a Common Recovery, and declares the Use to himself in Fee, and [183] by his Will devises it to C. in Fee, and dies without Issue; and the first Question was, whether by this Devise A. took an Estate in Tail Male, or only for Life; and it was held to be but an Estate for Life in A. *First*, Because it was devised to him expressly for Life, and that without Impeachment of Waste; which would have been needless, if it were an Estate-Tail. *2dly*, The Words, *and in case A. die without Issue Male, or leave no Issue*, are not to be taken substantively and absolutely, but relatively to what was said before, *viz.* if A. die without Issue, who shall take the Fee as before appointed; and these oblique Words cannot be intended to destroy by Implication the Estate expressly devised before to the Issue Male of A. and there is no Uncertainty in these Words, *to the Issue Male*, which of them shall take, if there be several; for the eldest shall take the Fee by Purchase; and the Court being ready to give Judgment on this Point, Justice *Powell*, junior, started another, *viz.* Whether these Remainders should take place as executory devises or contingent Remainders; upon which it was twice argued, but before any Judgment, the Parties agreed, according to 3 *Ler.* 431, but in *Salk.* 224, S. C. it is said to have been further held, that this Limitation to the Issue was not an executory Devise, being after a Freehold, but a contingent Remainder; so that a posthumous Son could never take; but there is no Judgment. *Lodington and Kime, 3 Ler.* 431; 1 *Salk.* 224 (S. C. *Lord Raym.* 203). But *per Raymond, C. J.*,

in the Case of *Shaw and Weigh*, it was determined, and Judgment entered, *Pasc. 2 W. 3* [1697], that it was only an Estate for Life; and it was likewise decided in the same Manner in Chancery, and on Appeal in the House of Lords.

24. *J. S.* devised his Estate to Trustees and their Heirs, in Trust for *A.* for Life, and to his first and other Sons in Tail; but in case *A.* died without an Heir Male of his Body begotten, the Trust to be void, and in such Case he gave the Estate to the Defendants; and it was held, that these Words, *If he die without Heir Male of his Body begotten*, did not give him an Estate Tail by Implication, nor enlarge an express Estate devised to him for Life. *Bamfield and Popham (a)*, 2 *Vern.* 427, 449, S. C. 1 *Salk.* 236, S. C. but stated, that the Devise was to *A.* for Life, Remainder to the first Son of *A.* in Tail Male (For this Point vide post, *the Note at the End of Langley v. Baldwin*, *pl.* 29.), and so on to the tenth Son in Tail Male, &c., by which if there had been more than ten Sons, they must be excluded; if it were construed and esteemed an Estate for Life in *A.* (1 *Will. Rep.* 54, S. C.; 2 *Freem.* 266, 269, S. C.)

(a) *Note*: The Case, as stated for the Opinion of the Court of Common Pleas, was in the Words following, *viz.* *A.* seized in Fee of the Lands in Question, Anno 1672 made his Last Will, in Writing, and thereby devised the said Lands to certain Persons therein named, and their Heirs, in Trust, by Wood-Sales and Fines for Leases, to raise Money for the Payment of his Debts; and after his Debts paid, in Trust for, and for the Use of *B.* for his Life; and after his Decease, in Trust for the Use of his first Son and the Heirs Male of his Body; and after the Decease of the first Son without Heir Male, then in Trust for such other Son and Sons, and their Heirs Male, as should be begotten by the said *B.* in Seniority one after another; provided that if the said *B.* shall die before he come to the Age of twenty-one Years, or at any Time thereafter, without Heir Male lawfully begotten of his Body, that then the Trust so limited to the said *B.* should be utterly void; and in such Case, from and after the Death of the said *B.* without Heir Male by him lawfully begotten, the Trustees to stand seised to the Use of *C.* and his Heirs; The Testator afterwards annexed a Codicil in Writing to the said Will, and thereby reciting, that he was minded to make some Alterations in his Will, and that he had devised all his Real Estate to the said *B.* and the Heirs Male of his Body, by the said Codicil declared, that if it should happen that the said Estate in Tail should determine by the Death of the said *B.* without Issue, before he attain the Age of twenty one Years, then the said Lands should be enjoyed by the Father of the said *B.* for his Life, to commence from and immediately after the Determination of the said Estate in Tail, as aforesaid; The Testator died soon after the making the said Codicil: the Trust, as to the Payment of Debts, is performed, and *B.* entered on the Premises, and now enjoys them. *Q.* what Estate *B.* hath by the said Will and Codicil: *Note*: *B.* is Cousin and Heir to *A.* the Devisor; and it was certified by the unanimous Opinion of the Court, that *B.* had but an Estate for Life: which was accordingly decreed by *Ld. K. Wright*, assisted by *Holt* and *Trecoor*, C. J., and *Powell*, Just., *Mich.* 1703, and the Cases cited were *Moor*, 611; *Yelv.* 19; 30 *Ed.* 3, 18. *Plunkett and Holmes*, 1 *Sid.* 27. *Clerk and Day*, 1 *Roll. Abr.* 839; *Owen*, 148. *Lodington and Kinn*, 3 *Lee*, 431; 9 *Co.* 173; 2 *Vent.* 55, 211. *Burchet and Durdant*, *Regm.* 28, 296. *Lisle and Gray*: which Case, *per Holt*, 2 *Jones* 114, mistakes, in saying it was reversed, for it was affirmed in the Exchequer Chamber.

[184] 25. If *A.* devises to *D.* his Daughter for Life, and after her Decease to her first Son and the Heirs of his Body; and if he die without Heirs of his Body, then to her second and other Sons, &c., and the Heirs of their Bodies; and after them to *N.* in eodem Forma; and for Default of such Issue to *J. S.* in Fee; and after the Will was finished, but before Publication, the Testator adds this clause, *Memorandum*. The Intent and Meaning of the Testator is, that *D.* shall not alien the Lands given to her, but that they shall be to her Heirs Male; and for want of such Issue, to *N.* This restrictive Clause explains the Intent of the Testator; and therefore *D.* shall have an Estate for Life only, and not an Estate Tail by Implication. 1 *Jac.* 2 [1685], *Freeman and Bouchier*, *Skin.* 240.

26. If *A.* devises Lands to Trustees to pay Debts and Legacies, and then to settle the Remainder of one Moiety of what should remain unsold to *H.* and the Heirs of his Body by a second Wife, and in Default of such Issue, to her Son *F.* and the Heirs of his Body, the other Moiety to *E.* and the Heirs of his Body, with Remainder over, Taking special Care in such Settlement, that there be in the Power of either or of the Sons *F.* or *H.* to dock the Intail of either of the said Moieties as aforesaid.

during their or either of their Life or Lives ; this Estate being only executory, it must be construed, as if like Provision had been contained in Marriage-Articles ; and therefore the Sons shall only have Estates for Life conveyed them ; but it must be without Impeachment of Waste. Deceased *Mich.* 1705, *Lennard* and *The Earl of Sussex*, 2 *Vern.* 526.

* 27. A Man seised in Fee devised to *J. B.* for his Life only, without Impeachment of Waste, and from and after his Decease, then to the Issue Male of his Body lawfully to be begotten ; if God shall bless him with any, and to the Heirs of the Bodies of such Issue lawfully begotten ; and for Default of such Issue, Remainder to *J. B.* and the Heirs Male of his Body ; and for Want of such Issue he limits two Remainders over in the same Words ; and it was adjudged, that *J. B.* took only an Estate for Life, for the Estate was given to him for Life, and there was a Limitation afterwards to his Issue, which was a Description of the Person who was to take the Estate-Tail. 11 *Ann. Backhouse* and *Wells*. (S. C. cit. *Ld. Raym.* 1439, 1440.)

Note : *The Strength of the Adjudication in this Case was upon this Word only. Per Ld. Hardwicke, Vide 2 Vez.* 229, *in Note.*

28. A. devises Lands to his Wife for Life, and for her better Support he gives and bequeaths unto her the Sum of £500 to be raised by her Executors or Administrators, by Sale of Timber, or by Sale of any part of the Premises, or otherwise by digging, sinking, getting, and Sale of Coal on the Premises, or any Part thereof, at hers, her Executors and Administrators' Choice and Election ; and if my said Wife shall happen to die before the said Sum be raised as aforesaid, then such Person whom she had appointed in her Life-time, to raise, for which I give them and her full Power and Authority ; provided, nevertheless, that if either of my Sisters hereafter named, or such Person for whom my Trustees hereafter named shall be Trus-[185]-tees, shall pay unto my Wife, her Executors, &c., the said sum of £500, that the said Power of selling shall cease ; and after the Decease of my said Wife, I devise all my Estate before-mentioned to A. B. and C. and the Survivor and Survivors of them, upon the Trusts hereafter-mentioned, that is to say, in Trust for my Sisters A. L. and D. E. equally betwixt them, during their natural Lives, without committing any Manner of Waste, from and after the Decease of my said Wife ; provided always, that what Sum or Sums of Money, in part or in full of the said £500 hereby left my Wife, shall be really paid my Wife, her Executors &c., by either of my said Sisters ; that in that case my Will is, that such Money be likewise raised by getting of Coal on the Premises only ; and if either of my said Sisters happen to die, leaving Issue or Issues of her or their Bodies lawfully begotten, or to be begotten, then in Trust for such Issue or Issues of the Mother's Share, or else in Trust for the Survivor or Survivors of them, and their respective Issue or Issues ; and if it shall happen that both my said Sisters die without Issue as aforesaid, and their Issue or Issues to die without Issue or Issues lawfully to be begotten, the said Trustees to stand and be intrusted to and for my Kinsman J. S. and the Heirs Male of his Body, &c., and for Want of such Issue, then in Trust for R. G. &c. And the chief Question was, whether this was an Estate-Tail, or an Estate for Life in the Sisters, who survived the Wife ; and it was adjudged an Estate-Tail in the Sisters, in the Great Sessions for the County of *Flint* ; which Judgment was reversed on a Writ of Error in the King's Bench ; but on a Writ of Error in the House of Lords, the last judgment was reversed, and the first established, by the Opinion of *Eggr.* C. J., *Penally*, C. B., and *Fortescue*, J., against the Opinion of all the rest of the Judges, who held it only an Estate for Life in the sisters. *Shaw* and *Weigh*, 28 April 1729 [8 *Mod.* 253].

(1 *Burn. Rep.* in *B. R.* 54, *Easter 1 Geo. 2*, *Shaw* and *Wey*, S. C. says, The Judgment below was reversed. 1 *Mod. Ca. in Law and Eq.* 382, S. Term says, The whole Court held, that the Sisters were only Tenants for Life ; *ergo* reversed the Judgment in the Grand Sessions.—*Fortesc.* *Rep.* 58, says, That the Judgment in *B. R.* was reversed in *Dom. Proc.*, *nomine contradicente*.—*Gibb. Rep.* 29, *Easter 1 Geo. 2*, in *B. R.* all the Judges held the Judgment below wrong, and that it must be reversed.—*Ibid.* 28, So on Error brought in the House of Lords, the Judges delivered their Opinions, and *Fortescue*, J., *Penally*, C. B., and *Eggr.* *Ld. C. J.*, were against the Judgment, but all the rest of the Judges and Barons argued in Support of it ; but it was reversed 28 April 1729.)

29. A. devised certain Lands to his eldest Son for Life, without Impeachment of Waste, Remainder to J. S. his Grandchild for Life, without Impeachment of Waste, with a Power to him to limit a Jointure of the same Land to any Woman he should

marry, for her Life ; and after his Death he devised the Lands to the first Son of *J. S.* the Grandchild in Tail, and so to the sixth Son, and then devised, that if *J. S.* the Grandchild should die without Issue Male, the Land should remain to *J. B.* and the Question was, what Estate *J. S.* took by the Will ; and it was certified by the Court of *C. P.* that he took an Estate-Tail ; which was decreed accordingly. *Pase, 1707, Langley and Baldwin.* (8 Mod. 258. S. C.) *Note* : per *Raymond, C. J.* in the Case of *Shaw and Weigh*, an Estate Tail was raised here by Implication, because the express Devise was not to all the Sons : for if there had been more than six, and the six dead, must the Heir at Law have it before a seventh Son ? (*This point was made in Bamfield v. Popham, ante pl. 24 [1 Eq. Ca. Abr. 183].*)

[*Mews' Dig. Will, IX, h, 7, a, ii.* See *Allgood v. Blake, 1872, L. R. 7 Ex. 359.*]

30. The Plaintiff's Father by his Will devised the Estate in Question to the Plaintiff for Life, without Impeachment of Waste, Remainder to Trustees, during his Life, to support contingent Remainders, with Remainder to the Heirs of the Body of his said Son, Reversion to himself in Fee, with a Power to the Son to make a Jointure of such a Part, and devised likewise a considerable Personal Estate to be laid out in a Purchase of Lands, and settled to the same Uses ; and the only Question was, whether the Plaintiff took an Estate Tail, or only an Estate for Life, by this Will ; and the Master of the Rolls, having taken Time to consider of it, decreed that he took only an Estate for Life, as the Words were express, and had all the other Marks attendant on an Estate for Life, and consequently that the Heirs of his Body should take by Purchase ; and though the Estate would vest in the first Son, as Tenant in Tail, by way of Purchase, yet not so as to exclude the other Sons, or their Issue, from taking the like Estate, whenever his Estate determined for Want of Issue ; and this he said was so resolved in the Case of *Trevor and Trevor*, by Lord *Macclesfield*, assisted with the Judges ; and as for the Personal Estate, there could be less Difficulty as to that than in the Conveyance of the legal Estate in Possession ; and for that he cited 2 *Vern. 526, Mich. 1728, Papillon and Bois.*

(2 *Will. Rep. 471. Papillon and Voice, S. C. Trin. 1728*, says, His Honour solemnly decreed, that as to the Devise of the Lands an Estate for Life only passed to the plaintiff, with Remainder to the Heirs of his Body by Purchase ; and that therefore he should not have the Writings, but that they should be brought into Court ; and that the Lands to be purchased should be conveyed in a strict Settlement according to the Testator's Intention. In Hil. 1731, Lord *King* (upon an Appeal) declared, that the Lands devised to *B. for Life, &c.* was within the general Rule, and must operate as Words of Limitation ; and consequently create a vested Estate-Tail in *B.* * and that the Breaking into this Rule would occasion the utmost Uncertainty ; wherefore the Writings of this Estate ought to be delivered up to the Plaintiff, and that the Court had a Power over the Money directed to be vested in Land ; that the Diversity was where the Will passes a legal Estate, and where it is only executory ; and the Party must come to this Court, in order to have the Benefit of the Will ; that in the latter Case, the Intention shall take Place, and not the Rules of Law ; So that as to the Lands to be purchased, they should not be limited to *B. for life, with Power, &c.* Remainder to the Heirs of his Body, but to *B. for Life, with Power, &c.* Remainder to Trustees during his Life, to preserve contingent Remainders, Remainder to his first, &c., Son in Tail Male, Remainder over, &c. *Ibid. 477, 478.*)

[186] (E) OF EXECUTORY DEVISES OF LANDS OF INHERITANCE ; AND HERE OF CONTINGENT REMAINDERS, AND CROSS REMAINDERS, AS FAR AS THEY RELATE TO THIS PLACE.

1. A Fee cannot be limited on a Fee ; as if Lands are limited to one and his Heirs, and if he dies without Heirs, that it shall remain over to another ; this last Limitation is void : So if Lands are given by Deed to one and his Heirs, so long as *J. S.* hath Issue,

* The Reporter in a Note says, Though this was *Ld. Chan. Opinion*, yet the Question as to the Land devised was given up, the Plaintiff having brought a supplemental Bill, whereby it appeared that by his Father's Marriage Articles he was intitled to an Estate-Tail. *Ibid. 478; Rep. of Sel. Ca. in Chan. 27, 34, S. C. and Decree* ; by the Master of the Rolls ; but it appearing on the supplemental Bill, as in *Williams's Note*, the Decree was varied *per Reg. C.* on an Appeal, as to the Lands devised, but affirmed for a strict Settlement.

and after the Death of *J. S.* without Issue, to remain over to another : this Remainder is likewise void, because the first Devisee had a Fee, though it was a base and determinable Fee. *Dyer*, 41 *a* ; *Brook*, 234 ; 1 *Co.* 85 *b* ; *Bulst.* 195 ; *Plow.* 29 ; 2 *Leon.* 69 ; *Co. Lit.* 18 *a* ; *Poph.* 34 ; 2 *Roll. Rep.* 220 ; *Godolph.* 355.

2. But yet in a Will such Limitations may be good upon a Contingency that may happen within the Compass of a Life or Lives, *in Esse*, or a reasonable Number of Years : but this not by way of direct Remainder, but by way of executory Devise. *Cro. Eliz.* 205 ; 1 *Roll. Abr.* 626 ; *Dyer*, 124.

(See *Eq. Ca. Abr.* Part 2, Tit. Devise. An executory Devise is defined a future Interest which cannot vest at the Death of the Testator, but depends upon some Contingency which must happen before it can vest ; of which there are three kinds, *first*. Where the Devisor departs with his whole Fee simple, but upon some Contingency qualifies that Disposition, and limits a Fee on that Contingency ; and this is new in Law, as appears by the following Cases. Second Sort is, when the Devisor gives a future Estate to arise upon a Contingency, but does not part with the Fee at present, but suffers it to descend to his Heir as a Devise, till his Debts are paid, *&c.*, to the Heirs of *J. S.* when he shall have one : and these have been frequent : But note, that if an Estate be limited upon a Contingency, after a particular Estate, capable of supporting a Remainder, it shall then be construed a contingent Remainder, and not an executory Devise. Of the third Sort be Leasehold Interests or Terms for Years, for which *vide infra*, Letter (F), and *vide* 1 *Salk.* 226 ; 1 *Saund.* 380 ; 1 *Salk.* 229.)

3. One devised Land in *London* to the Prior and Convent of *B.*, *ita quod reddant annuatim Decano & Capitulo Sancti Pauli* fourteen Marks ; and if they fail of Payment, that their Estate shall cease, and that the said Dean and Chapter, and their Successors, shall have it : and it was held by *Baldwin* and *Fitzherbert* (the greatest Lawyers of their Age, as my Lord *Vaughan* says) that this Remainder was void, because the first Devise carrying a Fee, nothing remained after to be disposed of, and executory Devises after a Fee simple were in former Ages unknown. 1 *Brook.* 234 ; *Dyer*, 33 *a* ; *Vaugh.* 271, and *per Nottingham*, *Ld. Chan.*, though this Doctrine is now exploded, [187] yet the Case of *Hinde* and *Lyon*, 19 *Eliz.* 3 *Leon.* 64, is the first Case wherein the contrary has received a solemn Resolution.

4. One having Issue three Sons, *A. B.* and *C.*, by his Will in Writing devises Lands to *B.* his second Son, and his Heirs for ever, and if *B.* die without Issue, living *A.*, then *A.* to have those Lands to him and his Heirs for ever ; *B.* enters and suffers a Common Recovery to the Use of himself and his Heirs, and then devises those Lands to the Plaintiff and his Heirs, and dies without Issue, living *A.* And it was adjudged, *first*, That *B.* had a Fee simple by the Devise to him and his Heirs for ever ; and that the other Words would not so correct or qualify it, as to make it an Estate-Tail, not being, if he die without Issue generally ; but upon the Contingency of his dying without Issue, living *A.*, so that if he survived *A.* or died in the Life time of *A.* leaving Issue, *A.* was to have nothing ; and this being a Contingency to happen within the Compass of Lives then in Being, though the first Devise was after a Fee, yet the Limitation over upon such Contingency was good, and not within the Danger of a Perpetuity ; for the Remainder to *A.* is not a Remainder directly, which cannot be after a Fee, but takes Effect by executory Devise : and upon Determination of the first Estate, by the happening of the Contingency, carries over the Land to the other. *2ndly*, It was adjudged, that this being a mere collateral Possibility was not bound by the Recovery, unless he to whom it was limited had been Party by way of Voucher ; for it had not Existence at all, when the Recovery was suffered, and therefore the Recompence in value could not extend to it. *Mich.* 18 *Jac.* 1, in *B. R. Pells and Browne*, *Cro. Jac.* 590 ; 1 *Roll. Abr.* 611, *S. C.* ; *Palm.* 131 ; 2 *Roll. Rep.* 216 ; 2 *Leon.* 111 ; *Vaugh.* 272.

5. One by Will devises Lands to his Mother for Life, and after her Death to his Brother in Fee ; provided, that if his Wife (being then *enseint*) be delivered of a Son, that then the Land should remain to him in Fee, and dies, and the Son is born ; and it was held that the Fee of the Brother should cease, and vest in the Son, by way of executory Devise upon the Happening of the Contingency. *Dyer* 127, *in Margine*.

6. One having Issue *A.* his only Daughter and Heir apparent, by Will devises Lands in *D.* to her and her Husband, and her Heir, upon Condition that they should assure Lands in *E.* to his Executors and their Heirs, to perform his Will ; and if they failed, then he devised the said Lands in *D.* to his Executors and their Heirs, and died ; and it was adjudged to be no Condition : for then by the Descent to the Daughter, being

Heir, it would be destroyed; but it was held a Limitation, or an executory Devise to his Executors, in case the Assurance was not made; and that they might for Brevel thereof enter and sell; for though a Fee cannot be limited upon a Fee Absolute, yet upon a Fee determinable it may, and enures as a new original Devise to take Effect, when the first Devisee failed to make the Assurance. *Hydr 33 a. in Marston; Palm.* 135; *Cro. Jac.* 259; *Cro. Eliz.* 359, S. C.

7. If A. devises Lands to B. for five Years, from *Michaelmas* following, the Remainder to C. and his Heirs, and A. dies before *Michaelmas*; yet this is a good Remainder though it cannot vest before the particular Estate begins; and the Freehold cannot be in Expectancy, for in the mean time the Fee shall descend to the Heir. *Cro. Eliz.* 878.

[188] 8. One devises Lands to his Wife, till his Son came to the Age of twenty one Years, and then that his said Son should have the Lands to him and his Heirs; and if he dies without Issue before his said Age, then to his Daughter and her Heirs; this is a good contingent or executory Devise to the Daughter; if the Contingency happens, and in the mean time the Fee descends to the Son as Heir; and if he lives to twenty one, though he after die without Issue, or leaves Issue, though he die before twenty one, yet the Daughter is not to have the Lands, because he is to die without Issue, and before twenty one, or else the Daughter cannot take. 2 *Rol. Rep.* 197, 217; *Palm.* 132.

9. But where one having Issue three Sons, A. B. and C., devises to his Son A. after the Death of his Wife, to him and the Heirs of his Body lawfully begotten, in Fee Simple; and if he die in the Life of my Wife, that then my Son C. shall be his Heir, and dies; A. hath Issue, and dies in the Life of the Wife; and it was adjudged, that the Issue should have the land after the Death of the Wife, and not C., for it was in Effect a Devise to the Wife for Life, Remainder to A. in Tail, Remainder to C. in Fee, upon the Contingency of A.'s dying in the Life of the Wife, and does not abridge the Estate Tail expressly given A. by his dying in the Life of the Wife. *Spalding and Spalding, Cro. Car.* 185.

(From this Case it may be observed, that Equity will construe a Will against the express Words, in order to make it take Effect according to the Intention of the Testator. — 2 *Mill. Rep.* 196, S. C. cited by *Macclesfield, C. Mich.* 1729, in the Case of *Neeland and Shephard*. — 1 *Will. Rep.* 427, S. C. cited by *Parker, C.*, and by *L. C. J. Hale*, 1 *Vent.* 230.)

10. Baron and Feme being seised of a Copyhold, to them and the Heirs of the Baron, he surrenders it to the Use of his Will, and then devises it to the Heirs of the Body of the Feme, if they attain the Age of fourteen, and dies without Issue; and then she marries a second Husband, and has Issue that attains the Age of fourteen, and then she dies; and whether this was a good Devise by reason of the double Contingency, *scilicet*, the having Heirs of her Body, and that such Heir should live till fourteen, was doubted; but it was admitted, that if the Devise was good, it must be by way of executory Devise, which is allowable when to take effect within the Compass of a Life, but not after a Dying without Issue, for that tends to a Perpetuity; and it cannot take Effect by way of Remainder; for it is a new Devise to take Effect after her Death, and is not as a Remainder joined to her Estate. But the Court being divided upon the Point of the Contingency, it was agreed to be adjourned into the Exchequer Chamber; and the Reporter supposes the Parties agreed afterwards, for he heard no more of it. *Steele and Cutler*, 1 *Lev.* 135.

11. If a Man having only one Sister and Heir, who had Issue A., and after married B. by whom she had Issue C. and D. devises Lands to his Sister until C. attains twenty one, and after C. attains that Age, to C. and his Heirs; and if C. dies before twenty one, then to the Heirs of the Body of B. and their Heirs, as they shall attain their respective Ages of twenty one, and dies; C. dies before twenty one, living B., and after B. dies, D. either as Heir of C. in whom the Fee was vested, or as Heir of the Body of B. (though he could not be so during the Life of B.) being of Age after the Death of B. shall have the Estate by way of executory Devise, and not the right Heir of the Deviser. *Faulkner and Bidolph*, 2 *Mod.* 289, adjudged. (1 *Freem.* 243, *Faulkner and Bidolph, Hb.* 1677, S. C.)

12. If A. hath Issue two Sons, *viz.* B. and C., and devises Lands to B. for Life, and if he dies without Issue living at his Death, that then the Fee shall remain to the Heirs of B. for ever, by which Devise B. has only an Estate for Life, the Remainder to his Heir not executed; and though the Reversion descended on B. as Heir of A. [189] yet it drowned not the Estate for Life against the express Devise and Intention of the Will.

but left an Opening, as it was termed, for the Interposition of the Remainder, when it shall happen to interpose between the Estate for Life and the Fee; and that this being a contingent Remainder, and not an executory Devise, was barred by the Recovery suffered by *B.* *Holmes and Plunket*, 1 *Lev.* 11.

13. If one devises Lands to his Wife for Life, and if she hath a Son, and causes him to be called by the Christian and Surname of *Sampson Shelton*, then after her Death devises the same to her Son; and if he die before twenty-one, to the right Heirs of the Devisor, and dies; and after the Wife marries *Broughton*, by whom she has a Son, which she caused to be christened *Sampson Shelton*, &c., the Devise is good by way of contingent Remainder, but not by way of executory Devise; for when a contingent Estate is limited, and depends upon a Freehold, which is capable of supporting a Remainder, it shall never be construed an executory Devise, but a contingent Remainder adjudged; and that the Reversion descending to the Heir of the Devisor till the Contingency happened by the Bargain and Sale, and Fine thereof by the Heir of the Devisor to *B.* and his Wife, and their Heirs, before the Birth of their Son, the contingent Remainder was destroyed. *Trin.* 22 *Car.* 2, *Purefoy and Rogers*, 2 *Saund.* 380. (*Mich.* 1734, S. C. cited by *Talbot*, C., in the Case of *Hopkins and Hopkins*.—*Vide Eq. Ca. Abr.* Part 2; 3 *Salk.* 299, Pl. 5, cites S. C. adjudged.)

14. *A.* having two Sons *B.* and *C.*, devised Lands to *B.* for fifty Years, if he should so long live; and as for my Inheritance after the said Term, I devise the same to the Heirs Male of the Body of *B.* and for Default of such Issue, then to *C.* And the Court resolved, *first*, That *B.* had not an Estate-Tail by Implication upon the Words *without Issue*, because the Devisor had given him an Estate for Years by express Words; and the Court cannot make such a Construction against express Words, when thereby they would drown the Estate for Years, and make an Estate of Inheritance. *2dly*, The Court held this Devise to the Heirs Male of the Body of *B.* to be void in its Creation, for want of an Estate of Freehold to support it; and they seemed not to think it an Executory Devise, because it was limited as a Remainder, and because it was limited *per verba in presenti*; for if one devise his Estate to the Heir of *J. S.* and *J. S.* is living, the Devise shall not be construed an executory Devise, and such a Devise is therefore void; but if it were to the Heir of *J. S.* after the death of *J. S.* that is good as an executory Devise. *3dly*, The Court held the Limitation to the Heirs Male of *B.* was become void by the Event, whatever it was, in its Creation; because *B.* is now dead without Issue. *4thly*, The Court held, that if the Remainder to the Heirs Male of *B.* was void in Point of Limitation, then the next Remainder limited to *C.* took Effect presently. *Goodright and Cornish*, 1 *Salk.* 226; 4 *Mod.* 255, S. C.

15. *J. S.* seised in Fee, devised to Trustees for eleven Years, and then to the first Son of *A.* and the Heirs Male of his Body, and so on to the second, third, &c., Sons in Tail Male; provided they the said Sons shall take on them my Surname; and in case they or their Heirs refuse to take my Surname, or die without Issue, then I devise my Land to the first Son of *B.* in Tail Male, provided he take my Surname; and if he refuse, or die without Issue, then to the right Heirs of the Devisor. *A.* had no Son at the Time of the Devise, and died without Issue; and *B.* had a Son, who was living at the Time [190] of the Devise, who took the Surname of the Devisor. The whole Court agreed, that the Devise to *B.* was not a contingent Remainder, because of the precedent Estate for Years, which could not support it; it appears likewise by the Case, to be the Opinion of *Treby*, C. J., and Just. *Powell*, that it could not be good as an executory Devise, if it were considered as a Devise to the Heirs of *A.* being limited *per verba in presenti*; but *Blencow*, J., held, that the Devise to the Son of *A.* was future; for he supposed the Testator knew that *A.* had no Son, and the rather because he does not name him; because it was adjudged and affirmed in *B. R.* that the Remainder to *C.* was good, and vested in him. *Scatterwood and Edge*, 1 *Salk.* 229. (A Devise to the first Issue Male of *A.* *A.* having no Issue at the Time of the Devise, is void. *Vide Ca. in B. R. Temp. W.* 3, 278, S. C.)

16. A Man devised Lands to his Executors till his Son should come of Age, and when his Son should come of Age, then he should enjoy it for him and his Heirs; this is a Remainder executed in the Son, and not in Contingency; for the Words *when* and *then*, in this Case, only denote the Time when the Remainder is to execute and will no more make the Remainder contingent, than in the common Case, when a Lease is made for Life or Years and after the Decease of the Tenant for Life, or the Expiration of the Term of Years, then to remain to another; for though the Words

be, *after the Term it shall remain*, yet it is a present, and not a contingent Remainder for where Words refer to that which must needs happen, there shall be no Contingency. *Barston's Case*, 3 Co. 19. (1 *Freem.* 243, S. C. cited *per Cur.*)

17. A. having Issue five Sons (his Wife being *envent* with a sixth) devised two Thirds of his Land to his four younger Sons and the Child *in Ventu sa more*, if it were a Son, and their Heirs; and if they all die without Issue Male of their Bodies, or any of them, that the Lands shall revert to the right Heirs of the Devisor; by this Devise the younger Sons are Tenants in Tail in Possession, with cross Remainders over to each other; and no Part shall revert to the Heirs of the Devisor till all the younger Sons be dead without Issue Male of their Bodies. *Dyer*, 303; *Hob.* 33.

18. A Man having two Sons, devised Part of the Lands to one of them and his Heirs, and the rest to the other and his Heirs; and further wills, that the Survivor shall be Heir to the other, if either dies without Issue; by this the Devisees are Tenants in Tail, with Remainder in Fee executed of each other's Part. [*Chadock v. Cowley.*] *Cro. Jac.* 695.

19. But where a Man having three Sons, and seised of three Houses, devised a House to each Son and his Heirs, with this Proviso, that, if all his said Children shall die without Issue of their Bodies lawfully begotten, then all his said Messuages shall remain over, and be to his Wife and her Heirs; and it was held in this Case, that these Words did not raise any cross Remainders, but that at the Death of any of the Sons his House shall go immediately to the Wife; and though a cross Remainder may be by Implication, where Lands are limited to two, yet they cannot rise where three or more Houses are limited to three, without express Limitation, because of the Inconvenience. *Gilbert and Witty*, *Ibid.* 655. *Vide* [*Cole v. Livingston*] 1 *Vent.* 224, where *per Holt, C. J.*, no cross Remainders can be created by Implication in a Deed, nor any in a Will between three, or more, unless the Words of the Will do plainly express the Intent of the Devisor to be so; as where *Black Acre* is devised to A., *White Acre* to B., and *Green Acre* to C. and if they die without Issues of [191] their Bodies, *vel alterius eorum*, then to remain; there, by reason of the Words *alterius eorum*, cross Remainder shall be.

(F) OF EXECUTORY DEVISES OF LEASES FOR YEARS, AND HERE OF THE LIMITATION OF THE TRUST OF A TERM, AS FAR AS IT RELATES TO AND AGREES WITH THE DEVISE THEREOF.

1. If a Termor devises his Term to A. for Life, the Remainder to another, though A. has the whole Estate (for that is in him during his Life), and so no Remainder can be limited over at Common Law; yet it is good by way of executory Devise. *Cro. Jac.* 198; 1 *Rob. Abr.* 610; 8 Co. 94.

(The great Question in these Cases was, whether the Disposition of the Term to a Man for his Life, was not such a total Disposition of it, that no Remainder could be limited over, it being in the Eye of the Law a greater Estate than for any Number of Years; which was resolved in the Affirmative in the Reign of 6 E. 6. *Dyer* 74, by all the Judges of *England*; but this Resolution seeming very severe, and against natural Justice, that a Man should be hindered from making Provision for his Family and the Contingencies of it, occasioned a contrary Resolution, 19 *Eliz. Co. Lit.* 46. *Dyer*, 35, for the Judges observing the good Effect such Limitations by way of Trust had, which were allowed in Chancery, permitted Farmers to dispose of their Leases in the same Manner by Last Will; and then the Chancery, the better to fix them in it, allowed of Bills by the Remainder-Man to compel the Devisee of the particular Estate to put in Security, that he in the Remainder should enjoy it, according to the Limitation; but when they perceived that this multiplied Chancery Suits, they resolved that there was no need of that Way, 10 Co. 47 a, 52 b, 1 *Sid.* 451, but that the particular Devisee should not have Power to bar the Remainder-Man; so that the Law has been long settled, that executory Devises are good, provided the Contingency is to happen within a Life or Lives all *in Esse*; for there can be no Tendency to a Perpetuity which was one great Mischief apprehended from these kind of Limitations; but what Kind of executory Devises do or do not tend to a Perpetuity, will be best seen by the Cases themselves.)

2. If A. possessed of a Term for Years, devises it to B. his Wife, for eighteen Years, and after to C. his eldest Son for Life, and after to the eldest Issue Male of C. for Life, though C. had not any Issue Male at the Time of the Devise and Death of the Devisor;

yet it be had Issue Male before his Death, this Issue Male shall have it as an executory Devise; for although there be a Contingent upon a Contingent, and the Issue not *in Esse* at the Time of the Devise, yet in as much as it is limited to him for Life, it is good, and all one with *Manning's Case*, upon a Reference out of Chancery to Justice *Jones, Croke* and *Burkley*, between *Colton* and *Heath*, by them resolved, without Question. 1 *Roll. Abr.* 612.

3. If A. possessed of a Term, devises to B. his Wife for Life, and after her Death to his Children unpreferred; and after B. dies, C. then being the only Daughter of A. shall have it; for an executory Devise that hath a Dependence on the first Devise, may be made to a Person uncertain. 1 *And.* 60, 61.

4. If one possessed of a Term devises it to his Wife for Life, the Remainder to his first Son for Life; and if he dies without Issue, to his second Son, &c. The Remainder to the second Son is void; for the Remainder of a Term cannot depend upon a Possibility so remote as the Dying without Issue; although it was objected, that the Devise was not to the first Son and his Issue (in which Case it was agreed it should go to his Executor), but it was given to him for Life only, with an executory Devise to the second Son, upon the Contingency of the first not having Issue at the Time of his Death. *Love* and *Windham*, 1 *Lev.* 290. (2 *Chan. Rep.* 14, S. C.)

[192] 5. If a Man possessed of a Term for Years, devises it to D. his Wife for Life, and after to W. his eldest Son, and his Assigns; and if he dies without Issue then living, to T. this being a perpetual Limitation by Intendment of Law, is void; and if Men should be admitted to make such Devises there would not be any End of them, nor any Certainty. *Child* and *Bayly*, *Cro. Jac.* 459, 460; 1 *Roll. Abr.* 613. Note: The Authority of this Case is shaken by the Duke of *Norfolk's*, and denied to be law. 1 *Salk.* 225. Vide *Pl.* 8.

6. If a Man possessed of a Term devises it to his Son, and if he dies unmarried, and without Issue, to his Daughters; and if his Son be married, and has no Issue then living to enjoy it, then after the Death of his Son's Wife, he devises it to his said Daughters; the Devise to the Daughters is void, being a Limitation after the Death of their Brother without Issue; for it is not to be taken (as objected) that the Dying should be without Issue living at his Death, and so the Contingency to happen within the Compass of a Life; and if it should be intended of such a Dying without Issue, yet the Court held it would be void, according to *Child* and *Bayly's Case*; for tho' such a Devise hath prevailed in case of an Inheritance, as in *Pell* and *Brown's Case*, yet it hath not yet prevailed in case of a Term; and the Court said they would not extend the Devises of Chattels to make Perpetuities, farther than they had been. *Gibbons* and *Summers*, 3 *Lev.* 22, 23. Quære.

7. A. having Issue several Sons (the eldest *Non compos*) created a Term for Years, and by another Deed declared the Trust thereof to his second Son and the Heirs Male of his Body, Remainder to his other Sons, provided that if his eldest Son died without Issue, or not leaving his Wife *enfeint* with a Child, living the second Son, so that the Earldom of ——— descended on the second Son, then the said Term to remain to the third Son and the Heirs Male of his Body, with like Limitations to the other Sons; the eldest Son died without Issue, living the second; and this Limitation to the third Son was held good; and so decreed by Lord *Nottingham* contrary to the Opinion of the three Chief Justices who assisted him. 3 *Chan. Ca.* 1. *Duke of Norfolk's Case*. Note: This Decree was reversed by *North*, *Ld. K.*, 1 *Vern.* 163. But upon an Appeal to the House of Lords, the last Decree was reversed, and Lord *Nottingham's* established, 1 *Chan. Ca.* 53. Note: Executory Devises and Limitations of the Trust of a Term are governed alike. 1 *Vern.* 164, 235.

8. If a Term is devised to A. and the Heirs of his Body, and if A. die without Issue, living B., then to B., this is a good Limitation, the Contingency arising within the Compass of a Life. Adjudged between *Lamb* and *Archer*, 5 *W. & M.* [1693-94] in *B. R.* 1 *Salk.* 225. And *Child* and *Bayly's Case* denied to be Law. Vide *Pl.* 5. (*Comb.* 208, S. C. *Skinn.* 340, S. C. *Per Cur.*) Here is not any of the Inconveniencies of Perpetuities; for the Estate is not unalienable, but only during one Life, and this upon a Contingency which might determine within a little Time, if the Party dies; and Judgment *visi*. *Proc. in Chan.* 15, S. C., and Decree says the Devise was to A. his Heirs, Executors and Assigns.)

9. J. S. devises to his Son a Leasehold Estate, to his Executors, Administrators and Assigns for ever; but if he died before twenty-one without Issue, in that Case devises it over to his Brother; and the Question was, whether the Remainder over

was good. It was objected, that it was a Perpetuity, for that the Remainder depends on the Son's dying without Issue; for if he die before twenty one, though he leaves a Child, and that Child afterwards dies without Issue, the Son may be said to be dead before twenty one without Issue: *Sed non Allocatur*; and the Court decreed the Remainder over good. *Trin.* 1690. *Martin and Long*, 2 *Vern.* 151. And a like Case said to have been adjudged in the Exchequer, *Smith and Smith*.

[193] * 10. One *F.* being possessed of a Term for Years, devises it to his Wife for Life, and after her Death to *R. F.* for her Life; and after her Death to *T. F.* and his Children; and then devises in this Manner; and if it shall happen the said *T. F.* do die before the Expiration of the said Term, not having Issue of his Body then living, then to go over to the Plaintiffs for the Residue of the Term; the Defendant's Title was by an Assignment of *R. F.* and *T. F.* of all their Estate, Right, Title and Interest. *R. F.* was dead, and *T. F.* died without Issue, and the Plaintiff brought his Bill to have an Assignment of the Term pursuant to the Will; all that was insisted upon for the Defendant, to difference this Case from the Duke of *Norfolk's* of a Term, and of *Pell and Browne's* Case, of a Fee, was, that this Contingency of his dying without Issue was not confined to his own Death, but that the Words, *then living*, should relate to the Words, *before the Expiration of the Term*; and so this went further than any of the Cases had ever yet been carried, for he might have Issue for several Generations; and yet if such Issue failed at any Time before the Expiration of the Term, then it was to go over; and this in a long Term tended plainly to a perpetuity, and therefore ought not to be allowed; but by the Devise to *T. F.* and his Children, and the subsequent Words, *and if he die without Issue*, the whole Term and Interest was vested in him, and he might dispose thereof as he thought fit, and it could not be restrained by the Words *then living*, which related only to the Words *before the Expiration of the Term*, and so the Remainder over to the Plaintiff void; but for the Plaintiffs it was argued and decreed, that the Remainders to them were good by way of executory Devise, and that the Words *then living*, must relate to the Time of his Death; for otherwise there would be no Difference between this and the common Limitations of a Term to one and the Heirs or Issue of his Body; and if he dies without Issue, the Remainder to another, which is void; for there it must likewise be intended, if he die without Issue before the Expiration of the Term, or during the Term; since after the Expiration of the Term he can limit no Remainders over, because nothing remains then to be limited; but here it being limited over upon this Contingency, if he die without Issue then living, *viz.* at the Time of his Death, it is good, because the Contingency must happen within one Life, or not at all; for upon his Death it will be certainly known, whether he leaves Issue or not; if he does, the Contingency cannot take place; if he does not, then it may; and this being to happen within the Compass of a Life, is good as an executory Devise, and differs in nothing from the Duke of *Norfolk's* Case, save only that there it was by Proviso, and also upon the Death of another Person without Issue then living; and here it is upon his own Death, which makes no Manner of Difference. *Fletcher's* Case, decreed *Trin.* 1709.

11. A Man possessed of a Term for thirty-one Years, devises it to his Son *H.* during his Minority; and if he attains to his Age of twenty-one Years, then to him during his Life, if the Term shall so long continue, and no longer, and after his Death to such of his Issue to whom he shall devise it; but if he die without Issue, then to his other Son *G.* for the Residue of the Term. *H.* afterwards died without Issue, or without making any Disposition of the Residue of the Term; and the only Question was, whether by the Words of this Will the whole Term did not vest in *H.*, and it was decreed, that it did not; for the Words *die without Issue*, have a twofold Meaning, either without Issue at the Time of his Death, or without Issue whenever the Issue fails; and though in case of an Inheritance, if Lands are devised to one, and if he die without Issue, the first Devisee takes an Estate-Tail by Implication, which shall go to his Issue, and they shall take in a Course of Descent to all succeeding Generations; but to make such a Construction in the Case of a Term, which cannot come to the Issue by Descent, is unnecessary, and therefore in such Case the other Construction of the Words, which is most natural and obvious, shall take place; and it shall be intended only, if he die without Issue living at the Time of his Death, and consequently the dying without Issue being confined within the Compass of a Life, hinders not the Remainder over; but it may well take place by way of executory Devise, according to the former Resolutions. Decreed *Pasc.* 1718, *Targett and Gaunt*.

(*Gilb. Eq. Rep.* 149, S. C. *in totidem verbis*, 1 *Will. Rep.* 432; *Easter* 1718, *Target* and *Grant & al.*, S. C. says, The Devise was to *H. for his Life, and no longer, and after his Decease to such of the Issue of the said H. as H. by his Will should appoint*; and in case *H.* should die without Issue, then the Testator devised the same over: *H.* died without Issue living at his Death: *Parker, C.* held the Devise over good. The Reporter in a Note says, the Words which are in *Italic* are all omitted in the Register-Book, though they are inserted in all the contemporary Reports of this Case, and seem here to be the principal Foundation of the Decree.—*Lucas's Rep.* 403, S. C.)

[194] (G) OF TERMS FOR YEARS, AND INCERTAIN INTERESTS BY DEVISE.

1. A Man devised his Land to his Executors for Payment of his Debts, and after Debts paid, the Remainder over: and it was admitted clearly, that the Remainder was good; but the Question was, what Estate the Executors had, for there being no particular Estate limited, if an Estate should be adjudged for them for Life, it might determine before they received sufficient to answer the End of the Devise: for on their Death it would not go to their Executors: and it was adjudged an incertain Interest, which should go from Executor to Executor for Payment of Debts. *Cro. Eliz.* 315; 8 *Co.* 96; 1 *Roll. Abr.* 829.

2. A. devises his Lands to his Executors, till his Son comes of Age, the Profits to be employed in the Performance of his Will, though the Son dies before he be of Age, yet the Interest of the Executors continues till he might be of Age, if he had lived; for since the Intent of the Devisor governs in Wills, it might destroy that, if the Executor's Interest ceased at the Death of the Son; for it is reasonable to believe, that the Testator found on a Computation, that the Profits of the Land, in that Time, would answer his Debts, &c. so that this is a good Devise of the Term, till the Son would be twenty-one, though he die before. [*Carter v. Church.*] 1 *Chan. Ca.* 113. 3 *Co.* 20 b, *Boraston's Case*, S. P.

3. If a Man devises Land to his Wife, till his Son comes of Age, to provide his Children with Necessaries; though the Wife dies before the Son comes of Age, yet her Interest does not determine by her Death, because it was not a Matter of mere Confidence, but shall go to her Executors: but if the Devise had been, that his Land should descend to his Son, but that his Wife should have the full Profits thereof, until the full Age of his Son, for his Education; [195] here is nothing devised to the Wife but a mere Confidence, that she shall take the Profits for the Education of the Son; and by the Will she is but in Nature of a Guardian or Bailiff, for the Benefit of the Infant, which determines by her Death. *Cro. Eliz.* 252; *Dyer*, 210.

4. A Man devised certain Lands to his Wife, till his Son and Heir apparent should attain to his Age of twenty-one Years, and when his Son should attain to his Age, then to his Son and his Heirs, and died; the Son lived to the Age of thirteen Years, and then died; and the Wife supposing that she had a Title to hold the Lands till such Time as the Son would have attained his Age of twenty-one Years, in case he had lived to that Time, continues in the Perception of the Rents and Profits of the said Lands, for several Years; and the Bill was brought against her by the Heir at Law of the Son, to have an Account of the Rents and Profits from the Death of the Son; and though the Wife was Executrix likewise of her Husband, yet it not being devised during that Time for Payment of Debts, nor any Creditors, or Want of Assets appearing, it was held by *Ld. Chan.* that the Wife's Estate determined by the Death of the Son, and that the Remainder vested presently in the Son upon the Testator's Death, and was not to expect, till the Contingency of his attaining his Age of twenty-one Years should happen: for then in this Case it never would have vested, he dying before that Age, and therefore decreed the Wife to account for the Profits from the Time of the Son's Death: and upon a Rehearing his Lordship continued of the same Opinion and grounded himself on the Distinctions taken in 3 *Co.* 19 (*Boraston's Case*) and 6 *Co.* 35 (*Bp. of Bath's Case*). *Hil.* 1713, *Manfield* and *Dugard*. (*Gilb. Eq. Rep.* 36, S. C. *in totidem Verbis*.)

5. If a Copyholder devises his Land to A. and B. his two Sons, and to the Heirs of their two Bodies begotten, and wills that each of them shall enter at the Age of twenty-one Years, the Executors shall not take the Profits till they are both of full Age; but he who comes of Age first shall enter, and then the other when he comes of Age, and they shall hold the Land jointly. *Cro. Jac.* 259; *Yelv.* 183; *vide* 1 *Bulst.* 48 *conl.*

6. A. devised to B. during his Exile; and if it please God to restore him to his Country, or if he die, then to J. S. B. was a *Dutchman*, and had a Pension from the States; but upon some Displeasure the States deprived him of his Employment and of his Pension, and gave them to another; whereupon he voluntarily left the Country, and lived here with A. who had been his Acquaintance beyond Sea; and after his coming hither, a War happened between the *Dutch* and *English*, and afterwards a Peace was concluded between the two Nations; yet B. continued here, and whether his Estate was determined was the Question; and the Court held it was not, for that the Exile intended by A. was the leaving his Country, because of the States Displeasure to him and the withdrawing of his Pension upon that Displeasure. *Pept* and *Vascios*, 2 *Lev.* 191.

7. A. devised his Land to B. and C. and the Survivor of them till £800 should be raised out of them; and it was adjudged that B. and C. should have the Land no longer than they might have received it out of the Profits; and that if a Stranger enters after the Death of the Devisor, they may have an Account of the mean Profits, but cannot hold the Land longer than the Sum might have been levied; for if that were allowed, they might make it an eternal Charge on [196] the Heir's Estate; but if the Heir himself enters and disturbs them, they may hold over, for the Heir shall have no Benefit of his own Wrong, or they may have their Action against him at their Election. 4 *Co.* 82, *Corbet's Case*, *Cro. Eliz.* 800. [Anonymous,] 1 *Salk.* 153, S. P.

(II) OF DEVISES BY IMPLICATION.

1. If A. devises Lands to his Heir, after the Death of his Wife; this is a good Devise to the Wife for Life by Implication; for by the express Words of the Will the Heir is not to have it during her Life; and if the Wife has it not, none else can, for the Executors cannot intermeddle. 1 *Rob. Abr.* 843. *Faulkner v. Faulkner*, 1 *Vern.* 22, S. P. *London v. Garway*, 2 *Vern.* 571, 572, S. P., 2 *Vent.* 223, S. P.

(The Law in conveying of Estates did not regularly suffer any to pass by Implication, because it is a Manner of transferring no Way agreeable to the Plainness and Solemnity of the Law: As if A. surrendered to the Use of D. and B. and for want of Issue to B. the Remainder over to C. This in a Conveyance at Law had been but an Estate for Life to B. and no Estate Tail by Implication; but as there has been greater Favour and Latitude allowed in the Disposition of Estates by Will, and in the Construction of them, the Judges, to support the Intent of the Devisor, where it was very apparent, have admitted Estates by Implication, though to the Dishonour of the Heir at Law. But where such Estates arise, it must be by a necessary, and not a possible Implication or Intention in the Devisor; for the Heir's Title being plain and obvious, no Words by Construction shall impeach it, which will bear a contrary Signification. *Vaugh.* 263.)

2. If a Man devises to a Stranger, after the Death of his Wife, this gives the Wife no Estate for Life by Implication; for it is but a Demonstration when the Estate of the Stranger shall commence. *Bro. Dev.* 52; *Cro. Jac.* 75. *Faulkner v. Faulkner*, 1 *Vern.* 22. *London v. Garway*, 2 *Vern.* 571, 572, S. P. 2 *Vent.* 223.

3. If one having a Wife and two Daughters Heirs at Law, devises Lands to one of the Daughters after the Wife's Death; this gives the Wife an Estate for Life, though the Daughter was but one of the Co-heirs. *Hutton v. Simpson*, 2 *Vern.* 722, 723.

4. If a Man possessed of a Term for Years, devises it to his Son after the Death of his Wife, and the Wife is made Executrix, she shall have the whole Term as Executrix; for there cannot be an Estate for Life of a Term by Implication, as there may be of an Inheritance. *Moor*, 635.

5. A. seised of a Manor, Part in Demesnes, and Part in Services, devised all the Demesnes to his Wife expressly for Life, and all the Services for fifteen Years; and then devised the whole Manor to a Stranger after her Death; it was resolved that the last Devise should not take Effect till after her Death, and yet she should not have the Services for her Life by Implication, but that the Heir should enjoy the Services after the fifteen Years, though she were still alive; for there appears no necessary Implication, that she should have the Whole for her Life, with an Exclusion of the Heir; and a possible Implication is not sufficient to exclude him, for nothing but the apparent Intent of the Devisor can do that; but if the Devisor had said, that after the Death of his Wife and the Stranger, the Heir should have the Manor, the Wife by a necessary Implication shall have the whole Manor for her Life, for the Devisor's

Intent is plain, that the Heir is not to have the Manor, while the Stranger and the [197] Wife live, and the Stranger cannot take any Thing whilst she lives. *Moor, Pl. 24, Vaugh. 365.*

6. One having Issue a Son, who was his Heir apparent, and two Daughters, devises in these Words : If it happen my Son *B.* and my two Daughters to die, without Issue of their Bodies lawfully begotten, then all my Lands shall be and remain to my Nephew *D.* and his Heirs for ever, and dies ; and it was held, *first*, That no express Estate was by this Will given to his Children ; *2dly*, Nor any Estate by Implication, because then it must be either a joint Estate for Life, with several Inheritances in Tail, or several Estates Tail in Succession one after another ; the last it cannot be, because incertain which shall take first, which next ; and the first it shall not be, because the Heir at Law shall not be disinherited without a necessary Implication, which in this Case there is not, for it is only a Designation and Appointment of the Time when the Land shall come to the Nephew ; as if he had devised thus ; I leave my Land to descend, or I give my Land to my Son and his Heirs, till he and my two Daughters die without Issue, or so long as any Heirs of the Body of him and my two Daughters shall be living ; and then or for want of such Heirs I devise the same to my Nephew ; this is good as a future and executory Devise ; and in the mean time the Land shall descend to the Heir at Law, he having made no Disposition thereof. *Hil. 21 & 22 Car. 2. c. 13 [1671]. Gardiner and Shelton, Vaugh. 259.*

(1 *Freem. 11, S. C. resolved by three Judges contra Tyrrell.*)

7. *A.* devises to *B.* and his Heirs Male, and if he dies without Heirs of his Body then to remain to *C.* in Fee ; this is but an Estate in Tail Male to *B.*, for the Law supplies the Words of *his Body*, and since the Devisor only gave it by express Words to him and his Heirs Male, it would be against his plain Words to let in Issue Female by Implication on the other Words, *viz. If he dies without Heir of his Body.* *Dyer, 171.*

8. So if a Man devises to *A.* and the Heirs of his Body ; and if he die without Heir, that shall not give the Devisee an Estate in Fee by Implication. *Vide [Bampffield v. Popham] 2 Vern. 451.* Where an Estate for Life may be enlarged by Implication, *vide Letter (D), p. 179.*

(I) OF DEVISES OF LANDS FOR PAYMENT OF DEBTS.

1. A Man seised of Copyhold Lands surrenders them to the Use of his Will, and then by his Will says, *My Debts and Legacies being first deducted, I devise all my Estate both Real and Personal, to J. S.*, and it was held by Ld. Chan. that this should amount to a Devise to sell for the Payment of Debts. *Pasc. 1682, Newman and Johnson, 1 Vern. 45.*

(Creditors are so far favoured in Equity, that whenever it appears to be the Testator's Intent, that his Lands should be liable to his Debts, Equity will make them subject, though there are not express Words of Charge ; but *note*, that there must be something more than a bare Declaration, that his Debts should be paid, otherwise it shall be intended out of the Personal Estate, and the Real will not be liable, as appears by the Cases on this Head.)

2. *A.* devised all his Lands to *B.* and the Heirs of his Body, Remainder over ; and in another Part of his Will, reciting that he owed *B.* Money upon Account, he therefore devised to him all his Personal Estate, and made him Executor, willing him to pay his Debts ; and upon the reading of the Will, though the Clause as to the Payment of Debts seemed to relate to the Personal Estate only ; and though the Lands were devised to *B.* in Tail, with a Remainder [198] over to another ; and that it was objected, that a Tenant in Tail could not be a Trustee ; yet the Court decreed both Real and Personal Estate to be sold for Payment of the Testator's Debts. *Mich. 1686, Cloudsly and Pelham, 1 Vern. 411.* 2 *Vern. 229, S. C. cited*, and the Decree said to be affirmed in the House of Lord

3. But where a Devise was in the following Manner : *I will all my Debts shall be paid before any of my Legacies or Gifts herein after mentioned*, and devises several pecuniary Legacies ; and after, in the same Will, devises Lands to *J. S.* on Condition to pay a certain Rent to *J. N.* and other Lands to *J. S.* on Condition to pay £5 *per Ann.* to *J. D.* And the Question was, whether these Lands were by the Will subjected to the Payment of the Testator's Debts, or only to the Payment of the Particular Rents thereout devised ; and the Court held, that the Lands were not subjected to the Payment

of the Testator's Debts, for the general Clause in the Beginning of the Will shall be intended only of the Personal Estate, and the pecuniary Legacies thereout devised. *Pasc.* 1687, *Eyles and Cary*, 1 *Vern.* 457.

(This is a strong Case. I question if it would now be so decreed: *Per Vernon*, Master of the Rolls, in the Case of *Mallison and Middleton*, Aug. 2, 1739.)

4. If *J. S.* devises his Lands to his Brother, who is his Heir at Law in Fee, and likewise devises several Legacies, and makes his Brother Executor, desiring him to see his Will performed according to the Trust and Confidence he had reposed in him; this makes the Real Estate liable; for the Testator needed not have devised the Estate to his Brother, being Heir at Law, unless he intended that he should take them chargeable with the Debts and Legacies. Decreed *Pasc.* 1691, *Alcock and Sparhawk*, 2 *Vern.* 228, and affirmed in the House of Lords.

5. *A.* devised in the following Words: *I do by this my Will dispose of such worldly Estate as it hath pleased God to bestow upon me; first, I will that all my Debts be paid and discharged, and out of the Remainder of my Estate I give and bequeath unto my Wife £300. My Mind and Will is, that my Wife have one Moiety of what is left after my Debts paid. Item, I give to my dear Brother R. B. a close lying in the Parish of ———, and for the remaining Part of my Estate, as well Real as Personal, I give and bequeath unto my Brother J. B. whom I make Executor; and it was held clearly, that these Words subjected his Real Estate to the Payment of his Debts.* *Beachcroft v. Beachcroft*, 2 *Vern.* 690.

6. So where *A.* being seised of a Real Estate, and also possessed of some Personal Estate, made his Will in Writing, and thereby devised in these Words: *Imprimis, I will and devise that all my Debts, Legacies and Funeral Charges shall be paid and satisfied in the first Place. Item, I give and devise,* and then proceeds to dispose of his Real and Personal Estate; the Personal Estate not being sufficient, the Question was, whether that Clause in this Will should amount to a Charge on his Real Estate for the Payment of his Debts, Legacies and Funerals; and *Ld. Chan. Cowper* was clear of Opinion that it should; for as to his Debts it was but natural Justice they should be paid, and his Personal Estate would have been liable to the Payment thereof, whether he had given any Directions in his Will about them, or not; when therefore he wills and devises that his Debts, Legacies and Funerals shall be paid and satisfied in the first Place, these Words must be intended to give a Preference for these Purposes to any other whatsoever; and since he does not devise his Real or Personal Estate to any Person in particular for these Pur-^[199]poses, the Persons who come within that Description must be supposed to be within his View; and it must be taken as a Devise for their Benefit, preferable to any other Disposition whatsoever, either of his Real or Personal Estate, and consequently both of them are thereby made liable thereto: Decreed *Hil.* 1715, *Trott and Vernon*. (*Prec. in Chan.* 430, *S. C. in totidem Verbis.* *Gibb. Eq. Rep.* 111, *S. C. in totidem Verbis.* 2 *Vern.* 708, *S. C.* where it is said, that some Stress was laid on the Word *Devise*. *Vide* 2 *Eq. Ca. Abr.* 291, *S. C.*)

7. If Lands are devised to Trustees for the Payment of Debts and Legacies out of the Rents and Profits, the Trustees may sell the Land itself. *Anon.* 1 *Vern.* 104. ([*Dacres v. Chute*,] 2 *Chan. Ca.* 105, *S. P.* Decreed.)

8. But if the Devise be to pay Debts and Legacies out of the annual Rents and Profits, by these Words the Lands shall not be sold. *Anon.* 1 *Vern.* 104.

9. If there be a Devise of a Sum certain, to be raised out of the Profits of Lands, and the Profits will not amount to raise the Sum in a convenient Time; *per Ld. Chan.*, it is the Law of this Court to decree a Sale. *Mich.* 1684, *Hoycock v. Hoycock*, *Vern.* 256. (2 *Vent.* 357.)

10. *A.* devises that his Executors shall receive the Rents, Issues and Profits of his Personal Estate, in the first Place to pay £60 *per Ann.* to one for Life, and after that Person's Death, out of the Remainder of his Estate, his Debts being paid, to raise Portions for several Children, payable at twenty one, and Maintenance in the mean time, and devises all his Lands in several Parcels to several Persons at future Times; and the Master of the Rolls held, that the Lands were liable to be sold, and that the Sales should be out of all the Devisee's Lands, unless the Personal Estate were sufficient, or the Rents and Profits in a reasonable Time; and ordered an Account to be taken thereof in the first Place. *Trin.* 1687, *Berry and Askam*, 2 *Vern.* 26.

(K) OF DEVISES OF THINGS PERSONAL; AS GOODS, CHATTELS, &c., BY WHAT DESCRIPTION, AND TO WHOM GOOD.

1. If a Man who has Debts due to him by Bond, and who is likewise possessed of a Term for Years, devises one Moiety of his Personal Estate to his Wife, and afterwards several Legacies to other Persons, and the Residue to *J. S.* The Wife shall have one compleat Moiety, if the other is sufficient to pay the Debts, and she shall have a Moiety of the Lease; though it was objected, that a Lease was not usually reckoned Personal Estate. *Lee and Hale, 1 Chan. Ca. 16. (2 Freem. 157, S. C.)*

2. If a Man possessed of a Lease for Years, bequeaths several Legacies of Plate and other Goods to several Persons, and after devises all the Residue of his Goods to his Wife, his Debts and Legacies being paid, and makes her sole Executrix; by this Will the Lease passes to her as Legatee; for though by a Grant of *omnia Bona*, a Lease passes not, yet by the Civil Law *Bona* including all Chattels, and this being a Legacy, the Judges of the Common Law in this Case ought to be guided by that Law. [*Portman v. Willis,*] *Cro. Eliz.* 387.

3. If a Man devises £1200 to *J. S.* and by general Words devises all his Goods, Chattels and Household Stuff in and about his House to the said *J. S.* Money in the House will not pass, he having a particular Legacy devised to him. [*Sanders v. Earle,*] *2 Chan. Rep.* 190.

[200] 4. Plate and Jewels will not pass by a Devise of Utensils. *Dyer* 59.

5. But by a Devise of Household Goods, Plate will pass. *Lillicott v. Compton,* *2 Vern.* 638.

(*Vide the Case of Jesson and Essington.* *2 Eq. Ca. Abr.* 321.—*Budgden and Ellison, Vide P. Wms.* 425, *in note.* *Nicholls v. Osborn,* *2 P. Wms.* 420.)

6. If a Nobleman possessed of a Collar of SS, and of a Garter of Gold, and a Buckle annexed to his Bonnet, and of many other Buttons of Gold and precious Stones annexed to his Robes, and of many other Chains, Bracelets, and Rings of Gold, and precious Stones, devises all his Jewels to his Wife, and dies; the Garter and Collar of SS pass not, because they are not properly Jewels, but Ensigns of Honour and State; and the Buckle in his Bonnet, and the Buttons pass not, because annexed to his Robes; but all the other Chains, Rings, Bracelets and Jewels pass. *Earl of Northumberland's Case*, upon a Reference to *Wray and Anderson, C. J. Owen* 124.

7. *J. S.* by Will devises thus; *Item, My Will and Pleasure is that the Furniture and Pictures in my Houses at A. B. and C. shall always remain there, and not in the Power of my Executors to dispose of, but shall go, with my said Houses, to such of my Grandchildren as shall be in the Possession thereof; and then appoints that the Plate gilt with Gold belonging to his Chapel at ———, together with the Ornaments thereof, should remain to the perpetual Use of the said Chapel, and makes D. Executor; to whom he gives all his Personal Estate, except what is before bequeathed, of what Nature or Kind soever, for his own proper Use; and the Question was, if the Plate the Testator constantly used, and removed with him, when he went from one House to another, should go to the Executor by the last Clause, or belong to the Houses, under the Word Furniture; and Wright, Ld. K. was of Opinion, that Furniture in a large Sense takes in Plate, but not here, because he distinguishes the Chapel Plate from the Furniture; and the Plate of ordinary Use, that was carried with him, could no more be said the Furniture of one House than of the others, and he meant only the particular Furniture of each House; so the Plate went to his Executors, and liable to the Plaintiffs, who were Creditors. *Mich.* 1705, *Franklin and Earl of Burlington (Prec. in Chan.* 251, *S. C. in totidem Verbis); vide 2 Vern.* 512, *S. C.*, where it is said to have been adjudged that the Plate passed by the Devise of his Furniture and Pictures. Sed quære.*

Under a Devise of Household Furniture which should be in Testator's House at her Death, Plate whether in common Use or not, if suitable to Testator's Rank, Pictures hung up, Linen and China both useful and ornamental will pass; but Books in a Library will not pass. *Kelly v. Powlet, Ambl.* 605.

8. If a Man devises his House, and all his Goods and Furniture therein, to his Wife for Life, and after her Decease to his Son *R.* and his Heirs, except his Pictures, which he gives to his Sons *A.* and *B.*, and he has Pictures in Boxes, as well as those hung up in the House, and likewise Pictures at his Death, which he had not at the Time of the making the Will; and it is proved in the Cause, that he had Skill in Pictures, and frequently bought Pictures, and sold them again; the Exception of the Pictures shall

extend, as well to the Pictures hung up as Furniture, as to those in Boxes, and as well to those in the House at the Time of the Will, as to those bought in after the Will made : so that they shall pass to his Sons A. and B. *Per* Ld. K. *Hil.* 1705, *Gage and Gage*, 2 *Vern.* 538.

Under a Devise of all my Pictures, &c., they being a good Collection Pictures purchased afterwards shall pass. Dean, &c. of Christ Church v. Barrow, Ambl. 641.

9. If a Man devises to his Wife all his Personal Estate at a Place called W., all his Personal Estate, as Coaches, Horses, &c., there at [201] the Time of his Death shall pass, though not there at the making of the Will, the Personal Estate being fluctuating and varying until the Time of the Testator's Death. *Mich.* 714, 1 *Sayer and Sayer*, 2 *Vern.* 688, *per Curiam* ; *vide Scrob.* 418. (*Prec. in Chan.* 392, S. C. *Gibb. Eq. Rep.* 87, S. C. *in totidem Verbis* with *Prec. in Chan.* *Vide Masters and Masters*, S. P. *Eq. Ca. Abr.* Part 2, p. 322.)

10. But if J. S. devises all his Household Goods and Furniture, which should be in his House at B. at his Death, to his Wife, and afterwards going beyond Sea, his Steward gets the Head Landlord of the House to accept of a Surrender of the Lease of the House, and removes the Goods to another House, and writes an Account of this to J. S. who approves of it : the Goods will not pass by the Will to the Wife ; otherwise, if they had been removed by Fraud to defeat the Legacy, or by any tortious Act, without the Privy of the Testator : Decreed *Hil.* 1716, *Earl and Countess of Shaftsbury*, 2 *Vern.* 747.

11. So if a Man devises to his Son the Furniture of his House at D. and two Years afterwards orders Goods which he had bought in London, to be carried to his House at D. and agrees with Carriers for that Purpose, but dies before the Goods are removed from London : these Goods shall not pass by the Will, as Part of the Furniture of the House at D. Decreed *Hil.* 1716, *Duke of Beaufort and Lord Dunsdown*, 2 *Vern.* 739.

* 12. A man devised all the Arrears now due, and unjustly detained from me by the Dean and Chapter of York, to be employed in a certain Charity : and the Question was, whether the Arrears incurred after the making of the Will, and a small Time before the Death of the Testator, and which were never demanded by the Testator, should pass : and *per* Ld. K. not : for though a general Devise of all a Man's Goods will carry all he had at his Death, though purchased after the making his Will : yet here it is confined to the Arrears due at the making the Will : Decreed *Trin.* 1701, *Attorney General and Bury*.

* 13. If a Man devises his Silver Tea-kettle and Lamp, with the Appurtenances, nothing shall pass but the Kettle and Lamp, and the Box wherein the Lamp was placed, and not the Silver Tea-pot, Milk-pot, Tongs, Strainer, or Cannisters. Resolved at the Rolls, *Mich.* 1728, in a Case between *Hunt and Berkley*.

* 14. A man devised to his Niece all his Goods, Chattels, Household-stuff, Furniture, and other Things which then were, or should be in his House at the Time of his Death, and some Time after died, leaving about £265 in ready Money in the House : and it was decreed, that this ready Money did not pass : for by the Words *other Things* shall be intended Things of like Nature and Species with those before-mentioned. *Mich.* 1729, *Trafford and Berrige*.

But where a Man devised to his Wife, his House for the Remainder or the Term he had therein, with all which should be in it at his Death : Lord Hardwicke held, that Cash and Bank Notes would pass by these Words, but that it would be otherwise of Bonds and other Securities. Popham v. Aylesbury, Ambl. 68.

15. If a Man devises £40 to be paid J. S. by him to be disposed of in such Manner as the Testator should by a private Note acquaint him with, and dies without such Appointment : this is a good Bequest to the Party : Decreed *Pasc.* 20 *Car.* 2 [1668], *Martin and Clerk*, 2 *Chan. Ca.* 198.

16. If one devises his Lands to B. in Fee, paying £400, whereof £200 to be at the Disposal of his Wife, by her last Will, to whom she shall think fit : and the Wife dies intestate, her Administrator shall have this £200, the Property thereof being absolutely vested in the Wife : Decreed *Mich.* 1690, *Robinson and Dingle*, 2 *Vern.* 181.

[202] 17. If one devises his Lands for the Payment of his Debts and Legacies, and devises £400 a-piece to two of his Sisters, and to his Third as much as his Executor should think fit : the Third shall have £400 also, and be made equal to her other Sisters, if the Estate will hold out : Decreed *Trin.* 1690, *Warcham and Brown*, 2 *Vern.* 153. (*In* 2 *Vern.* 153. *It is only said, the Court thought it reasonable that the other Sister (who was the eldest) should have, &c., not that there was any Decree made*.)

18. If Money is devised to younger Children, where there are divers Daughters and a Son, who by Birth is a younger Child, but is Heir at Law to a fair Inheritance, he shall not be considered as a younger Child, so as to take by the Devise. 12 *Car. 2. Britton and Britton*, 3 *Chan. Rep.* 1. (2 *Freem.* 158. *Britton and Britton*, S. C. and P. says, the like Case was adjudged so by the Master of the Rolls, *inter Mead and Cane & al.*, July 16, 1663. 1 *Chan. Rep.* 221. *Mead and Cane*, S. C. and P. accordingly.)

19. If a Man devises Lands to be sold for the Increase of Children's Portions, a Child born since the Will shall have a share. [*Coles v. Hancock*,] 2 *Chan. Rep.* 211.

20. So where one devised £20 a piece to all the Children of his Sister *B.*, and the Question was, whether a Child born after the making of the Will, and before the Death of the Testator, should take by virtue of the Devise; and the Court decreed it to extend to the after-born Child; the Word *Children* comprehending all. *Trin.* 1689, *Garb-land and Mayot* (2 *Freem. Rep.* 105, S. C. cited under the name of *Garberond and Garberond*), 2 *Vern.* 105, but if it had been to the Children by Name, *quære & vide Dyer*, 177. 1 *Inst.* 112 *b.*

21. A Man by Will devised all his Goods in such a House to *G.* for Life, and after his Decease to the Heir of *J. S.*, and the Point was, whether he that was Heir of *J. S.* should take these Goods as Devisee, and the said Goods go to his Executors; although such Heir die in the Life-time of *G.*, or whether he that was Heir to *J. S.* at the Time of *G.*'s Death should have them; and though it was urged that these Goods were only the Furniture of the Capital House, yet *Ld. Chan.* was of Opinion, that they absolutely vested in him, that was Heir of *J. S.* at the Time of his Death; and decreed accordingly. *Danvers and Earl of Clarendon*, 1 *Vern.* 35.

22. A Man devised his Estate to his Wife for Life, and after her Decease to his Son *T.*, his Heirs and Assigns for ever; provided if *T.* died without Issue of his Body, then he bequeathed unto his Daughters *M.* and *E.* £200 to be equally divided between them, and to be paid out of his Estate within six Months after the Decease of the Survivor of the Wife and Son; the Wife died, and *T.* died, leaving Issue, who died within three Months after the Father; and Lord *Harcourt* held, that this Personal Legacy could not be intended to arise upon any remoter Contingency, than that of *T.*'s dying with Issue living at his Death; and therefore dismissed the Bill, which sought the Benefit of it. *Trin.* 1712, *Nichols and Hooper*, 2 *Vern.* 686. (1 *Will. Rep.* 198, S. C. *Easter* 1712, says, Nieces, and that in Default of Payment the Testator devised the Lands to the Legatees for Payment, but as to this it was held, that with respect to the Legatees, if the Legacies take any Effect, the Words of the Will pass a legal Interest, and the Court does not hinder the Plaintiff from proceeding at Law in an Ejectment, but dismisses the Bill. 2 *Eq. Ca. Abr.* 559, *pl.* 4, says, *God-daughters*. Moreover it is there mentioned that the Decree was reversed in *Dom. Proc.*)

23. If *A.* devises £1500 in Trust for the Children of *B.*, and *B.* has only one Child, and several Grandchildren, the Child only shall take, and the Grandchildren shall not come in for Shares; but if *B.* had not a Child living, the Grandchildren might have taken by the Name of Children. *Crooke v. Brookeing*, 2 *Vern.* 106.

[203] 24. If a Man devises the Surplus of his Estate to his Grandchildren living at his Death, *Grandchildren born after his decease shall not take*; for if he had so intended it, he would not have restrained it to Children living at his Death: Decreed *Hil.* 1715, *Musgrave and Parry*, 2 *Vern.* 710. (*Vide contra* in *Northey v. Strange*, *Eq. Ca. Abr.* Pt. 2, 291. And *Vide* *Northey v. Burbage*, 2 *Eq. Ca. Abr.* 331, S. C. But *qu.* Whether it is so contradictory to *Musgrave v. Parry*, as the above Note insinuates.)

25. If one devises the Surplus of his Personal Estate to the Children of *A.* and *B.*, and neither of them has a Child at the making of the Will, or the Death of the Testator, the Devise is executory, and shall extend to any Children that *A.* and *B.* shall afterwards have, and the Children of each shall take *per Capita*, and not *per Stirpes*; they claiming in their own Right, and not as representing their Parents; *per Cur.* *Mich.* 1715, *Weld and Bradbury*, 2 *Vern.* 705.

26. The Duke of *Bolton* by his Will devised in these Words, *viz.* Item, *I give and bequeath unto such of my Servants, as shall be living with me at the Time of my Death, one Year's Wages.* *Per Ld. K. Stewards of Courts*, and such who are not obliged to spend their whole Time with their Master, but may also serve any other Master, are not Servants within the Intention of the Will; but I will not narrow it to such Servants only that lived in the Testator's House, or had Diet from him. *Townshend v. Windham*, 2 *Vern.* 546.

(L) WHERE A DEVISE SHALL BE IN SATISFACTION OF A THING DUE.

1. *J. S.* upon his Wife's joining with him in the Sale of Part of her Jointure, gave a Note to pay her £7, 10s. *per Ann.* for her Life; and upon a second Sale of a farther Part of her Jointure, gave her a Bond to pay her £6, 10s. *per Ann.* for her Life; and afterwards by Will, without taking Notice either of Bond or Note, devised unto her £14 *per. Ann.* for Life; and it was held, that the Devise should be in Lien and Satisfaction of the Bond and Note. *Pasc.* 1705. *Brown and Dawson*, 2 *Vern.* 498, *per Car.* (*Prec. in Chan.* 240, S. C. mentions two Notes, and held the Devise a Satisfaction of both.)

2. So if *A.* by Marriage-Articles agrees that his Wife over and above one third part of his Personal Estate, should, if she survived him, have £800 and her jewels, &c., and it is declared, that notwithstanding the Articles, she should not be debarred of any Thing he should give her by Will, &c., and *A.* by Will, makes a Disposition of his whole Estate among his Children, &c., and gives his Wife £1000, the Wife must waive the Articles or the Will, for she cannot have both; for his making a Disposition of the whole Estate shews, that he intended that every Part should be performed. *Pasc.* 1706. *Lady Herne and Herne*, 2 *Vern.* 555.

3. But if *A.* gives a Bond to *B.* her Servant, to pay her £20 *per Ann.* Quarterly for her Life, free from Taxes; and by Will, without taking Notice of the Bond, gives *B.* £20 *per Ann.* for her Life payable Half-yearly, but not said free of Taxes; *B.* shall have both the Annuities, for that by the Will not being so advantageous as the first, cannot be presumed a Satisfaction: Decreed *Hil.* 1704. *Atkinson and Webb*, 2 *Vern.* 478. (*Prec. in Chan.* 236, S. C. Decreed that *B.* should have both the Annuities: for that given by the Will was not so advantageous to her as the other, in respect of the Times of Payment, of the Difference of the Places, and of the one being free from, and the other (on the Land) liable to Taxes.)

4. So where *A.* on his Marriage covenanted to purchase and settle a Jointure of £20 *per Ann.* on his intended Wife; and if he died before such Purchase or Settlement made, she should have £300 out of his Estate for her own Use; the Marriage was had, and the Husband died before any such Settlement was made; but by his Will he devised to his Wife £330 for her Life, with a Power to dis[204]pose of £30 Part thereof, at her Death; and it was held, *first*, That she had a Right to £300 and Interest, and that the Executor could not now be at Liberty to settle £20 *per Ann.* as the Testator might have done: *2dly*, That she should have the £330 as an additional Bounty, and Provision for the Wife: Decreed and affirmed, *Trin.* 1705. *Perry and Perry*, 2 *Vern.* 505.

5. By a Marriage-Settlement the intended Husband was made Tenant in Tail, and a Provision was made of £3000 a-piece for the Daughters; the Husband afterwards docked the Intail, and devised to the Daughters £3000 a piece; and it being proved, that the Testator had declared, after making the Settlement, that he would add to his Daughter's Portions; and it being urged, that the cutting off the Intail was for this Purpose, the Court decreed the Daughters both Sums. 13 *Car.* 2 [1561-62]. *Pile and Pile*, 1 *Chan. Rep.* 199.

6. By a Marriage-Settlement, in case of Failure of Issue Male, a Remainder of the Estate was limited to Daughters, until they should raise £3000 for Portions; there was Issue of the Marriage a Son and two Daughters; the Father devised £700 a-piece to the Daughters, and died; the Son afterwards made his Will, and devised to the Daughters to the Amount of £7000 without mentioning of its being in lien or Satisfaction of any Thing due to them, and gave his Land to his Heirs Male, and died without Issue; and it was held clearly, that the Father's Legacy could be no Satisfaction, not being adequate in Value; besides the Father had then a Son living, and it was altogether contingent and uncertain, whether £3000 would ever arise, and become payable or not; and therefore it was but reasonable, that the Father should make some certain Provision for his Daughters; but as to the Son's Legacy of £7000, it was, by two Lords Commissioners against *Racine*, decreed a Satisfaction; but upon an Appeal to the Lords, the Decree was reversed; for the Daughters being Heirs at Law, and disinherited, there was no Ground for the Court to make a strained Construction to their Prejudice, in Favour of a voluntary Devisee. *Pasc.* 1692. *Duffield and Smith*, 2 *Vern.* 177, 258. *Freeman*, 185.

7. *A.* on the Marriage of his Daughter, gave a Bond to the Husband for the Daughter's Portion, and afterwards by Will devised Land of much greater Value to the Husband and Wife, and their Heirs, and died; and there being a Defect of Assets

to pay Debts, the Question was, whether the Devise of those Lands should be a Satisfaction; and the Court held that Cases of this Nature depend upon Circumstances; and that where a Legacy has been decreed to go in Satisfaction of a Debt, it was grounded upon some Evidence, or at least a strong Presumption, that the Testator did so intend it; but there is no Room for that in this Case, it plainly appearing the Testator intended to give all he could to his Son-in-Law and Daughter, and defraud his Creditors; and therefore the Devise of the Land must not be in Satisfaction of the Bond-Debt. *Trin. 1693, Goodfellow and Burchett, 2 Vern. 298.*

8. *H.* owed his Niece *A.* £100 by Bond, and having two other Nieces *B.* and *C.*, makes his Will, and bequeaths £300 to his Niece *A.* and to his other two Nieces £200 a-piece; after that he borrowed another £100 of his Niece *A.*, and being indebted to her £200 died; and to prove that the £300 should go in Satisfaction of the Debt, it was insisted upon as a Rule in Equity, that where the Testator [205] being indebted, gives his Debtee a Legacy greater than his Debt, it shall go in Satisfaction; for a Man shall be intended to be just before he is kind; otherwise where a Legacy is less, for that is neither to be just nor kind, and shall not be taken to go in Satisfaction of any Part. But *per Courper*, Chancellor, it might be as good Equity to construe him to be both just and kind, if he intended to be both; that if any Part of this £300 be applied to the Payment of the Debt, as for so much it is not a Gift; whereas a Legacy must be taken to be a Gift or Gratuity; and there being Assets, and some Proofs of the Testator's greater kindness to *A.* than his other Nieces, his Lordship decreed her the whole £300 over and above her Debt. *Mich. 6 Ann. [1707], between Cuthbert and Peacock, 1 Salk. 155. 2 Vern. 593, S. C. Vide 2 Salk. 508. Cranmer's Case, where Lord Harcourt reversed a Decree of the Master of the Rolls, upon the Circumstances of the Case, and Intention of the Party; that the Legacy though greater, should not be a Satisfaction for what is due to the Debtee.*

9. *A.* by Will gave six several Annuities for Lives, three of £10 each, and three of £5 each, to be paid out of his personal Estate, and gave all the rest of his real and personal Estate to *E.* his Wife, whom he made sole Executrix; the Annuitants were his Sisters, and their Children; and about two Years after, the Wife makes her Will, and gives two Annuities of £5 each to two of the £5 a-Year Annuitants in her Husband's Will, but gives them to them and their Heirs, in case they happen to over-live such a one, who by her Husband's Will had £10 *per Ann.* for Life; she likewise gives another Annuity of £10 *per Ann.* to one and her Heirs, and another of £5 *per Ann.* to another and her Heirs, who had each of them the like Annuities for Life by the Husband's Will; but in the Disposition of these Annuities, she takes no Manner of Notice of her Husband's Will, or that they had any Annuities thereby given them; and the only Question was, whether the four Annuities given to the Persons in Fee by the Wife's Will should be taken to be only in Satisfaction of the like Annuities for Life, given to the same Persons by the Husband's Will; and it was argued that they should; because the Husband's Annuities being payable only out of his personal Estate, and the Wife being his Executrix, she was in the Nature of a Debtor for them; and wherever a Person by his Will gives a Legacy, as great or greater than the Debt he owes to the Legatee, it has been always taken to be a Satisfaction of the Debt; but *per Lord Chancellor*, this Doctrine has already been carried too far, and he would never carry it farther; for though it is true, a Man ought to be just before he is bountiful, and therefore shall be presumed to pay a Debt, rather than give a Legacy to the same Person, when it is the same Sum or more than he owes him; yet why may he not be both just and bountiful, when there are Assets to answer both; as in the present Case; and there can be no Pretence to say, that the two first Annuities of £5 each can be a Satisfaction of the like Annuities given by the Husband, because they are given upon the Contingency of over-living such a one; which has not yet happened, and possibly never may; and then shall the Annuities for Life which are certain, be extinguished, by giving the same Persons Annuities in Fee on a Contingency which may never happen? and if that be so, as to these Annuities there is no Reason to imagine the Wife had a different Intention as to the others, or that she intended two of them should go in Satisfaction of the like Annuities given by her Husband, and the other [206] Two not; and the Cases where a Legacy has been held to be a Satisfaction of a Debt, are, where the Debt was owing by the same Person who gave the Legacy; but if such Legacy be given upon a Contingency, or to take Place at a future Day, it is no Satisfaction of the Debt; and therefore in the Principal Case

it was decreed, that the Annuities given by the Wife were distinct additional Annuities, and not an Enlargement only of the Husband's Annuities, from an Interest for Life to an Interest in Fee, as it was urged to be, and therefore should go in Satisfaction of those Annuities ; which the Court held they should not : but that the Annuitants should take both. *Tren. 1729, Crompton and Sale*, at my Lord Chancellor's. (Will. Rep. 553, S. C.)

(M) OF VOID DEVISES.

1st, By Devising what the Law already gives, or what the Policy of the Law will not admit.

2dly, By Uncertainty in the Description of the Thing devised.

3dly, By Uncertainty in the Description of the Person to take.

4thly, By the Devisee of Lands dying in the Life-time of the Devisor.

1st, BY DEVISING WHAT THE LAW ALREADY GIVES, OR WHAT THE POLICY OF THE LAW WILL NOT ADMIT.

1. If a Devise be made to *J. S.* and his Heirs, who is Heir at Law to the Devisor : this is a void Devise, and the Heir shall take by descent as his better Title, for the descent strengthens his Title, by taking away the Entry of such as may possibly have Right to the Estate ; whereas if he claims only by Devise, he is in by Purchase. *1 Rol. Abr. 626 ; Hob. 30 ; Plowd. 545 ; Godb. 461.*

2. So if a Man devises Lands to his Wife for Life, Remainder to *J. S.* who is Heir at Law in Fee, this is a void Devise to *J. S.* because, after the Disposition of the particular Estate, the Reversion would have gone without any farther Disposition in the same Manner it is now limited by the Will. *2 Leon. 101 ; 1 Rol. Abr. 626 ; Hob. 30.*

3. *A.* seised of Lands on the Part of his Mother, devises them to his Executors for sixteen Years, for Payment of his Debts, and after devises them to his Heir at Law *ex parte Materna* : this is a void Devise to the Heir at Law ; for though it was urged to support the Devise, that if it obtained, the Heir of the Part of the Father might in the End inherit, which he could never do, if the Devise be rejected ; yet the Court adjudged the Devise void, because this is no Alteration made in the Tenure of the Estate, nor is the Quality thereof any way altered ; but whether the Devisee taketh by the Will, or by Descent, it is a Fee simple ; and it were but *actum agere* to make him take by Will. *Hedger and Rowe, 3 Lev. 127.*

4. But where another Estate is created by the Will, than would descend to the Heir at Law, or where the Quality of the Estate is altered by the Devise, there the Disposition of the Will shall prevail, though it be made to the Heir at Law. *Moor. 680 ; Godol. 461 ; 1 Rol. Abr. 610 ; Hob. 30.*

[207] 5. As where a Man had Issue a Son and a Daughter, and devised that his Land should descend to his Son, and if he died without Issue of his Body, then the Land to go over, &c. The Son by this Devise took an Estate-tail, though Heir at Law to the Devisor, because here is an Estate-tail created by the Will, and the Heir must claim under the Will, or the Remainder will be void. *Hob. 30 ; 1 Rol. Abr. 610.*

6. So where a Man has Issue only three Daughters, and devises his Land to them and their Heirs, this is a Devise to the Heir at Law, and yet good, because the Devise makes them Jointenants in which Survivorship takes Place ; whereas had they taken by Descent, they had been Copartners ; and the Will altering the Generality of the Estate ought to prevail. *3 Lev. 128.*

7. If a Man devises Land in Fee to *A.* and if he dies without Heirs, then *M.* shall have it, the second Devise is void, for a Fee cannot depend on a Fee ; for no Man can say when the Heirs of *A.* will fail, and to allow the Remainder to *M.* good, up on such a distant Contingency, is to perpetuate the Estate in the Family of *A.* and yet preserve a Remainder or Interest in *M.* which very possibly may never vest ; and as these Estates are unalienable, though all Mankind joined in the Sale ; therefore the Reason and Policy of the Law will not suffer them to have a longer Duration than a Life or Lives *in esse*, and wearing out together, or the Term of twenty or thirty Years : But for this *vide* Letter (F).

8. *A.* devised his Manors, Messuages, &c., to the *Drapers Company* and their Successors, upon Trust, to convey to *B.* for Life, and to his first Son, and all other his Sons for

Life, and to their Issue Male for Life, and for Want of such Issue, to *J. S.* for Life, and to his Issue Male for Life, &c., and so to a great Number of them for Life; and so to convey *toties quoties*; and the Court held this Attempt to make a perpetual Succession of Estates for Life to be vain and impracticable; however, that there ought to be a strict Settlement made, and the Intent of the Testator followed, as far as the Rules of Law will admit of; and therefore directed a Settlement to be made so, that such who were in Being should be only Tenants for Life; but where the Limitation was to a Son not in Being, there he must be made Tenant in Tail Male. *Hil. 1716, Hummerston and Hummerston, 2 Vern. 737. (1 Will. Rep. 332, S. C.; Prec. in Chan. 455, S. C.; Gibb. Eq. Rep. 128, S. C. in totidem verbis with Prec. in Chan.)*

* 9. *A.* devised all the rest of his Personal Estate by Leases, in Trust, or otherwise, to his three Nephews, *A. B.* and *C.* and makes them Executors, and wills, that they shall give Bond to each other, in Case either die without Issue of his Body, to leave at their Death all the said Chattels and Personal Estate to the Survivors and Survivor of them; and the Bill was to have the said Bonds given, but was dismissed, being an Attempt to intail a Personalty. (A Personal Estate cannot be intailed. *Vide the Case of Seale and Seale, Eq. Ca. Abr. Part 2, p. 346, 716.*) *Trin. 1703, Williams and Williams.*

2dly, BY UNCERTAINTY IN THE DESCRIPTION OF THE THING DEVISED.

1. If a Man being seised of Lands within a Borough where Lands by Custom are deviseable by Parol, devises in these Words; *I give [208] all to my Mother, all to my Mother*; the Lands pass not, for the Words are too uncertain, and not sufficient to disinherit an Heir. *Bowman and Milbank, 1 Lev. 130.*

(Devises are void and rejected where the Words of the Will are so general and uncertain, that the Testator's Meaning cannot be collected from them; according to that Rule; as the Heir at Law has a plain and uncontroverted Title, unless the Ancestor disinherits him: it were severe and unreasonable to set him aside unless such Intent of the Testator is evident from the Will, for that were to set up and prefer a dark, or at least a doubtful Title, to a clear and certain one; but as it is likewise a Rule in the Construction of Wills, not to reject any Words in the Will which can have a Signification; these two have been the occasion of several Doubts and Resolutions concerning the Intention of the Testator, about the disposing of his Estate, whether he meant his Real or Personal, or what Part of either of which he intended to pass by the Words of the Will.)

2. If one having Lands in Fee, and other Lands for Years, devises all his Lands and Tenements, the Fee-simple Lands only pass; but if a Man had Leases for Years only and no Fee-simple Lands, by the Devise of all his Lands and Tenements, the Leases for Years pass; for otherwise the Will should be merely void. *Cro. Car. 293, per Curiam.*

3. So if a Man being seised of a Messuage in *A.* and of a Messuage and several Lands in *B.* devises to *J. S.* his House in *A.* with all other his Lands, Meadows, Pastures, with all and singular their Appurtenances whatsoever in *B.* yet the House in *B.* shall not pass; for though by a Feoffment or Lease of Lands in *D.* Houses will pass, because to be taken most strongly against the Feoffor, &c., and the Land passing, the House thereupon must also pass; yet Wills are to be taken according to the Intention of the Devisor; and when he devises his House in *A.* and Lands in *B.* it cannot be presumed that he would have more pass than by the Words is expressed. *2 And. 123.*

4. If a Man is seised of Lands in a Vill, and in *A.* and *B.* two Hamlets within the same Vill, and devises all his Lands in the Vill, and in *A.* and dies, no Part of the Land in *B.* shall pass; for his naming one Hamlet only, fully shews his Intent, that the Lands in the other should not pass. *Dyer, 261.*

5. But where a Man having two several Moieties of Lands by Purchase of the same Person, one lying in *Kent*, and the other in *Essex*, and he devised all his Moieties in *Kent*; it was held that both passed; for the Words being *all his Moieties*, they cannot be satisfied with one Moiety only. *1 Bulst. 117; 2 Bulst. 176; Hob. 173. Vide Noy, 112; Cro. Eliz. 658.*

6. If one seised of Lands called *Hayes-Land*, lying in two Vills, *viz. A.* and *B.*, devises all his Land in *A.* called *Hayes-Land*, to his youngest Son and his Heirs, and in another Part wills, that if his said Son dies without Issue, that his Wife should have *Hayes-Land*, and dies; and the Son dies without Issue, the Wife shall only have that Part of *Hayes*

Land which lies in *A.* because no more was devised to the Son. *Cro. Eliz.* 674. But *per Popham*, if the Devise had been to the eldest Son, and if he dies without Issue, &c., perhaps she should have had all, because the eldest Son had all, Part by Devise and Part by Descent.

7. If a Man seised in Fee of two Houses in *D.* adjoining the one to the other, and the one is in the Possession of *A.* and the other in the Possession of *B.* which is also the Corner-house in the Street of the Town, and he devises his Corner-house in the Possession of *A.* and *B.* by these Words, only the House, which is in the Possession of *B.* shall pass, which is the Corner-house, and not the other House which [209] is in the Possession of *A.* though it be next adjoining thereto, for his Intent appears to be so. 1 *Rob. Abr.* 613, 614; *Cro. Car.* 447. *Vide Stile*, 261.

8. *A.* sold Lands to *B.* but before a Conveyance was executed, *B.* sold the same Lands to *C.* and then *A.* conveyed to *C.*, and *C.* being thus seised, devised the Land to his younger Son in these Words, *I bequeath to R. my Son all my Land which I purchased of B.* whereas in Strictness of Law he purchased them from *A.* who conveyed them to him; yet this was allowed to be a sufficient Description of the Land, and consequently a good Devise of it, because the Purchase was really made from *B.* the Money being paid to him. *Thorp and Thompson*, 2 *Leon.* 120.

9. If one devises his House wherein *J. S.* dwells, called the *White Swan* in *Old-Street*, to *J. N.*, &c., and dies, and at the Time of his Death and making of the Will, *J. S.* occupied the Entry only, and three of the upper Rooms of the House, and others occupied the Garden and other Parts of the House; yet all the House passes, for the House imports the whole House, and the Sign of the *White Swan* makes it still more certain. *Cro. Car.* 129; 1 *Jon.* 195, S. C.

10. If a Man is seised of a Messuage and two Acres of Land in *A.* and of two Acres of Meadow in *B.* and hath used and occupied the two Acres of Meadow, being four Miles distant from his said House, together with his said House and Lands in *A.* and devises the House *cum omnibus & singulis pertinentiis suis adinde spectant* to *J. S.* the two Acres of Meadow shall not pass; for by the Words *cum pertinentiis* Lands pass not, but such Things only as may be properly appertaining; otherwise if the Words had been *cum terris pertinentibus*, for then the Lands used therewith should have passed. *Cro. Car.* 57.

11. If *A.* devises several pecuniary Legacies, and also some Lands, and then devises all the Rest and Residue of his Money, Goods and Chattels, and other Estate whatsoever to *J. S.* whom he makes Executor, he having other Lands, they shall pass by the Will. *Trin.* 27 *Car.* 2 [1676], *Tirrel and Page*, 1 *Chan. Ca.* 262.

12. But if a Man seised in Fee of three Tenements, and possessed of divers Goods, and of a Lease for Years, devises one Tenement to one of his Sons, and another Tenement to one of his Daughters, and then adds: *Item, I make my two Sons Executors of all my Goods moveable and immoveable, and all my Lands, Debts, Duties and Demands*; by this Clause no Estate in the three Tenements, of which the Devisor was seised in Fee, passed to the Executors by Force of the Words, *and all my Lands*, because that these Words might well be satisfied by the Lease for Years of Land, which passed by it. 1 *Rob. Abr.* 613.

13. *A.* devised in the following Manner: *I make my Niece Executrix of all my Goods, Lands and Chattels*; the Testator had a Real and Personal Estate, but no Leases or Interests for Years in any Lands whatsoever; and the Question was, whether any, or what Estate passed in the Lands by this Devise; and my Lord Chancellor was clear of Opinion, that the Real Estate did not pass by those Words; and that the Word *Lands* was not (as objected) useless, and to be rejected, for that in all Probability there might be Rents in Arrear of those Lands which would pass to the Niece by her being made Executrix. *Pasc.* 1717, *Piggot and Penrice*. (*Vide Prec. in Chan.* 471, and *Gillb. Eq. Rep.* 137, S. C. *in totidem verbis* with *Prec. in Chan.*)

[210] 14. If *A.* devises certain Lands to his youngest Son in Fee, and devises all his Lands in *D.* to his Wife for Life: *Item, I give to her for Life the Lands which I hold of G. T.* *Item, I give to her all the Lands which I purchased of J. S.* *Item, I give my Lands to my Son E. and his Heirs for ever*; not only the Lands purchased of *J. S.* but also the Reversion of all the others do pass by these Words: *Adjudged* 35 *Car.* 2 [1683-84], *Barrow and Gameam*, *Skin.* 130.

15. If *A.* being seised of the Manor of *A.* and of other Lands in the County of *S.* devises the Manor of *A.* for six Years, and Part of the other Lands to *J. S.* in Fee, and

then comes this Clause, And the Rest of my Lands in the County of *S.* or elsewhere, I give to my Brother, &c., by this Devise he shall have the Reversion of the Manor. *Allen*, 28.

16. If *A.* seised in Fee devises several Houses to a Charitable Use, and devises a Messuage to *J. S.* for Life, and by another Clause devises to his Wife, the better to enable her to pay his Legacies, all his Messuages, Lands, Tenements and Hereditaments, *not above disposed of*; this will pass the Reversion of the said Messuage, though it was found that the Wife had sufficient to pay the Legacies. *Mich.* 1 W. & M. [1689], *Willows* and *Lydcolt*, 2 Vent. 285. Adjudged upon a Writ of Error in the Exchequer Chamber, and the Judgment given in *B. R.* reversed. 1 Lev. 212, S. P. adjudged; *vide* the Case of *Hyley* and *Hyley*, 3 Mod. 228, which seems *cont'*, but has been denied to be Law in several of the following Cases.

17. *J. S.* seised in Fee devised *Blackacre* to *A.* for Life, and devised to *B.* all his Lands not before devised to be sold, and the Money to be divided between his younger Children; the Question was, whether the Reversion of *Blackacre* past by the Devise of all his Lands not before devised; and it having been referred to the Judges of the Common Pleas, they unanimously agreed, and certified that the Reversion was well devised; and it was agreed accordingly. *Hil.* 1703, *Rooke* and *Rooke*, 2 Vern. 461. (*Proc. in Chan.* 202, S. C. and decreed; 1 *Freem.* 519, S. C., and the Opinion of the Judges of C. B. certified accordingly.)

18. *A.* by Virtue of several Settlements, being Tenant in Tail, after Possibility of Issue extinct, of some Lands, Remainder in Fee to Trustees, in Trust for him and his Heirs; and as to some other Lands, being Tenant for Life, Remainder to his first and other Sons, Remainder to Trustees in Fee, in Trust for the right Heirs of *B.* whose Heir *A.* was; and as to other Lands, being Tenant in Tail, Remainder to the right Heirs of his Father, whose Heir he likewise was; and being likewise seised of a very considerable Real Estate of his own Purchase, and possessed of a large Personal Estate, made his Will, and devised some Part of his Lands to his Wife for Life, and gave several Legacies; and having no Issue devised all other his Lands, Tenements and Hereditaments, *out of Settlement*, to his Nephew, provided he took on him his Surname, subject to raise £4000 in Case the Testator left a Daughter; and it was held by my Lord Chancellor, assisted with the Master of the Rolls, Trevor, Ch. Just., and Just. Tracy, that all the Estates thus settled passed by the Will, notwithstanding the Words, *out of Settlement*; for the Word *Hereditament* comprehends a Remainder or Reversion, as well as an Estate in Possession. Decreed *Mich.* 1708, *Sir Litton Strode* and *Lady Russel*, 2 Vern. 621.

[211] 19. So where *A.* being seised in Fee of Lands in *D.* upon the Marriage of his eldest Son, settled those Lands on him in Tail Male, Remainder to his own right Heirs; and being seised in Fee in Possession of other Lands in *M. L.* and *N.* devised all his Messuages, Lands, Tenements and Hereditaments in *M. L. N.* or *elsewhere*, not by him formerly settled, for the Payment of his Debts; and after Debts paid, then to *J. S.* a second Son, and his Heirs for ever, and died; and soon after the eldest Son died, not having barred the Remainder, without Issue Male, but left several Daughters; it was held by my Lord Chancellor, assisted with Raymond, Ch. Just., Reynolds, C. B., and Mr. J. Price, 1st, That the Word *elsewhere* was a sufficient Description of the Lands in *D.* though of greater Value than those in *M. L.* and *N.* and that though it was of itself a significant and expressive Term; yet it was the rather so in this Case, because there were no Lands or Out-skirts not particularly enumerated, to which it could be applied but to those in *D.* 2dly, That the Words *Messuages, Lands, Tenements and Hereditaments*, were sufficient to pass the Reversion of the Lands in *D.* notwithstanding the Exception or restrictive Words, *not formerly settled*. Decreed *Trin.* 1730, *Chester* and *Chester*. (3 Will. Rep. 56, S. C., says, it was decreed by the unanimous Opinion of King, C., Raymond, Ch. Just., Reynolds, Ch. B., and Price, J.—Gibb, 152 S. C. and P.; 2 Eq. Ca. Abr. 330, S. C.)

20. But if *A.* devises Lands to *B.* in *D. S.* and *T.* and all his Lands *elsewhere*, and he hath a Mortgage of Lands that did not lie in *D. S.* or *T.* which is of more value than the Lands in *D. S.* and *T.* the mortgaged Lands will not pass; for he could not be thought to mean to comprehend Lands of so much Value under the Word *elsewhere*, which is like an &c. that comes in *currente calamo*, 33 Car. 2 [1681–82], *Sir Thomas Littleton's Case*, 2 Vent. 351, decreed; but the Reporter says there were other Circumstances in the Case, which shewed that it was not his Intention that the mortgaged

Lands should pass. *Vide* 1 Vern. 3. *Winn v. Littleton*, S. C., where it appears that there were some small Parcels of Land not specified, and of the same Nature of those devised; to which the Court held the Word *elsewhere* was applicable, and not to the Mortgaged Lands, which were of a different Nature and of greater Value; and that the Testator had charged the Lands devised with a Rent charge of £80 *per Ann.* which he never could intend should issue out of Lands which were every day redeemable.

21. By a general Devise of all Lands, Tenements and Hereditaments, Mortgages in Fee, though forfeited, will not pass, nor will they pass by such a general Devise, though the Equity of Redemption is, after the making the Will, foreclosed or released. [*Strode v. Russel*,] 2 Vern. 625, *per Curiam*.

22. A Man having settled all his Estate of Inheritance upon his Wife for Life, for her Jointure, makes his Will, and thereby devises several pecuniary Legacies to several Persons, and then says, *All the Rest and Residue of my Estate, Chattels Real and Personal*, I give and devise to my Wife, whom I made sole Executrix: and the only Question was, whether by this Devise the Reversion of the Jointure Lands passed to the Wife; and my Lord Keeper, having taken Time to consider of it, delivered his Opinion, that it did not because the precedent and subsequent Words explain his Intent, to carry only his Personal Estate; for in the first Part of his Will, having given only Legacies, and no Land whatsoever, the Words *All the Rest and Residue of his Estate* are relative, and must be intended Estate of the same Nature with that he had before devised, which was only Personal; for having before given no real Estate, there could be no Rest or Residue of that out of which he had given away none; then [212] the Words, *Chattels Real and Personal*, explain the Word *Estate*, and shew what sort of Estate he meant; and make the Devise, as if he had said, *All the Rest of my Estate, whether Chattels Real or Personal, &c.*, and so confine and restrain the extended Sense of the Word *Estate*. Decreed *Hil.* 1712, *Markant and Twisden*. (*Gillb. Eq. Rep.* 30. *Hil.* 9 Ann. S. C., accordingly says, Lord Keeper said that this Case differed from the Case of *Murray and Wise* (2 Vern. 564), and that no Resolution was ever carried so far as to construe these Words to pass a Fee.)

3dly. BY UNCERTAINTY IN THE DESCRIPTION OF THE PERSON TO TAKE.

1. If A. devises Lands to the eldest Son of J. S. by the Name of *William*, when in Truth his Name was *Andrew*, yet the Devise shall be good. [*Piteairne v. Brase*,] *Nel. Chan. Rep.* [Rep. Temp. Finch] 403.

(A Devise to the eldest Son of J. S. is good, or to his second or youngest; so is a Devise to the Wife of J. S. or though she be called *Em* for *Emlyn*, and to *Robert* Earl of, &c., though his Name was *Henry*. *Co. Lit.* 3. A Devise to the Stock, Family, or House, is good; and shall be intended of the Heir. *Hob.* 33.)

2. If a Man has two Sons named *I.* and devises to his Son *I.* all his Lands; this is a void Devise for the Uncertainty, unless it can be proved that the Testator meant one of them in particular, by the elder Son's being beyond Sea, probably dead, &c., for these Circumstances clear up the Intent of the Testator; and such Averment is admitted, because it is consistent with the Will; and the Construction and Judgment thereon must be genuine, because taken from the Words of the Will. 5 Co. 68 b.

3. If a Man hath Issue two Sons and two Daughters, and devises his Land to his Wife for Life, and that after her death the same shall remain to his Issue; this is a void Devise as to the Remainder for having several Children, it is uncertain what Issue is intended. *Taylor and Sayer*, *Cro. Eliz.* 742.

(*Vide Raym.* 83, S. C. cited, and denied to be Law, and 3 Lev. 433, *conf.* and 6 Co. 17.)

4. If a Man has Issue eight Daughters by three several Venters, and one Son, and devises his Land to his youngest Daughter, the Remainder to his Son in Tail, the Remainder to his two Daughters by the middle Venter for Life, the Remainder *Proximo de Sanguine* of the Devisor, and dies; and after the eldest Daughter has Issue, and dies; and after the Son, and all the other Daughters, except the two Daughters by the middle Venter, to whom it was given for Life, die without Issue, the Issue of the eldest Daughter shall have it. *Palm.* 303. *Vide Stile*, 240.

5. If a Man devises all his Lands to one of his Cousin *Nic. Amherst's* Daughters, that shall marry a *Norton* within fifteen Years, and dies; and *Nic. Amherst* having

three Daughters, one of them marries a *Norton* within the fifteen Years ; this is a good Devise to her, notwithstanding the Uncertainty ; and the Law supplies the Words, who shall first marry, &c. *Mich.* 15 *Car.* 2 [1663], *Bate and Amherst, Raym.* 82, adjudged.

6. If a Man devises Lands to *J. S.* in Trust for *A.* and the Heirs of his Body, Remainder to *B.* for Life ; and further wills, that if *A.* die without Issue, and *B.* be then deceased, then, and not otherwise, [213] he gives the Lands to *J. N.* and his Heirs ; though *A.* dies without Issue, and *B.* survives ; yet after the Death of *B.*, *J. N.* shall take ; for the Words, if *B.* be then deceased, express the Testator's Meaning, that *B.* should be sure to have it for Life, and also shew when *J. N.* should have it in possession. [Anonymous,] 2 *Vent.* 363.

7. *A.* devises Lands to Trustees in Fee, in Trust to pay Debts and Legacies ; and after those Debts paid, then to sell ; and if any of the Testator's Name would buy it, such Person to have it for £200 less than the Value ; one of the Testator's Name brings a Bill for this Benefit of Pre-emption, but delays bringing of it till twenty-five Years after the Testator's Death ; and the Bill was dismissed *per* Lord Chancellor ; for if two of the Testator's Name should claim the Benefit of the Devise, who must have it ? *Hil.* 1685, *Huckstep and Mathews*, 1 *Vern.* 362. (Not a very correct account of the report in *Vernon*.)

8. *A.* devised Lands to Trustees in Trust for his Daughter for Life, Remainder to the second Son of her Body to be begotten in Tail Male, and so to every younger Son ; and in Default of such Issue Male, to her eldest Daughter, and to the first Son of her Body, taking upon him the Name and Arms of the Testator ; and adds further, that he did not by Will devise the Estate to the Eldest Son, because that he expected that his Daughter would marry so prudently, as that the eldest Son would be provided for ; the Daughter married, and had Issue a Son, who died in twelve Months after his Birth ; she afterwards had another Son born, after the Death of the First ; this second must take, according to the Words of the Will, though contrary to the Intention of the Testator. *Trin.* 1710, *Trafford and Ashton*, 2 *Vern.* 660.

9. If *A.*, *B.* and *C.* being Aliens and Brothers, *A.* has Issue a Son, and *B.* and *C.* are naturalized, and *B.* purchases Lands, and devises them to the Heir of his Brother *A.* and his Heirs ; and *B.* dies, living *A.* and his Son, the Devise is void for the Uncertainty who is intended thereby ; for *A.* being an Alien can have no Heir ; or however, being living, can have none during his Life ; but *per Glyn*, Ch. Just., if it had been found that the Son of *A.* was the reputed Heir of *A.* though *A.* was an Alien, yet his Son might have taken by this Devise. *Trin.* 1656, *Foster and Ramsey*, 2 *Sid.* 23, 51.

10. A Man had Issue a Son and a Daughter, the Daughter was married, and had Issue two Daughters ; the Father devised, that all his Land should descend to his Son ; provided that if his Son died without Issue of his Body, then my Land to go to my right Heirs Male of my Name and Posterity for ever ; the Son died without Issue ; and upon Ejectment between the Brother of the Devisor and the Daughters, this was held a void Devise, because neither could claim under the Description of the Will ; not the Brother ; because, [214] though he was of his Name, yet he was not his Heir ; and though the Daughters were his Heirs, yet they were not of his Name, and so not within the Words of the Will ; and consequently the Limitation void for the Uncertainty. *Couden and Clerk, Hob.* 29, 30.

(This Resolution is founded on a Rule laid down in the Old Books, *viz.* that he who taketh by Description or Purchase, as Heir, must be Heir general or compleat Heir ; for Instance, If Lands are devised to the Heirs of *J. S.* and *J. S.* is living at the Death of the Testator, the Devise is void, for *Non est hæres viventis* ; so if Lands are devised to the right Heirs Male of *J. S.* and the Heir of *J. S.* is a Female, the Devise is void ; or if the Devise were to the Heirs Female, and the right Heir had been a Male, it would be void in the same Manner ; to which Purpose, *vide Moor*, 860 ; *Co. Lit.* 24 b ; 2 *Leon.* 70 ; *Dyer*, 99 ; *Hob.* 33 ; 1 *Co.* *Archer's Case* ; 1 *Co.* 103, *Shelly's Case*. But notwithstanding these Authorities, this Doctrine has been shaken by the following more modern Resolutions, in which it is held, that a special Heir may take by Purchase, and that a Description of a Person by the Name of Heir, though not Heir general, operating with the Intention of the Testator, is sufficient to ascertain the Person to take. But *vide Hargr. Co. Lit.* 24 b, note 3.)

11. If a Man devises Lands to *A.* and his Heirs, during the Life of *B.* in Trust for *B.* and after the Decease of *B.* to the Heirs Males of the Body of *B.* now living, *B.* having one Son then living ; by this Devise a Remainder is immediately vested in the Son ;

for the Words *Heirs Males now living*, in a Will, are a full Description of the Son, who then was the Heir apparent of *B.* and known by the Devisor (who was his Uncle and Godfather) to be so. *Mich. 29 Car. 2 [1677]. James and Richardson, 2 Jones 99, adjudged in B. R. but reversed in the Exchequer Chamber.*

Note: The Judgment of Reversal was revised in the House of Lords. *2 Lxx. 232, S. C.*, and *per. Levinz*, this Point was tried again upon a new Ejectment, and like Judgment given as at first in *B. R.* which was confirmed in the Exchequer Chamber, and likewise in the House of Lords. *1 Vent. 334, S. C.* by the Name of *Burchant* and *Durdant, 2 Vent. 311, S. C.; Raym. 330, S. C.; 3 Keb. 32, S. C.; Poll. 457, S. C.*

12. *A.* devised in this Manner: *I give to my eldest Heir Male, and his Heirs Males for ever, all my Lands in such a Place; and if there be a Female, she to have £12 per Ann. as long as she lives; the Testator had two Sons, the eldest of which died in his Life-time, leaving Issue a Daughter; and it was adjudged that the Lands should go to the second Son, and not to the Daughter of the Eldest, though she was Heir general. Trin. 3 W. 3, Rot. 1484, Baker and Hall in C. B.*

13. *A.* devises all his Lands to *B.* and *C.* and the survivor of them, for the Term of twenty-one Years, for the Payment of his Debts and Legacies, and after Payment the Term to cease; and after the End or sooner Determination of that Estate, he devises the Premises to the first Son of his Body, and to the Heirs Males of the Body of such Son lawfully issuing; and for Default of such Issue, to *B.* for ninety nine Years, if he so long live, without Impeachment of Waste, Remainder to the first and other Sons of *B.* and the Heirs Male of their Bodies successively; Remainder to *C.* for ninety-nine Years, if he so long live, Remainder to his first and other Sons in Tail Male successively; Remainder to the Heirs Males of my Aunt Mrs. *Eliz. Long*, Wife of *Richard Long*, Clerk, lawfully begotten, with Remainder to his own right Heirs; and by his Will gave £150 Annuity to *Dorothy Beaumont* his Sister, the Plaintiff in Error, for Life, and £500 to her Children; and to his Aunt *Eliz. Long* £100, and to her Children £500, and dies without Issue; *B.* and *C.* entered by Virtue of the Devise for twenty-one Years; and afterwards both died without Issue, and *John Beaumont* and *Dorothy* his Wife, entered in Right of *Dorothy*, as Heir at Law to the Testator; the Term for twenty-one Years being determined, and the Debts and Legacies paid, *Thomas Long*, eldest Son of *Eliz.* (she having, at the Time of making the said Will, three Sons, *viz.* the said *Thomas*, and two others) entered and brought Ejectment; and in the Exchequer Judgment was given by the Lord Chief Baron *Ward, Price* and *Lovell*, against Baron *Bury*, for the Plaintiff *Thomas Long*; but in *Trinity Term 1713* this Judgment was reversed in the Exchequer Chamber; and upon Error brought in the House of Lords it was argued, that this Reversal should be affirmed, 1st, Because *Dorothy* being Heir at Law to the Testator, her Right, as such, was to be favoured; and [215] all Devises to disinherit an Heir at Law were to be taken strictly. 2^{dly}, That to make this Devise good to *Thomas Long*, it must be construed either a contingent Remainder, or the Words *Heirs Males* be taken as a *Descriptio Personarum*, to vest in him as a contingent Remainder; it cannot be good for Want of a Freehold to support it, all the preceding Estates being only for Years; besides, if it were good as a contingent Remainder in its Creation, yet *Eliz. Long* the Mother being alive when the particular Estate determined it cannot vest, because *Non est hæres viventis*; as a *Descriptio Personarum* it cannot vest, for that ought to be such a Description as is *vice nominis*, which the Words *Heirs Males* (being a legal Term, and not accompanied with any other Words to determine the Sense otherwise, as Heir apparent, or Heir now living, &c.) cannot amount to; and the Word *begotten* doth not determine the Sense otherwise; nor does any Intent appear to confine the Devise to the Issue Male of *Eliz. Long*, much less to *Thomas Long* only, as the Person described in this Devise; but notwithstanding these Reasons, it was adjudged, that the Judgment should stand, and the Judgment of Reversal be reversed; though ten of the Judges were of Opinion, that the Devise was void, and only the three Judges (*Lovell* being dead) before-mentioned, held it good. *Mich. 1713, in Domo Procerum, Beaumont and Long. (1 Will. Rep. S. C.)*

14. *J. S.* devised to Trustees in Trust, after Debts and Legacies paid, to convey to *A.* his Cousin, and the Heirs Males of his body; and for Want of such Heirs Males, then to the Heirs Male of the Body of *B.* his Great Grandfather; and for Want of such Heirs Male, to his own right Heirs for ever; and gave to his Sister £2000 to be put out at Interest during her Life, she to receive the Interest, and after her Death to her Children, and died; and soon after *A.* died without Issue; and *C.* being Heir Male

of *B.* the Testator's Grandfather, but not Heir general, there being a Daughter of an elder Brother; the Question was between him and the Testator's Sister and Heir at Law, who had the £2000 devised to her, whether the Devise was void, or not; and Lord Chancellor held the Devise good, and that *C.* should take as a Person sufficiently described and intended by the Testator. Decreed *Mich.* 1716, *Newcomen and Barkham*, 2 *Vern.* 729, and this Matter well debated. (*Prec. in Chan.* 442, 461, *Broune and Barkham*, S. C. and Decree. *Gilb. Eq. Rep.* 116, 131; *Str.* 35; but vide *Harg. Co. Litt.* 24 *b.* note (3), and vide 2 *P. Wms.* 2 *in note*. See the Case of *Daves and Ferrers*, *Eq. Ca. Abr.* Part 2, p. 331.)

4thly. BY THE DEVISEE OF LANDS DYING IN THE LIFE-TIME OF THE DEVISOR.

1. If a Man devises Lands to *A.* and his Heirs, and *A.* dies in the Life-time of the Devisor, *B.* the Heir of *A.* shall take nothing by the Will, for the Heirs of *A.* were not named as immediate Takers, but only to express the Quantity of the Estate that *A.* should take. *Trin.* 10 *Eliz.* [1568], *Bret and Rigden*, *Plow. Com.* 345. Adjudged *per totam Curiam, præter Walsh*, though after the Death of *A.* the Devisor said to *B.* that he should be his Heir, and should have all the Lands which *A.* should have had, if he had out-lived the Devisor. Vide 2 *Lev.* 243. And what amounts to a new Publication, *Tittle Will* [1 *Eq. Ca. Abr.* 401].

2. So if a Man devises Lands to *A.* his second Son, and to the Heirs of his Body; and after his Death without Issue, then to *B.* his third Son in Tail, &c., if *A.* hath Issue, and dies in the Life of the Devisor, and then the Devisor dies, *B.* shall have the Lands [216] presently; for the Devise to *A.* being void, it is as if it had never been made. *Hil.* 36 *Eliz.* [1594], *Fuller and Fuller*, *Cro. Eliz.* 422, 423. But if the Devise had been to the Devisor's eldest Son in Tail, Remainder to the second Son, and the eldest Son had died in the Life-time of the Devisor, leaving Issue, *Q.*

3. If a Man devises to *A.* and his heirs, to the Use of *C.* and his Heirs, and *C.* dies in the Life-time of the Devisor, his Heir can take nothing; but the Devise will be to the Use of the Devisor and his Heirs. *Hortop's Case*, 1 *Leon.* 253; *Cro. Eliz.* 243.

4. But if there be a Devise to *A.* for Life, Remainder to *B.* in Fee; though *A.* dies in the Life of the Devisor, *B.* shall take, or if *A.* refuses, he shall take. *Plow.* 344; *Cro. Eliz.* 423; 1 *Co.* 101 *a.*

5. If a Man devises his Lands to his Wife for Life, and after to his four Daughters and Heirs, equally to be divided between them, Share and Share alike, to hold to them and their Heirs for ever; and one of the Daughters dies, having Issue a Son, and then the Devisor dies; the Will is void for a fourth Part. *Hil.* 1656, *Parchman and Cole*, 2 *Sid.* 53, 78, adjudged.

6. So if *A.* has Issue two Daughters, *B.* and *C.*, and he devises some Tithes and Money to *B.* and gives Legacies to her Children, but declares, that she having married without his Consent, she should have no Part of his Real Estate, and devises his Real Estate to *C.* in Tail, Remainder to *B.* for Life, and to her first, &c., and *C.* marries in the Life-time of the Testator, leaving Issue; though afterwards *A.* makes a Codicil to his Will, and devises some particular Legacies out of his Personal Estate; yet as that does not amount to a Republication of his Will, *B.* must have the Lands immediately after the Death of the Devisor, though contrary to the Intention of the Devisor; the Authorities be so. Per Lord Chancellor, *Mich.* 1716, *Hutton and Simpson*, 2 *Vern.* 722. (*Prec. in Chan.* 439, 452, *Simpson and Hornsby*, S. C. and P.—*Gilb. Eq. Rep.* 115, 120, S. C. and S. P.)

7. If a Man devises Lands to *A.* and *B.* and their Heirs; and *A.* dies in the Life of the Devisor, *B.* shall take the whole Land. *Mich.* 16 *Car.* 2, *Davis and Kemp*, *Carter* 4, 5.

[217] CAP. XXVII.

DOWER AND JOINTURE.

- (A) Of what Estate of the Husband's with respect to the Nature and Quality thereof, shall a Woman be endowed.
 (B) What shall be a Satisfaction or good Bar of Dower, and how far a Dowress shall be favoured in Equity.
 (C) Of Jointures, and in what Cases a Jointress shall be more favoured or restrained in Equity than at Law.

(A) OF WHAT ESTATE OF THE HUSBAND'S, WITH RESPECT TO THE NATURE AND QUALITY THEREOF, SHALL A WOMAN BE ENDOWED.

1. If A. in Consideration of £100 by Bargain and Sale inrolled, conveys to B. and his Heirs, to the Intent that B. shall redemise to A. for Life, with a Condition, that if A. paid the £100 at the End of twenty Years, the Bargain and Sale should be void; and B. redemises accordingly, and dies, his Wife shall be endowed: for though B. redemised upon the former Agreement, yet A. takes it subject to the Title of Dower: and it was his Folly, that he did not join another with the Bargainee, as is the antient Course in Mortgages. *Pasc. 6 Car. 1. Nash and Preston, Cro. Car. 190, agreed in Cancellaria, by Jones and Croke*; and upon a Conference with the other Justices certified accordingly. [Radnor v. Vandebendy,] *Show. P. C. 72, S. C. cited.*

2. If a Husband, before Marriage, conveys his Estate to Trustees and their Heirs, in such Manner as to put the legal Estate out of him, though the Trust be limited to him and his Heirs; yet the Wife shall not be endowed of this Trust Estate. *Pasc. 1712, Bottomley and Lord Fairfax, agreed clearly, and admitted per Curiam [Colt v. Colt], 1 Chan. Rep. 254, S. P. (Proc. in Chan. 336, S. C. and P. Vide Attorney General and Scot, Eq. Ca. Abr. Part 2.)*

(Of a Use (not executed) a Woman shall not be endowed, neither shall the Husband be Tenant by the Curtesy, *vide Perk. 349; 1 Co. 123; 4 Co. Vernon's Case; Doctor and Stud. lib. 2, cap. 22; Dyer, 11, pl. 47.* But as to the Husband's being Tenant by the Curtesy, *vide 2 Vern. 585, 681*; and *Q.* if there be any Difference.—There shall be a Tenancy by the Curtesy of a Trust, as well as of a legal Estate. *Vide the Case of Watts and Ball, Eq. Ca. Abr. Part 2 [727].*)

[218] 3. But if a Father purchases Lands in his eldest Son's Name, and the Son is put into Possession, who afterwards falls sick, and in his Sickness the Father gets him to execute a Deed, declaring his Name was made Use of only in Trust for him; and the Son recovers and continues in Possession, and marries; after his Death, his Wife shall be endowed notwithstanding this Declaration of the Trust; and though the Father had got a Conveyance of the legal Estate from the younger Son; for *per* Lord Chancellor, this is a secret and fraudulent Deed of Trust, to deceive Creditors and Purchasers, and therefore reversed the Master of the Roll's Decree, who had decreed it for the Father. *Pasc. 1702, Bateman and Bateman, 2 Vern. 436.*

4. If a Man devises Lands to his Executors for Payment of Debts, and after Debts paid, to his Son in Tail; and the Son marries, and dies before Debts paid, the Estate of the Executors is only a Chattel Interest, and will not hinder the Son's Wife of Dower; but the Wife's Dower cannot commence in Possession, nor Damages be recovered for detaining it, but from the Time of the Debts being paid. [Hitchens v. Hitchens,] *2 Vern. 404, per Curiam.*

5. If the Lands of J. S. are sequestered for a Personal Duty, and he marries and dies, though the Lands were sequestered before Marriage, yet the Wife's Right of Dower will attach them; for this Sequestration shall not so far bind or cover them, as to hinder the Wife of her Dower. [Anonymous,] *1 Vern. 118, ruled on Demurrer per Lord Keeper North, and Vide [University College, Oxon v. Foxcroft] 1 Vern. 166.*

(B) WHAT SHALL BE A SATISFACTION, OR GOOD BAR OF DOWER, AND HOW FAR A DOWRESS SHALL BE FAVOURED IN EQUITY.

1. If a Man devises certain Lands, Money, Goods, &c. in Lieu and Satisfaction of Dower, the Wife cannot have both; but she may waive the Devise and claim her

Dower. [Axtel v. Axtel,] 2 *Chan. Ca.* 24; [Pheasant v. Pheasant,] 1 *Chan. Ca.* 181; [2] *Vent.* 340, S. P. [& S. C.].

(But if a Man devises Lands to his Wife during Widowhood, without expressing any Consideration, the Wife shall have both. 1st, Because a Will imports a Consideration in itself, and cannot be averred to be in Bar of Dower, without it be so expressed. 2dly, Dower cannot be of less Estate than for Life of the Wife. 3dly, A Right to Dower cannot be barred by collateral Recompence. 4 *Co.* 1, 2, *Vernon's Case*; *Co. Lit.* 36; *Moor. pl.* 103. But if she makes her Election to take under the Will, she cannot afterwards claim her Dower. *Cro. Eliz.* 128; 3 *Leon.* 272; 3 *Co.* 27; *Dyer*, 220.)

2. *J. S.* devised Legacies to his Wife out of his Personal Estate, and devised to her Part of his Real Estate, during her Widowhood, and devised the Residue of his Estate to Trustees for twenty-one Years, for Payment of Debts and Legacies; and the Remainder of the whole Estate he devised to the Plaintiff (who was his Godson, and of his Name, but a remote Relation) for Life, and to his first and other Sons in Tail; and Lord Chancellor *Somers* decreed, that though it was not declared in the Will to be in Lieu and Satisfaction of Dower; yet as it may be plainly collected to be so intended (he having made Disposition of his whole Estate) and as a collateral Satisfaction may be a good Bar to Dower in Equity, though not at Law; she must either take her Dower and waive the Devise, or [219] accept the Devise and waive the Dower. *Mich.* 1699, *Laurence and Laurence*, 2 *Vern.* 365. But this Decree was reversed by *Wright*, Lord Keeper, *Mich.* 1702, which Decree of Reversal was affirmed in the House of Lords, with £30 Costs, 17 *May* 1717. (2 *Freem. Rep.* 234, S. C.; and *P.* says, the Decree was reversed by Lord Keep.—S. C. cited by the Master of the Rolls, *Trin.* 1731, 2 *Will. Rep.* 617.)

3. The Lady *Bodmin's* Husband was seised in Tail of the Lands in Question; but there was a Term for ninety-nine Years, prior to his Estate (which was created for Performance of several Trusts in the Earl of *Warwick's* Will, which were all performed, and after to attend the Inheritance); he levied a Fine and suffered a Recovery, and sold the Estate to *J. S.* who had Notice of the Marriage; but his Wife not joining, she, after his Death, recovered Dower, with a *Cessat Executio*, during the Term, and brought her Bill to have this Term removed, and to have the Benefit of her Judgment, and Recovery at Law; but the Court held, that this being against a Purchaser, Equity ought not to give her any Relief, and therefore dismissed the Bill. *Lady Bodmin v. Vandebendy*, 1 *Vern.* 356; 2 *Chan. Ca.* 172, S. C., which Decree of Dismission was affirmed in the House of Lords [sub nom. *Radnor v. Vandebendy*], *Show. P. C.* 69, 70. (*Prec. in Chan.* 65, S. C.—Lady *Radnor* and *Rotherham*, S. C., and Decree, which was affirmed in *Dom' Proc'* 14 *April* 1697; *Ibid.* 66.)

4. A Term was raised in *Black-acre*, in Trust, to indemnify *A.* against Incumbrances that might affect *White-acre*, which he had purchased of *B.* the Defendant; and the Widow of the Son and Heir of *B.* brought a Writ of Dower of *Black-acre* against the Plaintiff, who was an Infant, and his Guardian had let her take Judgment at Law, without setting up the Term, or taking any Notice of it; and the Infant brought his Bill to be relieved against the Judgment; and the Court held, that this Case was the same with Lady *Radnor's*; the Term being created to indemnify a Purchaser, must continue so, and subject to that, must be in Trust for the Heir; and there is no Difference where the Widow is Plaintiff or Defendant; for it is the Want of Equity excludes her from Relief. *Hil.* 1700, *Wray* and *Williams*, 2 *Vern.* 378, S. C. but no Resolution. (*Prec. in Chan.* 151, S. C. accordingly. 1 *Will. Rep.* 137, *Hil.* 1700, *Williams* and *Wray*, says, 28 *June* 1700, it was decreed that the Trustee produce the Trust Deed, &c. And at a Trial at Law to enable the Infant to recover Possession, and that the Widow should account for the Profits; that 21 *March* 1701, upon a Rehearing, and Time taken to consider of it, *Wright*, Lord Keeper, affirmed his former Decree; but that on a Bill of Review brought by the Widow, *Harcourt*, Lord Keeper, on solemn Argument, reversed Lord *Wright's* Decree, and ordered that the Widow having recovered Dower at Law, this Trust-Term should not stand in her Way. *Hil.* 1710; *Ibid.* 139. The Reporter by way of Note says, it appeared there was first a Demurrer put in to this Bill of Review, which being over-ruled, a Decree was made by Consent, fixing a Sum for the Arrears of Dower, and delivering up the Possession to the Widow. *Vide* the Argument of Sir *Joseph Jekyll*, Master of the Rolls, in the Case of *Banks* and *Sutton*, 2 *Will. Rep.* 700, 707.)

(In *Vern.* [647] the Report contains only a very jejune state of the Case, without Arguments or Decision.)

5. But where a Widow brought her Bill to be relieved against a Term for Years, assigned in Trust, to attend the Inheritance, and which had been set up by the Heir at Law, only in Bar of her Title; the Master of the Rolls decreed for the Widow; and that the Term should not stand in her Way (*a*); though it was objected, that it was the same with the Purchaser, who had Notice. *Mich.* 1705, *Dudley and Dudley*. S. P. decreed *Pasc.* 1710, *Higford and Higford* (*b*). (*Prec. in Chan.* 241, S. C.)

(*a*) That Tenant by Curtesy shall have the Aid of Equity in removing a Trust, *vide* 2 *Vern.* 324, 536, 585, 684. (*b*) Decreed by Lord *Harcourt*, *Easter* 1711, and not in 1710, *per Jekyll*, Master of the Rolls. *Vide* 2 *Will. Rep.* 707.

6. A Dowress may redeem a Mortgage, paying her Proportion of the Mortgage-Money; and as to the Rest, she may hold over till she is satisfied. Decreed *Hil.* 1700, *Palmer and Dandy*. (S. C. but not S. P. *post.* 261, *pl.* 2; *Prec. in Chan.* 137; 2 *Eq. Abr.* 383, 386; *Palmer v. Danby*, S. C. and S. P.)

7. If the Wife joins in a Mortgage, and levies a Fine, with an Intent to bar her Dower, and in consideration thereof the Husband agrees that she shall have the Equity of Redemption in lieu of her Dower; and he afterwards mortgages the same Estate twice more; although this Agreement be fraudulent against the subsequent Mortgagees, so as to intitle the Wife to the whole Equity of Redemption, yet she shall have her Dower if she survives her Husband, and shall not be put to her Writ of Dower; because the estate may be so conveyed away by some of the Mortgagees, that possibly she may not know against whom to bring her Writ of Dower. *Hil.* 1684, *Indin and Coltman*. 1 *Vern.* 294.

[220] 8. If *J. S.* apprehensive of a Charge of High Treason, makes a Conveyance of his Lands to his Son, and afterwards marries a second Wife, a Court of Equity will order that such Conveyance be not made use of to hinder such second Wife of her Dower. [*Robinson v. Fletcher*,] 3 *Chan. Rep.* 94.

9. If there be a fraudulent and partial Assignment of Dower by the Sheriff, Equity will relieve against it. *Hil.* 1683, *Hoby and Hoboy*, 1 *Vern.* 218; 2 *Chan. Ca.* 160, S. C.

(C) OF JOINTURES, AND IN WHAT CASES A JOINTRESS SHALL BE MORE FAVOURED OR RESTRAINED IN EQUITY THAN AT LAW.

*1. A Man, upon his Marriage, made a Settlement, whereby he was Tenant for Life, then to his Wife in special Tail, of Lands of £400 *per Ann.* Value, with Remainder to the right Heirs of the Husband; the Husband and Wife joined in barring this Settlement, and a new Settlement was made in this Manner, *viz.* to *J. S.* and his Heirs, in Trust as to Lands of £150 *per Ann.* for the Wife, and the Heirs of her Body; and for Want of such Issue in Trust for the Husband and his Heirs; the Husband died without Issue; and the Wife suffered a Recovery, and devised the Lands for the Payment of her Debts, and died without Issue; on a Bill brought by the Heir of the Husband against the Defendants Creditors of the Wife, the Question was, whether this was such a Jointure made on the Wife, as to make the Recovery a Forfeiture within the Statute 11 *H.* 7. For the Defendants it was objected, that a Court of Equity ought not to give any Assistance because the Statute makes the Recovery a Forfeiture of her Estate, and gives a Remedy by Way of Entry; and in this Case she has only a Trust, and no Estate to forfeit: it was likewise urged, that this Case was out of the Words and Meaning of the Statute; for the Limitation here is to the Wife in general Tail; and on Failure of Issue of that Marriage, her Issue by any other Husband would have had the Land, and might, without Doubt, have suffered a [221] Recovery, and barred the Remainder; and the Statute only intended to provide for the Issue of the Husband, whose the Lands were: It was further urged, that these Lands could not be said the Husband's; for the Wife, by parting with her former Settlement, which was £400 *per Ann.* for this of £150 *per Ann.* was a Purchaser of those Lands; and if the Wife, in consideration of this Settlement, had sold Lands of Inheritance of her own, it would not have been within the Statute. On the other Side it was said, that this was to aid a Forfeiture; but as the Statute makes the suffering a Recovery a Forfeiture, and gives an Entry to the Person that has the next Estate, so in another Place it makes all Recoveries suffered by a Jointress void; and upon that Clause it is proper to come into Equity, to have an Execution of the Trust; and this Case is within the Words of the Statute, for the Statute says, any Estate limited to the Wife, or to her Use; and this Statute was before the Statute *H.* 8 c*l.* Uses, at

which Time a Use was the same Thing that a Trust is now ; next, the Statute says, limited for Life, or in Tail : now a general Tail is as much an Intail as a special One, and as much within the Words of the Statute, and the Statute intended to provide for the Remainder man as well as the Issue. The Objection of her being a Purchaser, is quite to take away the Statute, for so is every Jointress ; and if she had kept her former Jointure, that had been under the same Restrictions ; and of the same Opinion was my Lord Keeper, and decreed accordingly. *Trin. 1700, Symson and Turner.*

*2. On a Motion to stay a Jointress, Tenant in Tail after Possibility, &c. from committing Waste ; the Court held, that she being a Jointress within the 11 H. 7. ought to be restrained, being Part of the Inheritance, which by the Statute she is restrained from aliening, and therefore granted an Injunction against wilful Waste. *Hil. 1701, Cook and Winford.*

3. If A. charges Land in D. with a Portion for a Daughter by a first Venter, and then marries, and settles Part of those Lands as a Jointure on a second Wife, who has no Notice of the Charge ; and A. believing that the Portion would take Place of the Jointure, by Will gives other Lands to the Wife in lieu thereof ; and the Wife, by Combination with the Heir, refuses to accept of the Devise ; the Daughter shall hold the other Lands which descended to the Heir, till satisfied her Portion. *Per North, Lord Keeper, Hil. 1683 ; Reeve and Reeve, 1 Vern. 219. (2 Vent. 363, S. C. and P. Post. 335, c. 1.)*

4. If A. in consideration of a Marriage-Portion, articles to settle a Jointure, and dies before the Portion paid, or Settlement made ; and the Wife takes out Administration to him, and so becomes intitled to the Money, and then brings a Bill against the Heir of the Husband, to have the Jointure settled, she shall have no Relief, for she is not intitled to the Jointure and Money too ; but the Reporter adds a *Quære* ; for she is entitled to these two Demands in distinct Capacities, and Debts may hereafter appear to exhaust the Assets ; and in case the Husband had actually received the Portion, and it had been in his Possession, she would have had it as his Administratrix. *Trin. 1687, Meredith and Jones, 1 Vern. 463.*

5. But if J. S. before Marriage, articles to settle a Jointure on his intended Wife, and the Marriage is consummated ; and the Husband dies before any Settlement made, an Execution of the Articles will be decreed in Equity. [*Haymer v. Haymer,*] *2 Vent. 343.*

6. If J. S. gives a voluntary Bond after Marriage to make a Jointure to his Wife, and he makes a Jointure accordingly, and the Wife gives up the Bond, and the Jointure is evicted, the Jointure shall be made good out of the Personal Estate, there being no Creditors ; for the Delivery up of the Bond by a Feme Covert could no Way bind her. *Hil. 1686, Beard and Nuthall, 1 Vern. 427.*

7. If a Man covenants to settle Lands of such a Value as a Jointure, and this Covenant is omitted in the Settlement, yet it subsists in Equity ; but the Value of the Lands is not to be estimated according to the present Value, but as they were at the Time of the Jointure settled, unless the Covenant be so. *Hil. 1683, Speake and Speake, 1 Vern. 217.*

8. If there be a Jointress, and a Covenant that her Jointure shall be of such a yearly Value, and it falls short ; though her Estate be not without Impachment of Waste, yet she may commit Waste, so far as to make up the Defect of the Jointure, and Equity will not prohibit. *Mich. 1698, Carew and Carew at the Rolls. (S. C. post. 400.)*

[222] 9. J. S. made a Settlement on his eldest Son for Life, with Remainder to his first and other Sons in Tail, Remainder over, with Power for his Son to appoint any of the Lands not exceeding £100 *per Ann.* to any Wife he should afterwards marry, for a Jointure (the Father being under an Apprehension that he was then married to a Woman which the Father disliked, and had no Intention his Son should provide for) ; the Father died, and the Son married that Woman (though there was strong presumptive Proof that he was married to her before) and after Marriage appointed certain Lands to Trustees, in trust for her, for a Jointure, and covenants, that if they were not of £100 *per Ann.* Value, that upon Request made to him, any Time during his Life, he would make them up so much out of other Lands in his Power ; he lived several Years, and no Complaint was made, that the Lands were not of that Value, nor Request to make it up, and died without Issue. On a Bill brought by the Widow to have the Jointure made up £100, my Lord Keeper said, that a

Provision for a Wife or Children was not to be considered as a voluntary Covenant, and therefore decreed the Deficiency to be made up, notwithstanding the Circumstances of the Case, and her Neglect in not requesting it during Coverture, for the Laches of a Feme cannot be imputed to her. *Hil. 1701, Fothergill and Fothergill. (2 Freem. 256, Trin. 1702, S. C. says, the Plaintiff was relieved, the Husband having covenanted, that in case these Lands were not sufficient it should be made up out of other Estates which he had a Power of, although he was only Tenant for Life of them)*

10. If A. in the Life-time of his first Wife, settles Lands to the Use of himself for Life, Remainder to his first and other Sons in Tail, and the Wife dies without Issue; and A. on his second Marriage, in consideration of a Portion paid, agrees to settle Part of the Lands as a Jointure on his second Wife, the Court will set aside the first Settlement, as fraudulent against the Jointress, who is a Purchaser for valuable Consideration. [*Douglasse v. Waad,*] 1 *Chan. Ca.* 100.

11. If a Feme Covert joins with her Husband in a Fine and Mortgage of her Jointure Lands, there results a Trust for her when the Mortgage is paid, to have the Lands again. [*Broad v. Broad,*] 2 *Chan. Ca.* 161.

12. So if a Feme Covert joins with her Husband in a Mortgage of her Jointure Lands, she may redeem; and if she pays more than the third Part of the Principal Money, her Executor shall hold the Lands till re-imbursed. 2 *Chan. Ca.*

13. So if a Jointure is made of Lands which are mortgaged, the Wife may redeem, and her Executor shall hold over till repaid with Interest. [*Bertue v. Stile,*] 1 *Chan. Ca.* 271; [*Haymer v. Haymer,*] 2 *Vent.* 343, S. P. decreed.

14. If the Heir brings a Bill against a Jointress to discover Deeds and Writings, he is not entitled to see them, unless he confirms the Wife's Jointure, though the Jointure was made after Marriage. *Towers v. Davys*, 1 *Vern.* 479. (*Ante* 167, *pl.* 3.)

15. So if a Bill is preferred against a Jointress to answer, whether her Husband had any other Title than as Assignee of a Mortgage, and she denies that she had any Notice of this Mortgage, and says, that her Husband told her that he was in by Descent; she shall not be obliged to answer, whether her Husband had any other Title than as Assignee of the Mortgagee. *Mich. 1715, Stephens and Gualc,* 2 *Vern.* 701.

[223] CAP. XXVIII.

EVIDENCE, WITNESSES, AND PROOF.

- (A) Of the Sufficiency and Disability of a Witness.
- (B) What will be admitted as Evidence, and will amount to sufficient Proof.
- (C) Where parol or collateral Evidence will be admitted to explain, confirm, or contradict what appears on the Face of a Deed or Will.
- (D) Of examining Witnesses, exhibiting Interrogatories, publishing and suppressing their Depositions.
- (E) Of examining Witnesses *de bene esse*, and establishing their Testimony *in perpetuam rei memoriam*.

(A) OF THE SUFFICIENCY AND DISABILITY OF A WITNESS.

1. A. exhibited a Bill to be relieved touching an Annuity charged on the Estate of the Defendant's Wife, and examined his Brother as a Witness for him, who had a like Annuity charged on the Estate by the same Deed; and though it was urged, that he had Satisfaction made to him in lieu of it, and had released his Right; yet it not appearing by any Proof in the Cause, the Court put off the Hearing, and gave the Plaintiff Liberty to examine Witnesses, to prove that the Brother had released the Annuity before he was examined as a Witness in the Cause. *Trin. 1700, Culpeper and Faircler,* 2 *Vern.* 375.

2. A Witness was examined whilst she was interested, before the Hearing; and the Cause being heard, and decreed to an Account, she was re-examined after the Hearing, before the *Master* on the Account, having first released her Interest; and it was objected that she ought not to be read, for having been examined whilst interested.

[224] and her Depositions published, she was thereby engaged, and almost under a Necessity of standing to what she had before sworn, and could not be free to retract or contradict it; but the Lord Keeper over-ruled the Objection. *Mich.* 1704. *Callow and Mince*. 2 *Vern.* 472. (*Proc. in Chan.* 234, S. C. under the Name of *Callow and Mince*.)

3. If a Bankrupt has assigned and released all his Estate and Right to the Assignees, he may be examined as a Witness for them. [*Phillips v. Willecox*.] 2 *Vern.* 637. *Per Curiam*: A Legatee of a small Legacy, as 5s. to a private Person, or £5 to a Nobleman, may be a Witness for the Will. [*Sutton Coldfield v. Wilson*.] 1 *Vern.* 254. (*Vide* 25 *G.* 2, c. 6.)

4. Upon an appeal from the Rolls, it was objected to the Evidence of one *Norris*, as a Witness examined in the Cause, and read at the Hearing at the Rolls, that since that Hearing, in Answer to a Bill exhibited against him, he had confessed, that on the Day on which he was examined as a Witness, he took a Bond of the Plaintiff, that if the Plaintiff recovered the Estate in Question, he would convey Part of it to the said *Norris*; and *per* Lord Keeper, *Holt*, Ch. Just., and *Powel*, Just., this Answer must be read to take off his Evidence as a Party interested. *Mich.* 1704. *Needham and Smith*, 2 *Vern.* 463, 464. And *per* Lord Keeper, though a Witness is examined an Hour together at Law, if in any Part of his Evidence it appears that he was a Party interested, the Court will direct the Jury, that he is no Witness, nor any Regard to be had to his Evidence.

5. Several Persons were examined as Witnesses no Ways concerned in Interest, and the Cause heard, and Issues directed to be tried, but the Trials were not carried on, and the Cause slept many Years, and after abated; and then those Persons who had been examined as Witnesses, became Heirs at Law, and thereby interested in the Matter; the Cause was revived and reheard, and the same Issues directed to be tried; and the Persons who had been so examined (being now Plaintiffs) prayed to have an Order, that their Depositions taken when they were disinterested, might be read as Evidence at Law for themselves; and my Lord Keeper ordered it accordingly; and likened it to the Case, where one who is the only, or only surviving Witness to a Deed becomes afterwards the Party interested, his Hand may be proved at Law; so if a Witness to a Deed becomes blind. Then the Cause proceeded to Trial at Bar in *C. B.* where the whole Court held these Depositions could not be read without Consent, the Parties being living; but the Defendant consented, and had a Verdict for him; and the Plaintiff obtained a new Trial, and then would have had the same Order; but my Lord Keeper said, since the Judges had resolved otherwise, he could not take upon him to make that Evidence which was not, and therefore only ordered they should be read in Evidence, as by Law they might. *Trin.* 1702. *Holcroft and Smith*. (2 *Freem.* 259, S. C. but not S. P. *Vide* *Eq. Ca. Abr.* Pt. 2 [413].)

6. But where one was examined as a Witness when disinterested, and afterwards became intitled to the Estate in Question, the Court of Chancery allowed his Depositions to be read. *vib* [*Gosse v. Tracy*] 2 *Vern.* 699, and there said, that the Reason why the Deposition of a Witness, taken whilst unconcerned in Interest, could not be made Use of at Law, was founded on that Rule of Law, *viz.* that where the Witness is living, and might be produced at the Trial, the Deposition of such Witness shall not be read.

[225] 7. A Co-Plaintiff, though but a Trustee, cannot be examined as a Witness for the other Plaintiff. [*Phillips v. Bucks*.] 1 *Vern.* 230. But one Defendant may be examined as a Witness for another. [*Windham v. Richardson*.] 2 *Chan. Ca.* 214, S. P.

(*Vide* the Case of the Mayor and Aldermen of *Colchester*, *Eq. Ca. Abr.* Part 2, 1 *P. Wms.* 595, S. C.)

8. Plaintiffs cannot examine each other as Witnesses in the Cause, because, if the Cause miscarries, the Plaintiffs will be liable to Costs, and therefore their Swearing is to exempt themselves; and it is their own Choice that they are made Plaintiffs, for without their Consent they could not; but Defendants are forced into the Cause; and if their being made Parties should absolutely invalidate their Testimony, it would be in the Power of any one who had a Mind to oppress another, to deprive him of his Defence, by making the most material Witnesses Defendants in the Suit; and therefore any of the Defendants to a Suit may be examined as Witnesses, saving just Exceptions to their Credit, &c. *Mich.* 1715. *Casey and Beachfield*, agreed *per Curiam in Cur.* (*Proc. in Chan.* 411, S. C. *Gillb. Eq. Rep.* 98, S. C. *in totidem verbis* with *Proc. in Chan.*)

9. A Commissioner may be a Witness, but he ought to be examined before any other Witness. [Bright v. Woodward,] 1 Vern. 369.

10. In a Suit to set aside a hard Award, the Arbitrator or Umpire, who made the Award, may be examined as a Witness. *Vide Brown v. Brown*, 1 Vern. 159.

11. A Bond of £400 Penalty was entered into; and the Question was, whether it was for the Benefit of the Corporation of — or for the Defendant; and the Witnesses for the Plaintiffs being all Members of the Corporation, it was objected, that they could not be read, they swearing for their own Benefit; which Exception was allowed; but it appearing that the Defendant had cross-examined some of the Plaintiff's Witnesses, not only to Questions barely whether they were of the Corporation, or not, but to other Questions, which tended to the Merits of the Cause; the Lord Keeper declared, that made them good Witnesses, though they were Members of the Corporation; and upon their Evidence it was decreed for the Plaintiffs. *Mich.* 1684, the Corporation of *Sutton Coldfield and Wilson*, 1 Vern. 254. And *per* Lord Keeper, a Corporation ought to have a Town-Clerk and Under-clerks, that are not Freemen, that they may be competent Witnesses, upon Occasion; and he said that he thought it very hard in the Case of the Water-bailage of *London*, that no one Freeman of the City, though it was not *6d.* Concern to him, could be admitted as a Witness. *But there indeed the Fee was in Question; and here being only a bare Sum of £200 in dispute, he thought that not considerable enough to take off a Man's Testimony.*

12. The Suit being touching the Loss and Misapplication of a Sum of Money given for the Benefit of the Parishioners, the Question was, whether any Inhabitant of the Parish ought to be admitted as a Witness. For the Plaintiff it was insisted, that the Interest was so minute and inconsiderable, that it could not be presumed to influence the Witness, or bias him in his Evidence; but *per Curiam*, the Cases where the Party was concerned in Interest, though never so small, have always prevailed; and it was so resolved, upon great Debate, in the Case of the City of *London*, concerning the Water-Bailiff. *Pasc.* 1694, *Dadswell and Nott*, 2 Vern. 317. (*Vide* the Case of *The Attorney General and Wyburgh & al'*, Eq. Ca. Abr. Part 2, S. P. 397.)

But Parishioners may prove a Derise to the Use of the Poor of the Parish for ever. Vide Townshend v. Row, 2 Sid. 109, *cit. Burr. Mansf.* 421.

13. If an Executrix to a first Husband marries a second, and a Bill is exhibited against them to discover a Trust, and they in their Answers disagree in the Matter, the Wife confessing what the Husband denies, and what the Plaintiff can prove only by one Witness, the Plaintiff can have no Relief; for one Witness is not sui-[226]-ficient against the Husband's Answer; and the Wife's Confession will not avail, for she can be no Witness against the Husband. [Anonymous,] 2 Chan. Ca. 39.

* 14. So where the Plaintiffs, who were Infants, and the Children of the Defendant's Wife by a former Husband, exhibited a Bill to have an Account of the Estate left them by their Father, and of the Produce thereof; and upon the Hearing it was referred to an Account, and the Defendant and his Wife were to be examined on Interrogatories, for Discovery of the Estate: the Wife being at Variance with her Husband, and living apart from him, on her Examination made the Estate of the Plaintiffs (who were her Children) as great as she could, thereupon to fix a Charge upon the Husband: the Plaintiffs, upon a Petition to the Master of the Rolls, obtained an Order to examine the Wife as a Witness against the Husband *de bene esse*; and the Master, upon her Evidence had charged the Husband with several Sums of Money, as Interest and Produce of the Infant's Estate: but upon Exceptions to the Report, the Lord Chancellor disallowed her Evidence, and declared the Wife could not be a Witness against her Husband. *Trin.* 1688, *Cole and Gray*, 2 Vern. 79.

* 15. The Plaintiff was Servant to the Defendant's Wife Mrs. *Baldwin*, and had in several Services saved about £50, the Defendant and his Wife having some Time lived separate. The Wife passed for a Widow, and the Plaintiff knew nothing of her being married: Application was made to Mrs. *Baldwin* by one *Bussen* (who was likewise a Defendant), to borrow £100 on a Mortgage; Mrs. *Baldwin* told him, she could only let him have £50 of her own Money, but that she could get the other £50 of a young Woman; accordingly, soon after, she acquaints *Bussen* that she had got the £100, and directed the Mortgage to be made to herself by the Name of *Phoebe*, that being her maiden Name, though she sometimes went by the Name of *Letitia*, and at other Times by the Name of *Taite*, having been the Widow of one *Taite*; the Mortgage was made accordingly; and some Time after she gave the Plaintiff a Bond of

the Penalty of £100 for Payment of £50 and Interest, and this she gave by the Name of *Tate*: *Bussey* made several Payments of Interest to Mrs. *Baldwin*, and knew nothing of her Marriage neither; afterwards Mr. *Baldwin*, having Notice of the Mortgage, gets that, and all the Writings relating to it, into his Custody, and some Time after Mrs. *Baldwin* obtained a Sentence of Divorce from her Husband, upon Pretence of ill Usage; and on Discovery of the Marriage, the Bill was brought against the Husband and Wife, and *Bussey*, to charge this £50 either on the Mortgage, or upon the Person of the Husband; the Wife put in a separate Answer, [227] wherein she disclosed all the Matter as above mentioned; *Bussey* by his Answer confessed what is before set forth, and moreover, that Mrs. *Baldwin* had told him lately, that the Plaintiff was the young Woman she meant, and of whom she had the £50. The Husband, by his Answer, insisted upon his Title by Law to this Mortgage, and £100, and denied to his Knowledge, that £50 or any Part of it was the Plaintiff's Money, and said, he believed this Suit to be set on Foot, on Contrivance between the Plaintiff and his Wife, to get so much Money out of him; the Plaintiff examined, by Order of Court, *Bussey* as a Witness, and his Deposition was in Effect the same as his Answer, which in Truth was nothing more than an Account of what he had heard the Wife say on this Occasion, so that the whole Evidence was in Effect the Wife's; and whether that should be allowed in this Case was the principal Question: The Court agreed clearly, that the Wife shall never be admitted by an Answer, or otherwise, as Evidence to charge her Husband; as where a Man marries a Widow Executrix, &c., her Evidence shall not be allowed to charge her second Husband with more than she can prove to have actually come to her Hands. But the Master of the Rolls said, this was perfectly a new Case: for here she transacted this Affair with *Bussey* and the Plaintiff as a *Feme Sole*, and neither of them knew or had Notice of the Marriage; and the Husband himself, as was proved in the Cause, on some other Occasions, had given in to the Concealment of the Marriage: and therefore the Court did allow of her Evidence, as it was supported by what *Bussey* said; and thought, upon the whole, the Evidence of the Wife sufficient to prove £50, Part of this Money, to be the Plaintiff's, not considered as a Wife, but as she transacted and appeared throughout as a *Feme Sole*, and therefore decreed the Plaintiff the £50 with Costs. *Hil. 1719, Rutter and Baldwin.*

[Commented on and distinguished, *Le Texier v. The Margravine of Anspach*, 1808, 15 Ves. junr. 165.]

(B) WHAT WILL BE ADMITTED AS EVIDENCE, AND WILL AMOUNT TO SUFFICIENT PROOF.

1. A Bill in another Cause is not to be read as Evidence against the Plaintiff named in it, unless it be proved, that it was exhibited with his Privity, for any one may file a Bill in another's Name. 17 Car. 2 [1665-66], *Wollett and Roberts*, 1 Chan. Ca. 64.

2. The Depositions of Witnesses taken in a Cause, which was heard thirty Years before, were ordered to be made Use of, the same Matters being then under Examination as at present; and the Plaintiff's Title not then appearing, and the Witnesses being since dead, though none of the present Parties were Parties to the former Suit, except the Tertenants. Pasch. 18 Car. 2 [1666], *Terwit and Gresham*, 1 Chan. Ca. 73. (2 Freem. 184, S. C. says, it was so ordered upon a long Debate.)

3. The Defendant's Counsel moved, that they might be at Liberty to read Depositions in this Cause, which were taken in a Cause where the Plaintiff's Father was a Party to the Suit, being in all Matters the same; but on the other Side it was objected, that the now Plaintiff not claiming as Heir, and his Father being only Tenant for Life, those Depositions could not be read against him; and upon long Debate, the Defendant had only the common Order, for Leave to read those Depositions at the Hearing, saving just Exceptions. Mich. 1686, *Coke and Fountain*, 1 Vern. 413. And it was said to be a common Case, that where one Legatee has brought his Bill against an Executor, and proved Assets; and afterwards another Legatee brings his Bill: that he should have the Benefit of the Depositions in the former Suit, though he was not Party to it.

4. So where *J. S.* devised his Real Estate for the Payment of his Debts, and the Surplus to the Plaintiffs, and the Creditors exhibited a Bill against one *J. N.* and made the Plaintiffs Parties, to set aside some Conveyances obtained by him, by Fraud from the Testator, and had a Decree to that Purpose; afterwards the Plaintiffs, who were intitled to the Surplus, exhibited a Bill likewise against *J. N.* relating to the

said Fraud : and it was held, that there being the same Question in both Causes, and *J. N.*'s Defence being the same, the Depositions in the former Cause should be read against him. [228] *Mich.* 1703, *Necill and Johnson*, 2 *Vern.* 447. That a Man's Answer in the Spiritual Court, or voluntary Oath before a Justice of the Peace, may be read against him in Chancery, by Order, *vide* [Mildmay v. Mildmay, 1 *Vern.* 53.

* 5. The Defendant, on presenting the Plaintiff to a Living, took a Bond from him to resign, and after put it in Suit, and recovered, and levied £98, and the Plaintiff's Bill was for Relief : the Defendant did not by Answer pretend any Misbehaviour : yet examined to several Misbehaviours : and it was urged that these Depositions could not be read, because those Misbehaviours were not in Issue : and so inclined my Lord Keeper : but after allowed them to be read, and founded his Decree on them. *Hil.* 1702, *Hodgson and Thornton*.

6. The Defendant having obtained a Bill of Sale of Goods, and likewise a Note from his brother, a little before his Death, for Payment of £300, the Plaintiff insisted those were voluntarily given, and for a Colour only : and that underneath the Note, the Defendant had subscribed an Acknowledgment, that no Debt was due to him : the Defendant by Answer swore his Debt, and denied that there was any such Defeasance or Acknowledgment : it appeared upon the Proof, that the Defendant deposited the two Instruments he had so obtained in the Hands of *A. B.* his Sister, and afterwards wrote to her to send him the two Instruments by a special Messenger sent for that Purpose, and that she should not let any Body see them : his Sister sent them, but sat up all Night to take Copies of them, as she declared in her Life-time (being dead before the Commencement of the Suit) : and upon producing the Copies so taken by the said *A. B.* there appeared to be such Acknowledgment under wrote, that there was no real Debt : and upon inspecting the Instruments produced by the Plaintiff upon stamp'd Paper, it appeared that the Bottom was torn off : and my Lord Chancellor allowed the Copies to be read, being the Hand writing of *A. B.*, although not proved to be true Copies. *Hil.* 1707, *Winne and Loyd*, 2 *Vern.* 603.

7. A Deed to lead the Uses of a Fine was inrolled for safe Custody only, and a Copy from the Inrolment being offered in Evidence, it was objected, that it was no Evidence, being inrolled for safe Custody only : nor is the Inrolment itself, without particular Circumstances to support it, as proving the original Deed was in the Defendant's Custody or Power, or accidentally lost, &c., and of that Opinion was the Master of the Rolls, who said, that in case of an Inrolment for safe Custody, the Deed may be said to be recorded : but where a Bargain and Sale is inrolled pursuant to the Statute, the Inrolment is a Record, so that a Copy of it may be read in Evidence. *Mich.* 1704, *Combes and Spencer*, 2 *Vern.* 471. The Reporter adds a Note, that afterwards, upon a Rehearing, an Issue at Law was directed, whether such Deed of Uses was executed : and upon the Trial a Copy of the Deed was allowed to be read, and a Verdict for the Deed. 2 *Vern.* 591, S. C.

8. The Defendant having suppressed a Marriage Settlement, by which a Remainder in Tail Male was limited to the Plaintiff's Father, and all the prior Estates spent : upon Proof made that the Settlement came to the Defendant's Hand, and that he had confessed it in an Answer to a former Bill, though now he denied it : the Master [229] of the Rolls decreed the Plaintiff should hold and enjoy the Estate : and this Decree was confirmed by my Lord Keeper. 2 *Vern.* 380. *Vide* 1 *Vern.* 452, *Wardour v. Berisford*.

9. A Bill was exhibited touching the Plaintiff's Jointure, which the Bill charged was, by parol Agreement, made on the Marriage, agreed to be £400 *per Annum* : the Defendant pleaded, that after all Treaties and Agreements touching the Marriage Settlement, a Jointure was actually settled and accepted, and the Marriage thereupon had eighteen Years before. And *per* Lord Chancellor, the Jointure Deed is an Evidence, that all the precedent Treaties and Agreements were resolved into that : but ordered the Defendants to answer, and saved the Benefit of the Plea to the Hearing. *Jules v. Benson*, 1 *Vern.* 369.

10. The Plaintiff having lent *J. S.* £500 on a Mortgage, and afterwards discovering that the Estate was pre-mortgaged to the Defendant, got in an old satisfied Incumbrance, and brought his Bill to compel the Defendant to redeem, or be foreclosed : and it was objected, that the Plaintiff, in this Case (as between him and the Defendant, who was a Purchaser), ought to have proved the actual lending and Payment of the Consideration-Money : and the producing the Deed or an Acquittance was not suffi-

cient : but the Court held it well enough, and that the producing the Deed or Acquittance was sufficient Evidence. *Mich.* 1692, *The Lord Chief Justice Holt and Mill*, 2 *Vern.* 279. *Vide* [Hall v. Dench] 1 *Vern.* 330, where by Sir John Churchill, Master of the Rolls, there are four Things favoured in Equity, *viz.* Livery, Attornment, Assent to a Legacy, and the new Publication of a Will, and in either of these Cases a slender Evidence will serve the Turn.

11. Some Bailiffs, who had served an Execution in Breach of an Injunction, find Money hid in the House, and carry it away : and the Party at whose Suit the Execution was taken out, was ordered to make satisfaction, who complained of this Order as unjust, saying that the Parties should be admitted to purge themselves by Oath, and that the Plaintiff should not be admitted to be Judge of his own Damages : but my Lord Keeper confirmed the Order, and said, that a Man who had stolen, would not stick to forswear it : and that therefore, in Odium *Spoliatoris*, the Oath of the Party injured should be a good Charge on him who did the Wrong. *Childerns v. Sarby*, 1 *Vern.* 207. *Vide Vern.* 308.

12. If there be but one Witness against the Defendant's Answer, the Plaintiff cannot have a Decree, it being Oath against Oath. *Pasch.* 1683, *Alam and Jourdon*, 1 *Vern.* 161. [Montague v. Bath,] 3 *Chan. Ca.* 123, S. P.

But Symb. that the Testimony of one Witness, corroborated by Circumstances, though contradictory to the Defendant's Answer, is sufficient Ground for a Decree. *Pember v. Mathers*, 1 *Bro. Chan. Ca.* 52.

13. The Defendant denied Notice of the Plaintiff's Title, the Plaintiff proved it by one Witness, which by the Usage of this Court, is not sufficient to ground a Decree for the Plaintiff, being Oath against Oath ; but the Course has been to direct a Trial at Law ; but in this Case my Lord Keeper said, he did not see the Difference between doing it *per Plura* and *per Pauciora* ; for to send it to law to be tried, where the Jury will certainly find it on the Testimony of one Witness, and then decreeing it on that Verdict, is the same Thing as decreeing on one Witness, without trying it at all, and therefore directed it to be tried : but that the Plaintiff should admit the Defendant's Answer to be read at the Trial, not as Evidence, for that he said it could not be, nor should they admit it to be true : but to be sworn, so that the Defendant might have the Benefit [230] of his Oath at Law, as in this Court, if it would weigh any Thing with the Jury. *Pasch.* 1706, *Ibbotson and Rhodes*. *Vide* 2 *Vern.* 554, S. C.

(C) WHERE PAROL OR COLLATERAL EVIDENCE WILL BE ADMITTED TO EXPLAIN, CONFIRM OR CONTRADICT WHAT APPEARS ON THE FACE OF A DEED OR WILL.

1. The Earl of *Gainsborough* made his Will, and thereby devised several Legacies, and charged his Real Estate with the Payment of them and his Debts, and devised his Estate so charged to the Defendant his Nephew, and made the Plaintiff his Wife Executrix ; and the Bill was brought to have the Personal Estate discharged from the Debts and Legacies, suggesting, that the Creditors threatened to come upon and exhaust the Personal Estate, and that it was the Intent of the Testator that she should have the Personal Estate clear to herself, and that the directions for making the Will were so ; but that either by the Mistake or Contrivance of the Person who drew the Will, it was not so expressed ; the Defendant demurs, for that no such Averment could or ought to be admitted against the Will in Writing ; but by *Rawlinson and Hutchins* the Demurrer was over-ruled ; and they said, that though such an Averment could not be admitted, where it was to make the Party a Title, yet where it was only to rebut an Equity, as it is in this Case, it might ; and cited the Case of *Crompton and North*, 1 *Chan. Ca.* 196, where Mrs. *Crompton* devised her Lands to Sir *H. North*, to be sold for Payment of her Debts, which were very small, and the Heir would have had the Surplus a Trust for him : and the Court was of Opinion, that Sir *H. North* might be admitted to prove Mrs. *Crompton's* Intent otherwise ; and the Case of *Kingsmill and Ogbe*, 8 *May*, 17 *Car.* 2 [1665], and *Foster and Munt*, and *Pring and Pring*, 2 *Vern.* 99. Afterwards the Cause coming on to be heard, on the Proofs it appeared plainly that my Lord's Intention was, that she should have the Personal Estate, clear of the Debts ; which was decreed accordingly ; and that if it were taken from her by the Creditors, she should come in as a Creditor on the Real Estate ; and 27 *Feb.* this Decree was affirmed in the House of Peers. *The Countess and Earl of Gainsborough*, 2 *Vern.* 252, S. C. (2 *Freem.* 188, S. G. ; 1 *Will. Rep.* 9 & 116, S. C. cited.)

(The constant Rule of Law has been, to reject all parol Proof brought to supply the Words of a Will, or to explain the Intent of the Testator, and that nothing *dehors* should be averred, is the express Resolution in Lord *Chayney's Case*, 5 Co. 67. and this Rule has since been thought necessary to be adhered to, not only on account of the Statute of *Frauds* and *Perjuries*, which was made to prevent Perjury, Contrariety of Evidence, and Uncertainty; but because little Regard ought to be had to the Expressions of the Testator, either before or after the making his Will; because, possibly those Expressions might be used by him, on purpose to controul or disguise what he was doing, or to keep the Family quiet, or for other secret Motives and Inducements, which cannot after his Death be found out; but this Rule has received a Distinction which has greatly prevailed of late, *viz.* between Evidence offered to a Court, and Evidence offered to a Jury; for in the last Case, no parol Evidence is to be admitted, lest the Jury might be inveigled by it; but in the first Case it can do no Hurt, being to inform the Conscience of the Court, who cannot be biassed or prejudiced by it. *Vide* 2 Vern. 98, 337, 625.)

2. So where *J. S.* devised all his Household-Goods, as Woollen, Linen, Pewter and Brass whatsoever, except a Trunk under the Chamber-window; and the Question was, whether the parol Proof of the Person who drew the Will, should be admitted to explain [231] these Words; my Lord Keeper thought it might, notwithstanding the Statute of *Frauds* and *Perjuries*; for it here neither adds to, nor alters the Will, but only explains which of the Meanings shall be taken; as in Case of a Devise to *Sen John*, when the Testator had two of the same Name; and here the Word (*As*) may be a Restriction, or if the following be as particular Instances, it may not restrain the Word (*whatsoever*); and he thought the Words imported to carry all the Household-Goods; and the Master of the Rolls being of that Opinion too, the Proof was read. *Mich.* 1705, *Pendleton* and *Grant*, 2 Vern. 517, S. C.

3. *J. S.* having three Daughters, and several Grandchildren and Great Grandchildren, made his Will, and devised the Surplus of his Estate to be equally divided amongst his three Daughters, and all his Grandchildren and Great Grandchildren, that should be living within two Years after his Death, and died; and within two Years after his Death other Grandchildren were born; the Plaintiffs examined Witnesses to prove *J. S.*'s Intent, that none born after his Death should take; and the Question was, whether they could be admitted to read this Proof; and my Lord Keeper was of Opinion that such Proof might be admitted; so the Witnesses were read; but their Depositions were only, that *J. S.* said so or so, or to that Effect, which my Lord said signified nothing, for that makes the Witness the Judge; and he ought to set down the very Words, for the Court to judge of; but without this Proof, my Lord held, that the Words in the Will (within two Years after my Death) were to be taken restrictively, and extended to none born after; and decreed accordingly; which Decree was affirmed in the House of Lords. [*Sub nom.* *Trelawney v. Molesworth*, Colles. 163.] *Trin.* 1700, *Dayrell* and *Molesworth*. (2 Vern. 378, & *post*, 297, S. C., reported on another point.)

4. The Testator made his Will, and his Brother Executor, and devised to him his Real Estate, and thereby willed, that his Executor, out of his Rents in arrear, and other his personal Estate, and out of half a Year's Rents and Profits of his Real Estate, after his Death, should pay his Debts and Legacies therein after mentioned, and amongst other Legacies devised £40 *per Ann.* to the Plaintiff, his Wife's Nephew, to maintain him at *Cambridge*, to be paid by his Brother and Executor; the Brother alledging, that he had fully administered the Personal Estate, and also the Half Year's Profits of the Real which incurred after the Testator's Death, refused to pay the £40 *per Ann.*, and though it was admitted, that the Will had only made the Half Year's Rents and Profits of the Real Estate liable; yet upon the Evidence of one *J. N.*, who swore that the Brother promised the Testator, that he would pay the Plaintiff the Annuity, it was decreed for him by the Master of the Rolls, and confirmed by my Lord Keeper. *Trin.* 1705, *Oldham* and *Litchford*, 2 Vern. 506 (a). (2 Freem. 284, *Easter* 1705, S. C. reports it, that Testator was making his Will, and amongst other Things was directing this Gift to the Plaintiff to be inserted in his Will, and Defendant being present desired him not to put it in his Will, but said as he was a Christian he would take Care to see it paid, and thereupon it was omitted in the Will and Plaintiff having preferred his Bill for it, the Master of the Rolls decreed the Payment, and that it should be charged on the Real Estate (*see* Lord Thurlow's *Judgment*, Bro. Chan. Ca. 54, *on* *Pember v.*

Mathers), and on Appeal Lord Keeper decreed, that the Defendant should pay it, and said the Ground he went upon was, that this was a Fraud upon the Testator and the Legatee, and that notwithstanding the Statute of Frauds, this Court had relieved in Case of a Fraud, although there was nothing in Writing to charge the Party, but he said he could not decree it as a Charge upon the Land; but the Master of the Rolls said, the Reason he went upon to charge the Land was, because the Maintenance of a poor Scholar was a Charity, and within the 43 *Eliz.* of Charitable Uses, and it might amount to an Appointment within that Statute.)

(a) Mr. *Vernon* does not give the Reasons the Court went upon, but perhaps the Court looked upon the Promise of the Executor as a Confession of Assets. *Per Hardwicke, C., in the Case of Whithorne and Russel, Trin. 12 Geo. 2.*

5. A. devised to B. Lands of £60 *per Annum* Value, paying £100, which he owed to J. S. and £100 more, which he by Bond owed J. N., and after small Legacies, devised the Rest of his Personal Estate to the Plaintiffs his Nieces; it happened that the £100 by Bond was not due to J. N. but to S. H., and therefore the Devisee of Lands refused to pay it, insisting it should be paid out of the Personal Estate; but the Person who [232] drew the Will having sworn that the Testator intended the Debt due to S. H., the Master of the Rolls decreed the Devisee of the Lands liable; which Decree was affirmed by my Lord Chancellor, who said, he saw no Hurt in admitting collateral Proof to make certain the Person or the Thing described. *Mich. 1707, Hodgson and Hodgson, 2 Vern. 593.* (*Precedents in Chan.* 229, S. C. states it thus: A. devised Lands to B., he paying £100, which he owed by Bond to J. S., which was the Obligee's maiden Name; but though he knew she was married, yet he forgot her Husband's Name; and this being proved by the Person that drew the Will and another, the Payment was decreed.)

6. A. devised to his Wife some particular Legacies, and made her Executrix, but made no Disposition of the Surplus of his Personal Estate; and the Court admitted parol Proof, to shew that the Testator intended her the Surplus, being to oust an Implication or Rule in Equity; and on the Evidence decreed for the Wife. *2 Vern. 648.* [*Batcheller v. Searl,*] [*Ibid.*] 736, S. P. Parol Proof admitted to shew that a Legacy greater than a Debt due to the Legatee was not in Satisfaction of the Debt. *Cuthbert v. Peacock, 2 Vern. 593, ante* [1 Eq. Ca. ABR.], 204. (Reversed in *Dom. Proc. Vide* 1 P. Wms. 114.)

(*Vide* the Case of *The Duke of Rutland & al'* and *Dutchess of Rutland & al', Eq. Ca. ABR. Part 2, p. 416, 440, S. P.*)

7. If A. purchases in the Name of B., A. may be admitted to prove that he paid the Purchase Money, and so make it a resulting Trust, or Trust by Implication of Law for himself. *Vide* [*Gascoigne v. Thwing*] 1 *Vern. 366.*

8. An Entry in the Steward's Book, and a parol Proof by the Foreman of the Jury, admitted as good Evidence, that a Feme Covert surrendered her whole Estate, although the Surrender upon the Roll, and the Admission thereon, was but of a Moiety. *Pasch. 1706, Hill and Wigget, 2 Vern. 547.*

(D) OF EXAMINING WITNESSES, EXHIBITING INTERROGATORIES, PUBLISHING AND SUPPRESSING THEIR DEPOSITIONS.

1. A Master examined one Witness three Times to a Matter of Account, and the Depositions were suppressed. [*Anonymous,*] 2 *Chan. Ca. 79.*

2. If an Interrogatory is leading, that is sufficient to suppress the Deposition. *Vide Callow v. Mime, 2 Vern. 472.*

3. Interrogatories, and the Depositions of a Witness taken as them, had been suppressed, for that the Interrogatories were leading, and then Publication passed; and the Court was moved, that a new Set of Interrogatories might be drawn, and settled by the Master, for the Examination of this Witness, whose Evidence was very material, and yet must be wholly lost, unless the Court would indulge them this Way; and though the Practice was admitted to be always against it; and it was urged to be of dangerous Consequence; yet one Precedent being produced to this Purpose, and the Interrogatories which had been suppressed being such as might be drawn by many other Counsel, without an Apprehension of their being leading; the Court, to let in the Party to the Benefit of his Witnesses' Testimony, ordered Interrogatories to be put in and settled by a Master, for his Examination over again. *Trin. 1718, Spence and Aden. (Cath. Eq. Rep. 150, S. C. in totidem verbis; Pr. in Chan. 493, S. C. in totidem verbis.)*

4. Though the Rule be, that after Publication no new Witness can be examined, nor a Witness before examined re-examined; yet on special Circumstances set forth by Motion and Affidavit, the Rule may be dispensed with. [London (Mayor of) v. Dorset,] 1 *Chan. Ca.* 228; [Newland v. Horsman,] 2 *Chan. Ca.* 75; [Randal v. Richford,] 1 *Chan. Ca.* 25.

[233] 5. Upon a Motion for Leave to examine after Publication upon making the usual Oath of not having seen the Depositions, the Lord Keeper declared, that in such a Case, the other Side should be at Liberty to examine at large as well as to cross-examine the Witnesses produced by the Party that made the Motion, (which was all he might do formerly) and his Reason was, that a crafty Solicitor may lie on the Lurch, and examine nothing till after Publication is past; and the other Party may think himself secure, and so not examine to those Points, which he could otherwise have proved, in Regard he finds his Adversary has not examined to those Matters: And when once Publication is past, and the Party that examined has seen his own Depositions, then the Side that lay still having tied up his Adversary, so that he can only cross-examine the other's Witnesses, applies for an Order upon the usual Affidavit to enlarge Publication: and when he has got that Order, then he comes in with a whole Cloud of Witnesses: And though it may be thought hard that any one should have Liberty to examine after he has seen the Depositions, yet his Lordship thought it a reasonable Penalty on such as would not examine in Time, or that should lie upon the Catch, to take Advantage of the other Party, and ordered the Register to take Notice of it as a fixt Rule for the Future. *Mich.* 1684, *Anon.* 1 *Vern.* 253.

6. If Interrogatories are exhibited in the Examiner's Office, and Witnesses examined thereon, either Party may without Application to the Court, or Order for that Purpose, exhibit one or more Interrogatories, or a new Set of Interrogatories, for further Examination of the same or other Witnesses: But when a Commission is taken out, there no new Interrogatories, or Set of Interrogatories, can be exhibited without Motion and Order of the Court; and the Reason of the Difference is, because the Examiner is an Officer of Credit, and sworn, and therefore presumed to be impartial, and that he will not disclose the Depositions; whereas Commissioners are private Persons, and therefore without Leave of the Court no new Interrogatories can be added before them; agreed by the Court and Bar. *Pasch.* 1714, *Andrews and Brown.* (*Prec. in Chan.* 385, S. C.; *Gilb. Rep.* 42, S. C. *Vide* 2 *Eq. Ca. Abr.* 490, S. C. [but not S. P.].)

(E) OF EXAMINING WITNESSES *de bene esse*, AND ESTABLISHING THEIR TESTIMONY *in Perpetuum Rei Memoriam*.

1. A Cause having been heard, and referred to an Account, the Plaintiff afterwards moved to examine two of the Defendants *de bene esse*, which was ordered, unless Cause was shewn; and the Defendant's Counsel in shewing Cause took this Difference, *viz.* [234] that although it was an Order of Course (a) to examine a Defendant *de bene esse*, saving just Exceptions; yet when the Cause was open, and it appeared that the Defendants were Parties interested, it was proper to shew it as Cause against such an Order before the Witnesses were examined; which Difference was allowed of; but it appearing in this Case, that the Defendants had given Releases of their Right, the Cause was disallowed. *Pasch.* 1687, *Glover and Faulkner*, 1 *Vern.* 452.

(a) After a Bill filed in any Cause, the Court will, on Affidavit, that any of the Witnesses are aged or infirm, sick, or going beyond Sea, so that the Party is in Danger of losing their Testimony, order them to be examined *de bene esse*, which will make their Depositions valid in that Cause only, and against those who are Parties to it; but if it appear, that they might afterwards have been examined in Chief, regularly, such Depositions shall not be made use of. To establish Testimony *in Perpetuum Rei Memoriam*, a Bill must be filed against all those concerned in Interest, setting forth the Title, and that the Party is in Danger of losing the Benefit of the Testimony of several Witnesses by their Age, Sickness, &c. (*Vide* the Case of *Phillips and Carew*, *Eq. Ca. Abr.* Part 2, p. 13, 159, 180; *P. Wms.* 117, S. P.) And the Depositions taken in such a Case will not only bind the Parties in that and all other Suits, but likewise all those claiming by or from them. *Vide Stile's Pract. Reg.* 587.

2. The Plaintiff examined his Witnesses *de bene esse*, in *Mich.* Vacation, and in *Hil.* Term following, the Defendant put in his Answer; and five Weeks afterwards

before any Replication filed, or Examination in Chief, the Witnesses died ; and it was moved, that this Deposition might be read ; and it was likewise prayed, that it might be made use of at Law (although by the strict Rules of the Common Law, no Depositions of Witnesses taken *de bene esse*, or before Issue joined, can be read or given in Evidence) and that the Defendant might be ordered not to oppose the reading of it at the Trial there ; which my Lord Keeper held reasonable ; for that otherwise an Examination *de bene esse* would be to no purpose. *Masden v. Bound*, 1 Vern. 331.

(Whether such Evidence ought to be admitted at Law, *vide* 1 Salk. : *Cro. Eliz.* 352 ; *Hard.* 332 ; *Raym.* 335 ; *Hob.* 112 ; *Godb.* 336.)

3. If one makes a Will, and afterwards becomes a Lunatick, a Bill will not lie to perpetuate the Testimony of the Witnesses to it in the Lunatick's Life-time. *Vide Sackvill v. Ayleworth*, 1 Vern. 105.

4. If there are two Persons, and each of them pretends to be the Purchaser of a Reversion after an Estate for Life, and one of them exhibits his Bill to try his Title, and to perpetuate the Testimony of his Witnesses ; such Bill will be dismissed, not being proper in the Life-time of Tenant for Life. *Vide* [Hitchcock *v.* Sedgwick] 2 Vern. 159.

5. A Bill was exhibited to examine Witnesses *in Perpetuum Rei Memoriam*, to prove a *Modus Decimandi* ; the Defendant demurred, for that the Bill was to establish a Custom against the Church, and in Prejudice of Tithes, which are due *Communi Jure* ; and several Precedents were cited, where Bills to have a *Modus* decreed were upon a Demurrer dismissed ; but this Bill being only to preserve Testimony, the Lord Keeper thought it reasonable the Defendant should answer, and over-ruled the Demurrer. *Somerset v. Fotherby*, 1 Vern. 185. *Vide* [Pawlet *v.* Ingres] 1 Vern. 308, [Parry *v.* Rogers, *Ibid.*] 441.

6. But where a Bill was exhibited to prove a Will, and to perpetuate the Testimony of the Witnesses, the Defendant pleaded himself a Purchaser without Notice of any such Will ; and insisted, that unless there had been a Verdict in Affirmance of such Will, (nothing hindering the Plaintiff, but that if he had a Title, he might recover at Law) the Plaintiff ought not to be admitted to examine the Witnesses, thereby to hang a Cloud over a Purchaser's Estate ; and upon Debate the Court allowed the Plea. *Hil.* 1685, *Bechinall and Arnold*, 1 Vern. 354.

Whether in aid of a legal Title, a Bill to perpetuate the Testimony of Witnesses shall be entertained before an Action brought : *Vide* *Moodalay v. Morton*, [1] Bro. Chan. Ca. 469.

A Bill to perpetuate Testimony may be dismissed for want of Prosecution any Time before Replication and Examination of Witnesses ; but after the Witnesses are examined, Plaintiff must not proceed to set his Cause down to be heard ; for the End is answered by the Examination. And if he does, his Bill will be dismissed with Costs, but so as not to prejudice him in perpetuating the Testimony of his Witnesses. [Anonymous,] Per Lord Hardwicke, Chan. Ambl. 237.

[235] CAP. XXIX.

EXECUTORS AND ADMINISTRATORS.

- (A) Executors, in what Cases more or less favoured in a Court of Equity, than elsewhere.
- (B) What shall be Assets.
- (C) Where upon the Death of one of the Executors, the Surplus of the Personal Estate, after Debts and Legacies paid, shall survive to the other.
- (D) Where the Surplus of the Personal Estate belongs to the Executor, or he is to be a Trustee for the next of Kin to the Testator.
- (E) Of Remedies by one Executor against another, and how far the one shall be answerable for the other.
- (F) Of Administration, to whom to be granted, who are intitled to a Distribution, and in what Proportion ; and here of bringing into Hotch-Pot.

(A) EXECUTORS, IN WHAT CASES MORE OR LESS FAVOURED IN A COURT OF EQUITY, THAN ELSEWHERE.

1. A. by Will gave the three Children of B. (the Eldest of whom was not ten Years old) £200. B. the Father, sued the Executor in the *Consistory Court* for these Legacies,

who brought his Bill, offering to pay them, provided he might be indemnified : to which the Father demurred, because the Matter was properly cognisable in the *Consistory Court* ; but the Demurrer was overruled : my Lord Chancellor declaring, that the Matter was proper here, and that if the Matter had proceeded to a Sentence in the Ecclesiastical Court, it would be proper to come here for the Executor's Indemnity ; and that here Legatees were to give Security to refund, but not there : and this Court will see the Money put [236] out for the Benefit of the Children. *Hil.* 1681, *Horrel* and *Waldron*, 1 *Vern.* 26.

2. If the Spiritual Court go about to compel an Executor to pay a Legacy without Security to refund, a Prohibition shall go. [Noel v. Robinson.] 1 *Vern.* 93, *per* Lord Chancellor ; *Knight v. Clarke*, *there cited*.

3. The Plaintiff being Executor, and his Testator greatly indebted, and being desirous to be rid of the Assets, as far as they would go, and that his Payments might not be afterwards questioned, brought a Bill against all the Testator's Creditors, to the Intent they might if they would, contest each other's Debts, and dispute who ought to be preferred in Payment : The Defendant being a Creditor demurred, for that the Bill contained Multiplicity of Matter, wherein he was not concerned ; but the Court over-ruled the Demurrer, and held it a proper Bill, and a safe Way for the Executor to take. *Buckle v. Atleo*, 2 *Vern.* 37.

4. A Widow possessed herself of her Husband's Personal Estate, and paid several of his Debts, and after his Executor got the Estate out of her Hands ; and upon a Bill preferred by her, it was decreed by Consent of Counsel, that she should be allowed for all Payments made, which were incumbent on the Executor to pay, according to the Course of Law ; but as to Payments made out of Order and Rule which the Law left the Executor liable to, she should not be allowed, if they were to the Prejudice of the Executor. 15 *Car.* 2 [1663], *Ayer and Ayer*, 1 *Chan. Ca.* 33.

5. If a Widow possesses herself of the Personal Estate as Executrix under a revoked Will, and pays Debts and Legacies, but has no Notice of the Revocation, she shall be allowed those Payments in Equity. *Vide* [*Hele v. Stowel*] 1 *Chan. Ca.* 126.

6. But where an Administrator possessed himself of the Intestate's Goods, and devised Legacies and died, and his Executor, without Compulsion, and pending a Suit in Right of the Intestate to recover the Goods, paid the Legacies ; the Court would not relieve him, because the Payment was voluntary, and with Notice, that the Right to the Intestate's Goods was controverted. 31 *Car.* 2 [1679], *Hodges and Waddington*, 2 *Chan. Ca.* 9.

7. If an Administrator exhibits a Bill for a Discovery of the Personal Estate of the Intestate, and the Defendant pleads, that the Party made a Will, and that it is now litigated in the Spiritual Court ; yet Equity will decree a Discovery. *Mich.* 1682, *Wright and Blicke*, 1 *Vern.* 106. (*S. P. Dulwich College v. Johnson*, 2 *Vern.* 49, *ante* [1 *Eq. Ca. Abr.*], 77).

8. If three several Actions at one Time are brought against an Executor, and he to each Action pleads *Riens entre mains ultra* £100, and so upon each Action there is Judgment for £100, and therefore prays an Injunction ; yet *per* Lord Keeper, he can have no Relief ; for in Cases proper for Law, a Man must defend himself by legal Pleadings ; and every Executor ought to be careful in the first place to cover his Assets with a Judgment. *Anon.* 1 *Vern.* 119.

9. So where an Administrator exhibited a Bill to be relieved after a special *Plene Administravit* pleaded, and a Verdict and Judgment thereon ; upon Pretence that the Attorney at Law, without Direction pleaded, that the Defender had not Notice of the Original, until the 12th of *March*, and had then fully administered ; and Issue taken, that the Defendant had Notice before the 12th, *viz.* the 6th of *March* ; whereas in Truth he had fully administered before the 6th [237] of *March*, and before the Original purchased, so that the Right was never tried at Law ; yet the Bill was dismissed at the Rolls, and the Dismission affirmed upon an Appeal to the Lord Keeper. *Mich.* 1695, *Stephenson and Wilson*, 2 *Vern.* 325.

10. But where an Executor exhibited a Bill to be relieved against a Judgment obtained against him, and surmised that he gave Directions to his Attorney to plead specially, that he had not Assets *ultra* what would satisfy Debts of a higher Nature ; but that the Attorney pleaded generally *Plenement Administ.* and on the Issue, a Letter which he had been persuaded to write by the Importunity of the Defendant's Friends, giving an Account of the Testator's Estate, and in which was an Acknowledgment of

£300 due to the Testator on a Mortgage, was given in Evidence, and held sufficient by the Court and Jury to charge him, but he proving that this Mortgage was worth nothing, there being three precedent Mortgages on the same Estate; and that he had not Notice of it at the Writing of the Letter; the Court relieved him. *Trin.* 1690, *Robinson and Bell*, 2 *Vern.* 146.

11. In Debt against an Executor for £700, the Executor pleaded *Ne unques Executor*, and on proving at the trial, that a Chimney back, or some other slight Thing came to the Defendant's Hands, the Plaintiff had a Verdict; but Equity relieved against it; cited by *Hutchins*, Lord Commissioner, to be adjudged in Lord *Bacon's* Time. [*Robinson v. Bell*,] 2 *Vern.* 147.

12. So in another Case upon the like Plea of *Ne unques Executor* the Plaintiff proved the Defendant took Money for some few Pots of Ale, sold in the House after her Husband's Death; and Equity relieved. *Cryer and Goodhand*, 2 *Vern.* 148, cited by *Hutchins*, Lord Commissioner, to be adjudged by Lord *Nottingham*.

13. The Executor of an Executor shall be liable in Equity for any Waste or Wrong done by his Executor; although at Law it is considered as a Personal Tort, which dies with the Executor. [*Price v. Morgan*,] 2 *Chan. Ca.* 217, *per* Lord Chancellor.

14. An Executor of an Executor is not liable at Law, but there may be Remedy had against him in Equity. 2 *Mod.* 293. The Executor of an Executor, who commits a *Devastavit*, liable in Equity. [*Vanaere's Case*,] 1 *Chan. Ca.* 303.

15. If A. devises Legacies, and makes B. and C. Executors, and B. makes C. and D. his Executors, and dies; and they possess themselves of the Estate of A., they may be both charged in Equity; for though in Point of Law the Executorship survived to C. and D. is not privy, yet the Estate of A. in whose Hands soever, ought to be liable. *Trin.* 15 *Car.* 2 [1663], *Nicholson and Sherman*, 1 *Chan. Ca.* 57, resolved upon Demurrer. *Vide Stiddolph v. Leigh*, 2 *Vern.* 75, that a Creditor may follow the Testator's Estate into whose Hands soever it comes, notwithstanding any Assignment of it by the Executor. (2 *Freem.* 181, S. C.)

16. If A. makes B. Executor, and after Debts and Legacies paid, devises *residuum bonorum* to C., if B. put not all the Goods into his Inventory, or under-values those he puts in; C. before the Debts are paid, may sue B. in Equity, to enforce him to shew the true Value of the Goods. *Pasch.* 1 *Car.* 1 [1625], *Palm.* 402, *per Dold and Crew*.

[238] 17. A Bill may be exhibited in Equity to discover Assets [*Alexander v. Alexander*], 2 *Chan. Rep.* 37, against an Executor, and he thereupon decreed to pay Debts and Legacies [*Parker v. Dee*], 2 *Chan. Ca.* 200, must charge that Goods came to his Hands [*Davis v. Curtis*], 1 *Chan. Ca.* 226, but not till he is sued at Law. [*Cough v. Floyd*,] *Hard.* 115. *Q.*

18. A. was bound to B. in a Bond of £100, and B. made his Will, and C. Executor thereof; and after declared his farther Will, that A. should have the Bond, and died; C. proved the Will, but omitted this Codicil; and to compel him to prove it, A. sued C. before the, &c., pending which the Bond was sued at Law; A. having filed his Bill for Relief, it was resolved that there should be no Relief for the Legacy before the Codicil proved, and that then he should be relieved against the Bond by Reason of the Legacy; but the Court supported the Injunction till, &c. *Pasch.* 1657, *Took and Fitz-John*, *Hard.* 96.

19. A Bill was exhibited, suggesting that the Defendant had set up a Bill pretended to be made by one, who died in the great Sickness in *London*; and that the Defendant pretending to be Executor of it, endeavoured, being insolvent, to get in the Debts due to the Testator; whereas the Will was unduly obtained, and now litigated in the Spiritual Court; and the Court on Motion ordered, that the Debtors to the Deceased's Estate should forbear to pay any Money, till the Matter settled in the Spiritual Court; although it was urged, that the Objection of Insolvency might be made to every Executor. *Pasch.* 18 *Car.* 2 [1666], *Smallpiece and Anguish*, 1 *Chan. Ca.* 75.

20. Equity will oblige an Executor to pay Arrears of Rent though the Person of the Testator was not liable at Law. [*Eaton Coll. v. Beauchamp*,] 1 *Chan. Ca.* 121.

21. The Defendant's Testator gave the Plaintiff £1000, to be paid at the Age of Twentyone Years; the Bill suggested, that the Defendant wasted his Estate, and therefore the Plaintiff prayed he might have his Security to pay this Legacy when due; which was decreed accordingly by the Master of the Rolls. *Hil.* 20 & 21 *Car.* 2 [1868, *Duncumban v. Stint*], 1 *Chan. Ca.* 121.

22. So where the Testator devised a Legacy to his Child an Infant, payable at the

Age of Twenty-three, and made his Wife Executrix and Residuary Legatee, and she married a second Husband and died; and he took out Administration *de bonis non*, with the Will annexed (his Wife being Residuary Legatee); and upon a Suggestion of Insolvency, the Court decreed him to give Security to pay the Legacy when it should become payable. *Mich.* 1691, *Rous and Noble*, 2 *Vern.* 249.

23. If an Executor or Administrator receives in Money which was secured to the Testator, and he lends it out again, and receives Interest for it, yet he shall not be accountable for the Interest; for he lends it out at his own Peril; and there is no Difference when the Debtor voluntarily pays in the Debt, and when he is compelled to it: Decreed *Hil.* 31 *Car.* 2, *Grosvenor* (called *Gardener* in 1 *Vern.* 197) and *Cartwright*, 2 *Chan. Ca.* 21. 1 *Vern.* 197, S. C. cited, and said to have been adjudged otherwise by Lord Chancellor, but reversed in the House of Lords. [*Lynch v. Cappy.*] 2 *Chan. Ca.* 35, S. P. decreed. *Vide* [*Ratcliffe v. Graves.*] 1 *Vern.* 197, *cont.* and there held by Lord Keeper to be reasonable, that Executors in all Cases should answer Interest, if they had used the Money [239] in Trade, or received any Interest for it; and that the Objection of the Executors being answerable for the Money, if it should miscarry or be lost, was of little Force now, because a Man may insure his Money for *one per Cent.*, and therefore decreed the Executor liable, unless he made Oath that he kept the Money by him. [*Ratcliffe v. Graves.*] 2 *Chan. Ca.* 152, S. C., that an Executor or Trustee, though not impowered or directed to place out Money at Interest, yet if he makes Interest, shall be accountable for it: Decreed 2 *Vern.* 548, *Lee v. Lee.*

24. In this Case a Difference was taken by my Lord Chancellor, that if an Executor or Trustee of Money places it out in the Funds, or on other Security, whereby he gains considerably, that he shall have the whole Benefit thereof to himself, in respect of the Hazard he run of being a considerable Loser thereby, which he must have born: But if such Executor or Trustee were an insolvent Person at the Time of placing out such Trust Money, there the *Cestui que Trust* shall have the whole Benefit gained thereby, as he only would have borne the Loss thereof, if any had happened; the Trustee or Executor, by reason of his Insolvency, being incapable thereof, and consequently running no Hazard at all. *Mich.* 1718, *Bromfield and Wytherley.* (*Pr. in Chan.* 505, S. C. in *totidem verbis*, post [1 Eq. Ca. Abr.], 398, S. C.)

* 25. A. made his Will, and gave several Legacies, and made B. his Kinsman Executor and Residuary Legatee; great Part of his Estate consisted in *East-India Stock*, and he by his Will directed his Executor to turn his Estate into Money, as soon as conveniently might be; *East-India Stock* bore then a good Price, and several of the Legatees called for their Legacies; and the Executor taking the Estate to be sufficient to pay them all, gave them Bonds for their Legacies, but kept the Stock so long, till it fell so low, that he had not Assets to pay the Legacies; and the Executor brought his Bill to have those, to whom he had given Bonds for their Legacies, abate; and that those that were unpaid might take their Legacies in Proportion, at the Rate the Stock was then at; but my Lord Keeper would not give him any Relief against those that had Bonds; and as to the others, he was to answer for the Stock at the Value it was of at the End of the Year, after the Testator's Death. *Hil.* 1702, *Keylinge's Case.*

26. An Executor lost a Bond due to the Testator, which it was urged, in Behalf of a Bond-Creditor, he should stand charged with, and make good the Debt to the Testator's Estate; and for the Executor it being insisted, that a Bond is not Assets at Law, but a Creditor must expect until the Money due upon it be recovered; nor is the Loss of a Bond a *Derastavit* at Law, and it would be hard to make the Executor answer it out of his own Estate, in Case the Obligor was insolvent (as in this Case he was) especially in Equity; and the rather, for that the losing of the Bond did not lose the Debt, but might be recovered in Equity; and the Executor had already brought a Bill against the Obligor for that purpose; and the Court inclined to charge the Defendant with the Debt, but for the present only directed, that the Executor should prosecute the Suit brought by him against the Obligor, with Effect, in order to recover the money due on the Bond that was lost, and respited the Judgment obtained by the Bond-Creditor in the mean Time. *Goodfellow v. Burchett*, 2 *Vern.* 298, 299.

[240] 27. If an Administrator brings Trover for Goods, and recovers, and takes Part in Hand, and accepts a Covenant for Satisfaction of the Residue, and the Debtor afterwards fails, this is a *Derastavit* in the Executor. *Norden and Lovett*, cited by my

Lord Chancellor, to be adjudged in *B. R.* and affirmed on a Writ of Error in the House of Lords. [*Barker v. Talbot*,] 1 *Vern.* 474.

28. An Heir at Law being sued paid a Bond-Debt of his Ancestor's, in which he was bound, and afterwards brought his Bill against the Executor, to be reimbursed out of the Personal Assets; the Executor delivered up a Bond of the Testator's, and took another Bond from the Obligor, in which *J. S.* was bound as Surety with him; though it was admitted, that at Law this did charge the Executrix as a Conversion and Receipt of so much of the Testator's Estate; yet as the Security was intended to be bettered by it, and as the Heir at Law was Plaintiff, the Court decreed, that the Executor should not be chargeable, but that he should assign a Security to the Heir. [*Armitage v. Metcalfe*,] 1 *Chan. Ca.* 74.

29. A. purchased a Leasehold Estate of an Executor, who had wasted a great Part of the Assets, having Notice, that there was a Bond-Creditor of the Testator's, whose Debt was £100 unsatisfied, and out of the Purchase-Money he had an allowance of a Debt of £200 due to him from the Testator, and a Debt of £550 due to him from the Executor himself; the Remainder being £150, he paid the Executor. On a Bill brought by the Bond-Creditor, to have Satisfaction for his Debts out of the Leasehold Estate, being Part of the Testator's Assets; though for the Defendant it was insisted, that an Executor may sell, and with the Money, when he has it, pay his own Debts: And for the same Reason he may, upon Sale, discount and allow the Purchaser the Debt he owes him; and the rather in this case, because he paid £150 in Money, with which the Executor might have paid the Plaintiff's Debt; yet it was decreed by the Master of the Rolls, and confirmed by my Lord Chancellor for the Plaintiff; saying that the Defendant was a Party, and consenting to, and contriving a *Devastavit*. *Mich.* 1708, *Crane and Drake*, 2 *Vern.* 616.

30. After a Suit commenced in Equity, an Executor shall not be allowed any voluntary Payments. *Hil.* 1685, *Bright and Woodward*, 1 *Vern.* 369, *per Curiam*. [*Parker v. Dee*,] 2 *Chan. Ca.* 201, *S. P. per Curiam*.

31. So where an Executor confessed a Judgment, pending a Bill in Equity, the Court held that it should not be allowed upon an Account of Assets. *Pasch.* 1687, *Surrey and Smalley*, 1 *Vern.* 457. [*Solley v. Gower*,] 2 *Vern.* 62, *S. P. per Curiam*; but if he is sued at Law by one Bond-Creditor, pending a Suit against him in Equity by another, he may confess Judgment to the Bond-Creditor, who sues him at Law. [*Goodfellow v. Burchett*,] 2 *Vern.* 299, 300. (An Executor in Case of legal Assets may give Judgment to one Creditor in Preference to another. *Vide* the Case of *Darston and Earl of Oxford*, *Eq. Ca. Abr.* Part 2.)

[241] (B) WHAT SHALL BE ASSETS.

Vide Title Heir, and Creditor and Debtor.

1. A. purchased in his own Name, and took an Assignment of a Mortgage Term for Years in the Name of two Trustees, and died, leaving his Wife Executrix; and the Plaintiff, his Heir at Law, brought a Bill to have the Term assigned to him, for that it was to attend the Inheritance; which was decreed accordingly; although it was insisted upon, in Behalf of the Executrix, that it was a Term in Gross; and that there being no Mention in the Assignment that it should attend the inheritance, it should be Assets, and enjoyed as a Chattel. *Hil.* 1680, *Tiffin and Tiffin*, 1 *Vern.* 1, but *Q.* if there was any want of Assets.

2. For where a Man took an Assignment of a Term in a Trustee's Name, and the Inheritance in his own Name, it was held, that though by Construction in Equity the Term is attendant upon the Inheritance; yet it shall be Assets for Payment of Debts, as well as a Term in a Man's own Name is Assets at Law; but with this Difference, that the Heir shall have the Benefit of the Surplus of a Trust of a Term, and not the Executor, after Debts paid; but if a Term be expressly declared by Deed to be attendant on the Inheritance, then such a Term shall not be made Assets in Equity; but the Reporter says, this Point was not directly in the Case, but came in by Way of Argument only. *Mich.* 1683, *Chapman and Bond*, 1 *Vern.* 188. *Vide* *Dowse v. Derivall*, 1 *Vern.* 104, that such a Term shall be Assets to pay Debts, though not subject to the Custom of *London*. [*Ratliffe v. Graves*,] 2 *Chan. Ca.* 152, *S. P. per Curiam*, and a Note added by the Reporter, that it was contrary to former Resolutions.

3. But where A. seised in Fee, in consideration of a Marriage-Portion, demised

certain Lands for ninety-nine Years to *B.* and *C.* under the Rent of a Pepper-Corn, upon trust that they should redemise them in the following Manner, *viz.* to *A.* for ninety-eight Years and eleven Months, if he should live so long, reserving the Rent of a Pepper-Corn only during the Life of *A.* and after his Decease, a Rent of £1500 *per Ann.* during the Life of his Wife, as a Jointure for her; and after her Death a Pepper-Corn for the Residue of the Term; *B.* and *C.* re-demised accordingly: *A.* died indebted £9000 by Bond-Debts, and £18,000 by Simple Contract, and left not above £6000 Personal Estate. On a Bill brought by the Creditors, to have this Term made Assets, it was held by three Judges, the Master of the Rolls, and my Lord Chancellor, that this Term being raised for a particular Purpose, could not be liable to any other Debts than the Inheritance was: and decreed accordingly. *Pasch. 1688. Baden & al' and the Countess Dowager of Pembroke, 2 Vern. 52.*

4. By the Statute of Frauds and Perjuries, the Trust of an Inheritance is made Assets at Law, but the Trust of a Term is not; and by a Clause in the Statute, when Judgment is obtained against the Testator, the Sheriff may take the Trust Estate into Execution. *King v. Ballett, 2 Vern. 248.*

(What shall be legal, what equitable Assets, *vide* the order in which Debts shall be paid, Title Creditor and Debtor, Letter (B).)

[242] 5. If *A.* purchases a Walk in a Chase, and takes the Patent to himself and his Wife, and *J. S.* during their Lives and the Life of the Survivor, and the Husband dies indebted, yet the Wife shall have the Benefit of the Patent during her Life, though *A.* had not left Assets to pay his Debts; but after her Death, *J. S.* must be a Trustee for the Executor: Decreed, *Kingdome v. Bridges, 2 Vern. 67.*

6. *J. S.* on the Sale of Lands takes a Bond from the purchaser, to pay any Sum or Sums of Money not exceeding £500 as he should by Will appoint; and *J. S.* by Will distributes it, and appoints Payment of it to several of his Relations; the Bill was brought by the Creditors of *J. S.* for Satisfaction out of Assets; and (*inter alia*) to have the £500 applied towards Payment of their Debts; and the Court held, that *J. S.* having Power to dispose of the £500, it must be looked upon as Part of his Estate; and decreed it to be Assets liable to the Plaintiff's Debts. *Trin. 1694. Thompson and Towne, 2 Vern. 319.*

7. So where *A.* by Marriage-Settlement having a Power to charge an Estate with any Sum not exceeding £3000 for such Purposes as he thought fit, by Deed appointed the £3000 as a Collateral Security, for quiet Enjoyment of an Estate he had sold; and if no Incumbrance did appear, the Appointment was to be void, and by Will devised the £3000 to his Daughter; and upon a Bill brought by the Creditors of *A.* the £3000 was decreed to be applied to the Payment of his Debts. *Lassells v. Cornwallis, 2 Vern. 465.*

8. If *A.* seised of a Leasehold Estate to him and his Heirs for three Lives, settles it on his Daughter and her Husband for their Lives, Remainder to the Use of his own Executors and Administrators, and the Daughter and her Husband die, and *A.* dies indebted by Simple Contract, having devised this Estate to his Wife: the Use of this Estate being limited to the Executors and Administrators of *A.*, makes it Personal Estate in *A.*, and being Personal Estate, *A.* cannot devise it exempt from his Debts, though due but by Simple Contract: Decreed, *Devon v. Kinton, 2 Vern. 719. Vide [Raggett v. Clerke] 1 Vern. 234.*

(C) WHERE UPON THE DEATH OF ONE OF THE EXECUTORS, THE SURPLUS OF THE PERSONAL ESTATE, AFTER DEBTS AND LEGACIES PAID, SHALL SURVIVE TO THE OTHER.

1. If a Man makes *B.* and *C.* Executors, and deviseth to them *residuum bonorum*, &c., after Debts and Legacies paid, and after *B.* dies, the Surplusage shall not survive, for it shall be supposed, that the Testator intended an equal Share to his Executors; and decreed for the Administrator of *B.* accordingly, but much to the Dissatisfaction of the Bar: for where the Intention is secret, and not declared, it must give Way to the legal Intent. *Mich. 26 [1674] Car., Cox and Quantock, 1 Chan. Ca. 238.*

(2. For the Resolutions since have been otherwise in Equity, and it seems well settled, that the Survivor shall have the whole by Law; as where a Man devised Goods to *A.* and *B.* and the Executor assented to the Legacy, and *A.* died, and his Executor sued in the Spiritual Court for *A.*'s share, there being no Survivorship in such Case by the Ecclesiastical Law; whereupon *B.* sued a Prohibition, and declared; and upon

Demurrer and Argument it was adjudged the Prohibition should stand ; for by the Assent of the Executor the Interest was vested in the Legatees, and became a Chattel in them, governable by the Rules of the Common Law. *Mich.* 29 *Car.* 2, *Bastard and Stukely*, 2 *Lev.* 209. *Vide* 1 *Lev.* 264 ; 2 *Jon.* 161, 130.)

[243] 2. A Man having devised the Surplus of his Estate, after his Debts paid, to A. and B., A. died ; and it was adjudged in the Delegates, and decreed by the Lord North, and confirmed by *Jefferies*, Lord Chancellor, that this was a Joint Devise, and should survive to B., and the Lord Chancellor's Opinion was, that if A. and B. had been made Executors, and A. had possessed a Moiety of the Goods, and died, it would have been all one. *Mich.* 1687, *Lady Shore and Billingsly*, 1 *Vern.* 482.

(That it should survive to the Executor, *vide* 2 *Chan. Ca.* 64, *Draper's Case* resolved ; S. P. resolved, *Cox and Quantock*, 1 *Chan. Ca.* 238.)

3. So where a Man devised all the Rest and Residue of his Goods, Chattels and Personal Estate, to two Persons, their Executors and Administrators, and one of them died ; and it was on a Bill brought by his Executor against the surviving Devisee, held, that the Survivor should take the whole to his own Use, and should not be a Trustee, as to a Moiety, for the Representatives of him who is dead ; and that they were to be considered as Jointenants, where Survivorship takes Place, as well in Cases of Chattels, as in Cases of Inheritance. *Trin.* 1729, *Cray and Willis* at the Rolls. (2 *Will. Rep.* 529, S. C. *Vide Webster and Webster*, S. P., *Eq. Ca. Abr.* Part 2, p. 572.)

* 4. A. made his Will, and after several Legacies, gave and devised all the Rest and Residue and Remainder of his Personal Estate to three Persons, whom he made his Executors ; one of them died in the Life-time of the Testator ; and the only Question was, whether the two surviving Executors should have the Whole, or whether the third Part should be distributed according to the Statute amongst the next of Kin ; and the Master of the Rolls, on Time taken to consider of the Case, and citing most of the Authorities, both out of the Civil and Common Law, was of Opinion, and decreed accordingly, that the two surviving Executors should take the whole. *Trin.* 1730, *Hunt and Berkeley* at the Rolls. (*Hardwicke, C.* *East*, 12 *Geo.* 2, in the Case of *Owen and Owen* said, on Consideration of this Case he did not think the Reasons the Master of the Rolls went upon sufficient to warrant this Determination ; for the next of Kin take not by the Intent of the Party who makes the Will, but by a legal Right arising on the Trust and Intestacy. *MS. Notes, vide* 1 *Atk.* 494.)

(D) WHERE THE SURPLUS OF THE PERSONAL ESTATE BELONGS TO THE EXECUTOR, OR HE IS TO BE A TRUSTEE FOR THE NEXT OF KIN TO THE TESTATOR.

1. A. by Will devised particular Legacies to his Children and Grandchildren and £10 a-piece to A. and B., whom he made Executors, for their Care ; the Surplus of the Personal Estate being £5000 and upwards ; the Question was, whether the Surplus should be a Trust for the Children, or go to the Executors ; and it was decreed a Trust for the Children. *Mich.* 1687, *Foster and Munt*, 1 *Vern.* 473, *per Jefferies*, Lord Chancellor. [*Granville v. Beaufort*.] 2 *Vern.* 649, S. C., cited and said to be affirmed in the House of Lords. (*Vide Ball v. Smith*, 2 *Vern.* 676 ; *Granville v. Beaufort*, 2 *P. Wms.* 116, and *Farrington v. Knightley*, 2 *P. Wms.* 548.)

(Since this Case, there hath been Variety of Resolutions, both in Chancery and the House of Lords on this Head ; notwithstanding which, this matter seems as undetermined as any in Equity ; for though the Law casts the whole Personal Estate on the Executor, yet as the Intention of the Testator is chiefly to be regarded in a Will, if it appears by a strong and necessary Implication, that the Executor was not to have it to his own Use, Equity will decree him a Trustee for the next of Kin to the Testator ; and therefore it seems agreed, that if Strangers, or distant Relations are made Executors, and Legacies are given them for their Care and Trouble, that they shall not have the Surplus ; but where the Executors are as nearly related, as those who claim as next of Kin, and they have had all Legacies given them, though perhaps some of them greater, and some of them less, great Doubt has been : in which Instances it has (as appears by the Cases) been determined according to the Intention of the Testator, collected not only from the Words of the Will, but likewise from collateral Proof of Testator's greater kindness, &c., which upon these Occasions has been admitted sometimes for the Executor, and sometimes for the next a-kin.)

[244] 2. A. by Will gave several Legacies therein specified, to all her next of Kin by

Name; and likewise gave particular legacies to *M.* and *P.* two dissenting Ministers, and made them her Executors, but did not make any express Disposition of the Surplus of the Personal Estate: and the Executors were obliged to account and distribute the Surplus amongst the next of Kin to the Testator. *Mich.* 1698, *Bailey and Powell*, 2 *Vern.* 361, decreed. (2 *Freem. Rep.* 225, *S. C. accord.*). The Reporter says, it was admitted that if Proof could have been made of a Parol Declaration of the Testator's Intent, that the Executors should have had the Overplus, it would have been sufficient, as in *Lady Gainsbury's Case*.—*Prec. in Chan.* 92, *S. C.* says, Lord Chancellor decreed the Surplus to be distributed, and the Executors to pay Costs for insisting on it. *Vide* the Case of *Farrington and Knightly*; *Rachfield and Careless*; *Duke of Rutland and Dutchess of Rutland accord*; and the Case of the *Attorney General* and *contra*, all in *Eq. Ca. Abr.* Part 2.)

3. So where *A.* made *B.* his Executor, and gave him £20 for Mourning, and *B.* not being of Kin to the Testator, the Surplus of the Personal Estate was decreed to be distributed. *Pasch.* 7 *Ann.* [1708], *Cook and Walker*, 2 *Vern.* 676, *S. C.* cited. (2 *Freem. Rep.* 276, *S. C. accord.*)

4. So where *A.* gave £100 Legacy, and the Interest of £300 to his Wife for her Life, and made her and *B.* and *C.* Executors, and gave to *B.* £20 for Mourning; the Surplus was decreed to be distributed. *Trin.* 7 *Ann.* *Durwell and Bennet*, 2 *Vern.* 677, cited.

5. *A.* made his Will, to the Effect following, *I dispose of my Estate after-mentioned, and what else I have in the World, in Manner and Form following*, and then gives several Legacies to his Relations, amounting to near the Value of his Estate (as appeared by a Calculation of his own Hand-writing by him about that Time made) and made *B.* and *C.* Executors, and gave them £20 and intreated them to take the Trouble of getting in his Estate; the Testator lived ten Years after, and acquired an additional Estate, and died, not having altered, nor new published his Will; and on a Bill brought by the next of Kin against the surviving Executor, it was decreed, that the surviving Executor was but an Executor in Trust, and that the new acquired Estate should go to the Legatees in Proportion to their Legacies. *Trin.* 1690, *Cordell and Noden*, 2 *Vern.* 148. Decreed by the Lords Commissioners, and *Rawlinson* rested much on the Words, *I dispose of my Estate after-mentioned, and what else I have in the World, &c.*

6. So where one made his Will, and his Wife Executrix, lived twenty Years after the Will, and acquired an Estate; and the Surplus was decreed to be distributed. 13 *W. 3.* *Ward and Lane*, 2 *Vern.* 677, cited to be adjudged.

* 7. *A.* devised Lands to be sold for Payment of his Debts, and wills, that the Surplus shall be deemed Part of his Personal Estate, and go to his Executors, and gives to his Executors £100 a-piece as a Legacy; and the Question was, whether the Executors should have the Surplus to their own Use, or should distribute according to the Statute of Distributions. For the Executors it was insisted, that the Surplus should be Part of his Personal Estate, and go to them, and that he meant it them to their own Use; and his giving them a Legacy of £100 a-piece, cannot alter the Case, for the Surplus perhaps might be nothing; and therefore he gave them the £100 that they might at all Events be sure of something, and not to exclude them of the Benefit of the Surplus; and this being a Devise of the Surplus after Debts and Legacies paid, cannot be a Trust in them, for then all their Trust is performed, when Debts and Legacies are paid. On the other Side it was said, that the Words in the Will, that the Surplus should be Part of his Personal Estate (*and go to his Executors*) were only intended to exclude the Heir, who else would have had it, and not to give any greater Interest to his Executors [245] than they would have had otherwise; and of the same Opinion was my Lord Chancellor; and decreed accordingly. *Hil.* 1697, *The Lord Bristol and Hungerford*. (*S. C. Prec. in Chan.* 81. *Vide* 2 *Vern.* 645; 3 *P. Wms.* 194, in not.)

8. But where a Man devised his Library of Books to *A.* (except ten Books, such as his Wife should chuse, as Plays, Romances, Sermons, but not Law-Books) and made her Executrix: it was held by Lord Keeper, that she should not by this Devise be excluded from the Benefit of the Surplus of the Personal Estate. *Trin.* 1704, *Griffith and Rogers*, decreed. (*Prec in Chan.* 231, *S. C.*)

9. So where one not of Kin, but a Stranger, was made Executor, and had considerable Legacies given him; although it was decreed by Sir *Peter King*, in the Mayor's Court, in Favour of the Testator's two Brothers, that the Surplus should be distributed;

yet upon Appeal to the House of Peers, that Decree was reversed; not barely as it stood upon the Will, but that parol Proof ought to be received in Favour of the Executor's Title, consistent with the Will; and the Proof being full as to the Testator's frequent Declarations, that his Executor, though a Stranger, should have the Surplus; it was decreed accordingly. *Littlebury and Buckley*, S. P. Decreed on the parol Proof, *The Lady Granville* and *The Dutchess of Beaufort* (a) 2 Vern. 648, and affirmed in the House of Lords. *Vide* Title Evidence, Letter (C) [1 Eq. Ca. Abr. 230]. (2 Vern. 677, S. C. *Vide* 1 Bro. P. C. 340; 9 Mod. 10.)

(a) 1 Will. Rep. 114, S. C. *Vide* the Case of *Mallabar* and *Mallabar*, S. P. *per Talbot*, C., Eq. Ca. temp. *Talbot*, 78, 80, though *animo reluctant*.

10. A. possessed of a long Term for Years, by Will devised it to his Wife for Life, and after her Death to the Child she was then *enseint* with; and if such Child died before it came to twenty-one, then he devised one third Part of the same Term to his Wife, her Executors and Administrators, and the other two Thirds to other Persons, and made his Wife Executrix of his Will, and died; and the Bill was brought against her by the next of Kin to the Testator, to have an Account and Distribution of the Surplus of his Personal Estate not devised by the Will; and two Questions were made; 1st, Whether the Devise to the Wife of one third Part of the Term was good, because it happened she was not then *enseint* at all; and so the Contingency, upon which the Devise to her was to take place, never happened; the other Question was, whether this Term being Part of the Personal Estate, and expressly devised to her for Life, with such other contingent Interest on the Death of the supposed *enseint* Child before twenty-one, should shut her out from the Surplus of the Personal Estate, which belonged to her as Executrix, and so the Surplus go in a Course of Administration, to be distributed amongst the Plaintiffs, as next of Kin. As to the first Point, Lord Keeper delivered his Opinion, that though the Wife was not *enseint* at the Time of the Will, yet the Devise to her of such third Part of the Term was good; and as to the other Point dismissed the Plaintiff's Bill, and so let in the Executrix to the Surplus of the Personal Estate, notwithstanding the Devise to her of Part, as aforesaid. *Mich.* 1711, *Jones* and *Westcomb*. (*Prec. in Chan.* 316, S. C. *Gillb. Eq. Rep.* 74, S. C. *Vide* also *Andrews on the Demise of Jones v. Fulham*, Eq. Ca. Abr. Part 2, p. 294.)

11. A. was Executrix of B. her former Husband, and after married C., who, by his Will in 1686, devised to his Wife the Plate and Goods she brought him in Marriage, and two Silver Salvers, in lieu of Plate that had been changed away, and made her Executrix, and died, leaving a Daughter by a former Wife, and his Wife *enseint* of a Daughter; and there being no Devise of the Surplus of the Per-[246]-sonal Estate, the Question was, whether she should take it as Executrix to her own Use, or liable to Distribution; and Lord Keeper decreed the Surplus to the Wife, as well for that this Will was made before the Case of *Foster* and *Munt*, as also for that in this Case nothing is devised to the Wife, but what was her own before, and as she was Executrix to her former Husband; but principally, because where a Wife is made Executrix, it is to be presumed she was not made so to have barely an Office of Trouble but of Benefit, to take the Surplus. *Hil.* 1711, *Ball* and *Smith*, 2 Vern. 675.

12. The Plaintiff married one Mrs. *Allen*, Sister to *William Allen*, who being possessed of a Personal Estate to the Value of about £2000, and being taken ill makes his Will in Writing the very Day before his Death, and thereby devises several Legacies to his Relations, and amongst the Rest, gives the Plaintiff his Sister about £1000, and gives £70 to Mr. *Serle* and his Wife, and their four Children, to buy them Mourning; and gives to his dear and most esteemed Friend, Mrs. *Sarah Serle* (one of the Daughters of Mr. *Serle*, to whom he had made his Addresses in Way of Marriage) £500, and gives his Horse and Furniture to one of the Defendants, by his Christian Name and Surname, and his Cloaths to be disposed of by his Executors; and then concludes, as to the £700 I am intitled to in the South-Sea Company, and the Rest of my Personal Estate, I will, that the same should be sold for Payment of my Debts and Legacies, and I make Mr. John and Mr. Thomas *Serle* my Executors, and dies; the Executors were two of the Children of Mr. *Serle*, and intitled to their Proportion of the £70 devised for Mourning, and one of them to the Horse and Furniture; but were no Ways related to the Testator. The Surplus of the Personal Estate came to about £600, and this Bill was brought against the Defendants the Executors to have an Account thereof; and that it might be paid to the Plaintiff, whose Wife was the only Sister and next of Kin to the Testator. And for the Plaintiffs it was insisted, that the Executors were mere

Strangers, no Ways related to the Testator, and that they had particular Legacies left them for Mourning out of the £70, and one of them had a Horse and Furniture expressly devised to him and therefore it was not reasonable that they should go away with the Surplus of the Personal Estate. On the other Side it was insisted, that the Defendants being Executors, they represented the Testator; that they stood in his Place, and were intitled to whatever he left undisposed of; that this was the Antient Law for many Ages, and therefore the legal Title being in them, they ought not to be defeated of it, without a manifest Intention of the Testator to the contrary; that here appeared no such Intent in the Will, for they are not named, either by the Christian Name or Surname, or so much as by the Name of their Office, till the very Close of the Will; nay, it was in Proof, that the Testator did not so much as consider whom he should make his Executors, till he had disposed of all the Legacies; that the giving one of them his Horse and Furniture, was only to exclude the other, who by being Executor with him, would have been equally intitled to it, and could not be construed a Legacy to shut them out of the Surplus, since it rather regarded the other Executor than the Plaintiff, the next of Kin; that they had it fully in Proof, that the Testator being asked, whether he would not give his Sister more? answered he would not; that being asked, who should have the Surplus, or what should become of the Surplus? he [247] said his Will should stand as it was, and that he had a very great Regard for the Defendant's Family, and was to have married their Sister; that these Proofs being in Affirmance of the Disposition which the Law made to the Executors might be read; and that several Resolutions, since the Case of *Foster* and *Munt*, had pared away the Authority of that Case, and therefore prayed that the Bill may be dismissed. My Lord Chancellor was clearly of Opinion, that the Proofs being in Affirmance of the Disposition, ought to be read, and said, that they were so full as to make an End of this Case that without a strong and violent Implication, the Executors ought not to be defeated of the *Residuum*; that here was no such Implication in this Will, but rather the contrary; that to make Sense of the last Clause, it must be construed as a Devise of the *South-Sea* Stock, and the Rest of his Personal Estate, to his Executors; for it immediately follows, and I make *John* and *Thomas Serle* my Executors, which could have no Relation to the Direction for Sale, unless by giving them the Surplus which should arise by Sale; and as there appeared no strong or violent Implication to induce any other Construction, he could not give into so great a Change of the Law, but must decree for the Executors; and accordingly did so. *Hil. 1716, Batchelor and Serle. (Gilb. Rep. 125, S. C. in totidem verbis, 2 Vern. 736, S. C.)*

(E) OF REMEDIES BY ONE EXECUTOR AGAINST ANOTHER, AND HOW FAR THE ONE SHALL BE ANSWERABLE FOR THE OTHER.

1. If two Executors make Partition of the Specialties, &c., of the Testator, and after one of them releases an Obligation, which by the Partition belonged to the other; though the Debtor had Notice of the Partition, yet the other Executor shall not be relieved in Equity, unless the Release was procured by Fraud, or without a full Satisfaction; the Debtor must then satisfy the Overplus. [Anonymous.] *Moor* 620, but *vide* [Griffith v. Manser.] *Hard.* 168, and *Q.* whether he has not Remedy against the Executor.

2. A. made B. and C., Men of good Credit, his Executors; C. being a Banker received all the Money, but B. joined with him in the Receipts, taking his Note, to shew that he received not the Money; and *per Harcourt*, Lord Chancellor, if two Trustees join in a Receipt, and one receives the Money, he only who receives shall be liable: If there be two Executors, and they join in a Receipt, and one only receives the Money; as to Creditors, who are to have the utmost Benefit of the Law, each is liable for the Whole, though one Executor alone might give a Discharge, and the joining of the other was unnecessary; but as to Legatees and those claiming Distribution, who have no Remedy but in Equity, the Receipt of one Executor shall not charge the other; for the joining in the Receipt is only a Matter of Form, the substantial Part is the actual receiving; and this only is regarded in Conscience. *Mich. 12 Ann. [1713], Churchill and Hobson, 1 Salk. 318. (Vide 1 Will. Rep. 241, S. C. accord.)*

3. But where one made two Executors, and devised all his Estate to his Wife for Life, and after to be equally divided amongst the Plaintiffs, who brought their Bill against the Executors for an Ac [248] count; and the Defendants, by Answer, charge themselves jointly and discharge themselves jointly; and *inter alia* charge themselves

with two Notes for £200 *East-India* Stock, and afterwards pending the Suit, sold the said *East India* Stock, and joined in the Transfer of it ; but whether any Acquittance were given for the Purchase-Money did not appear : *Cox*, one of the Executors becomes insolvent ; and if *Pitt*, the other, should be charged with the whole Purchase-Money, or only a Moiety, was the Question. *Pitt*, on Examination after the Hearing, having sworn he was persuaded by *Cox* to join in the Sale, but received only a Moiety of the Money ; and it was decreed by the Master of the Rolls, and affirmed by my Lord Keeper, that he should be charged with the Whole, notwithstanding the Cases of *Heaton* and *Marriott* (2 *Vern.* 504, *Proc. in Chan.* 174), and *Fellows* and *Owen* (2 *Vern.* 504, 515 ; 1 *P. Wms.* 81 ; 2 *Frem.* 283) ; for they were Trustees of a Real Estate, where there was a Necessity for both to join ; but these were Executors, where no such Necessity was ; for one Executor might have sold without the other ; besides, this was done *pendente lite*, and no Application made to this Court ; and there is nothing to discharge *Pitt*, but his own Examination. *Hil.* 1708, *Murrel* and *Cox* and *Pitt*, 2 *Vern.* 570, S. C.

(F) OF ADMINISTRATION, TO WHOM TO BE GRANTED, WHO ARE ENTITLED TO A DISTRIBUTION, AND IN WHAT PROPORTION ; AND HERE OF BRINGING INTO HOTCHPOT.

1. If an Intestate dies before the Year 1670, yet Administration being granted after the making of the Statute, his Personal Estate is liable to a Distribution. *Mich.* 1709, *Brice* and *Whiteing*, 2 *Vern.* 642.

(By the 22 & 23 *Car.* 2, *cap.* 10. All Ordinaries and Ecclesiastical Judges, upon granting Administration, must take Bond of the Administrator, with two or more Sureties, with Condition, that the Administrator shall make a true and perfect Inventory of all the Goods and Chattels of the Deceased, and exhibit it into the Registry of the Ordinary's Court by such a Day, and to administer according to Law, and to make a true and just Account thereof, and to make Distribution as followeth, *viz.* one Third to the Wife of the Intestate, the Residue amongst his Children, and such as legally represent them, if any are dead, other than such Children who shall have any Estate by Settlement of the Intestate in his Life-time, equal to the other Shares ; but those Children who have been advanced by Settlements or Portions by the Intestate, not equal to the other Shares, shall have so much of the Surplus as will make all equal ; and the Heirat Law shall have an equal Share in the Distribution with the other Children without any Consideration of what he had by Descent or otherwise, from the Intestate. If there are no Children, nor legal Representatives of them, in such Case, one Moiety shall be allotted to the Wife, the Residue equally to the next of Kin of the Intestate, in an equal Degree, and those who legally represent them ; there shall be no Representation amongst Collaterals, after Brothers and Sisters Children ; and if there is no Wife, then all shall be distributed amongst the Children ; and if no Child, then to the next of Kin to the Intestate, in an equal Degree, and their Representatives ; no Distribution shall be made till a Year after the Intestate's Death ; and every one to whom any Share be allotted, shall give Bond, with Sureties in the Spiritual Court, if Debts shall afterwards appear, to refund his rateable Part thereof, and of the Charges of the Administration. By the 29 *Car.* 2, *cap.* 3, the above Act shall not extend to the Estates of Feme Coverts that die intestate, but that their Husbands shall have Administration of their Personal Estates, as before the making of the Act ; and the Husbands are not compellable to make Distribution of their Personal Estates. By the 1 *Jac.* 2, *cap.* 17. No Administrator shall be cited to render an Account of the Personal Estate of the Intestate, otherwise than by Inventory, unless it be at the Instance of some Person, in Behalf of a Minor, or of one having a demand out of such Personal Estate, as Creditor, or next of Kin. If after the Death of the Father, any of his Children shall die intestate, without Wife or Children, in the Life of the Mother, every Brother and Sister, and the Representatives of them, shall have an equal Share with the Mother ; such Part of any Intestate's Estate within the City of *London* or Province of *York*, as any Administrator hath by Virtue only of being Administrator, shall be subject to Distribution, as in other Cases ; and the Custom observed therein shall not be subject to extend to it.)

[249] 2. If Administration is granted to two, and one dies, yet the Administration does not cease, for it is not like a Letter of Attorney to two, where by the Death of one, the Authority ceases : but is rather an Office ; and Administrators are enabled to bring Actions in their own Names, come in the Place of Executors, and therefore the Office

survives. *Mich.* 1705, *Adams and Buckland*, 2 *Vern.* 514, *per Lord Keeper*. (*Vide* the Case of *Hudson and Hudson*, S. P. by *Talbot*, C., on hearing Civilians, *Eq. Ca. Abr.* Pt. 2, p. 425.)

3. If a Man makes his Will, and his Son Executor, but makes no Disposition of the Surplus of the Personal Estate; the Son dies without proving of the Will; the Testator is dead Intestate as to the Surplus, and the same shall be distributed amongst the next of Kin of the Testator. [*Ball v. Smith*,] 2 *Vern.* 634. (*Vide* 2 *Mod.* 101.)

4. On the Statute for the better settling of Intestates Estates; the Question was on that Clause of the Statute, that there should be no Representation among Collaterals beyond Brothers and Sisters Children, whether to be intended of Brothers and Sisters to the Intestate; or whether, when Distribution falls out amongst Brothers and Sisters, though remote Relations to the Intestate, Representation shall be admitted; and the Court held that the Representation should be only between the Brothers and Sisters to the Intestate. *Trin.* 1691, *Maw and Harding*, 2 *Vern.* 233, S. P. resolved on a Motion for a Prohibition in *B. R. Pett's Case*, 1 *Salk.* 250. (1 *Will. Rep.* 25, S. C.) *Vide Beeton v. Darkin*, 2 *Vern.* 168, S. P. but no Resolution.

(*Vide* the Case of *Bowers and Littlewood*, 1 *Wil. Rep.* 594, where Lord *Parker* declares the Law to be settled by *Pett's Case*.)

5. If one dies Intestate, leaving a Grandmother, and Uncles and Aunts, the Grandmother is intitled to the Personal Estate, in Exclusion of the Uncles and Aunts. *Trin.* 1719, *Woodrooff and Winkworth*, held clearly *per Curiam*. (*Prec. in Chan.* 527, S. G. and P.)

(1 *Salk.* 251, S. P. resolved.)

6. If there be Grandfather, Father and Son, and the Father dies Intestate, the Son shall have the Administration, and not the Grandfather. *Vide* [*Crooke v. Watt*] 2 *Vern.* 125.

7. A. had three Brothers, one died, leaving three Children, another Two, and the third Five; then A. died Intestate; and it was resolved, that Distribution should be *per Capita*, and not *per Stirpes*, and that all the Children should have equal, because none take by Way of Representation, but all as next of Kin in equal Degree. *Mich.* 1695, *Walsh and Walsh*, resolved in *Chan.* (*Pr. in Chan.* 54, S. C. *in totidem verbis*.)

8. A Man died Intestate, leaving a Brother of the whole Blood, and Sister of the half Blood; and it was held that the Sister of the half Blood should come in for an equal Share with the Brother of the whole Blood. *Smith and Tracy*, 1 *Mod.* 209; 1 *Vent.* 316, 2 *Ler.* 173; [Cited *Winchelsea v. Norcliffe*,] 1 *Vern.* 437; 2 *Vern.* 124, S. P. *Crooke and Watt*. (a) Resolved, and affirmed in the House of Lords on great Debate. *Show. P. C.* 109; 2 *Vent.* 317, S. C.

(a) 2 *Freem.* 112, S. C. says, the Court were of Opinion, according to the late Resolutions, that the half Blood was *in equali gradu*, and ought to have a whole Share.

9. The Plaintiff's Father on the Marriage of the Daughter of B. covenanted, in Case of a second Marriage, to pay the first Son by the first Wife £500, there was a Son and several other Children of the first Marriage; the Father died Intestate; and it was held, that the Heir must bring the £500 into Hotchpot, although in Nature of Purchaser under a Marriage-Settlement. *Hil.* 1708, *Phiney and Phiney*, 2 *Vern.* 638.

10. Mr. *Freeman* (late Chancellor of *Ireland*) in the Year 1693, on his Marriage, entered into Articles, in Consideration of the said [250] Marriage, and of £4000 Portion, to settle such an Estate to the Use of himself for Life, Remainder to his intended Wife for Life, Remainder to the first and other Sons of the Marriage successively in Tail Male, Remainder to Trustees for 1000 Years, in Trust to raise Portions for Daughters, in Case there were no Sons; that is to say, if but one such Daughter, the Sum of £5000, and if Two, or more, then the Sum of £6000 equally between them, to be paid and payable at her and their respective Age or Ages of eighteen Years, or Days of Marriage, which should first happen; and £80 *per Ann.* Maintenance in the mean Time, to each Daughter, with Remainder to his own right Heirs, and gave a Bond of £10,000 Penalty, for Performance of Covenants; the Marriage takes Effect, and they had Issue one Daughter only, and no Son; then the Wife dies, and afterwards Mr. *Freeman* married a second Wife; and on that Marriage made a Settlement of this Estate amongst others; but the second Wife, or her Trustees, had no Notice of the Articles made on the first Marriage. Afterwards Mr. *Freeman* died intestate, leaving a Son and a Daughter by his second Wife, and left a Personal Estate to the Amount of £20,000 and upwards, at the Time of his Death, which was in 1710; the Daughter by his first Wife, at that

Time, was about twelve Years of Age, and some Time since inter-marrying with the Plaintiff, they brought their Bill to have an Account of the Personal Estate of Mr. *Freeman*, and their distributory Share thereof; and the only Question was, whether this £5000 should not be looked upon to be so far an Advancement of the Plaintiff, the Wife, that if she would have any farther Share of her Father's Personal Estate, they must bring this £5000 into Hotchpot, upon the several Clauses and Intent of the Statute 22 & 23 *Car. 2.* for the Distribution of Intestates Estates.

For the Plaintiffs it was argued, that they were intitled to a distributory Share of the Personal Estate left by the Father at the Time of his Death, without Regard to this £5000, which was no Advancement, either within the Words or Meaning of the Act of Parliament, which intended only an Advancement of Children after they come *in esse*, and when they were about being married or disposed of in the World; but this, if any, was an Advancement long before the Plaintiff was born, and when it was wholly unknown and uncertain, whether there ever would be such a Daughter.

That it was likewise contingent and uncertain, after she was born, whether she would ever be intitled to this Fortune, or not; for if she had died before eighteen, or Marriage, it would have sunk into the Inheritance, for the Benefit of the Heir at Law; according to the Case of *Pawlett and Pawlett*, 2 *Vent.* [366]. And she was but twelve Years of Age at the Time of her Father's Death, and therefore might have died before she was intitled to this £5000.

That her distributive Share of her Father's Personal Estate vested in her immediately on her Father's Death, or not at all, and then it could not be divested out of her, by the Accident of her attaining eighteen, or being married, whereby this £5000 became due.

That this £5000 was a Debt upon the Father's Estate, which she was intitled to as a Creditor or Purchaser, in Consideration of her Mother's Marriage and Portion; for which was cited the Case of *Feast and Feast*, 3 *April* 1726, where, on a Marriage-Treaty, Sir *Felix Feast* covenanted to leave his Wife £2000 at his Death, £2000 to his eldest Son, and £1000 a piece to his younger Children, [251] and afterwards, being a Freeman of *London*, died, leaving several younger Children; and it was held in that Case, that the £1000 a piece to the younger Children being due only by Covenant, was a Debt on the Personal Estate; and not being to be paid till after the Father's Death, was no Provision or Advancement, either within the Statute of Distributions, or the Custom of *London*, to bar them of their customary or distributory Shares of their Father's Personal Estate, which were greatly advanced at the Time of his Death.

To shew that this was not an Advancement within the Statute, were considered the several Clauses of the Act; and it was urged,

1st, That this Statute mentions only two Cases wherein there is to be any bringing into Hotchpot: 1st, Where the Child had been advanced by the Father with any Estate. 2^{dly}, Where he had been advanced with any Portion; as to the first, the Plaintiff cannot be said to have any Estate by these Articles, for the Word *Estate* in the Statute means Lands in Opposition to Portion; and in the latter Part of it, 'tis mentioned Lands by Settlement expressly; but in the present Case the Plaintiff cannot be said to have any Provision of Lands, the Settlement of the Lands being only in the Nature of a Mortgage, for her Portion. 3^{dly}, That this Portion is not within the Statute, as an Advancement by the Intestate in his Life-time, being neither payable nor demandable till after his Death; and therefore in the Case of *Rowland and Shepherd*, where the Father agreed to give him in Marriage with his Daughter the Sum of £7000 to be paid by Instalments of £1000 a Year, and the Father had paid £6000 of this Portion, but died before the last £1000 became due; and on a Bill brought for a Distribution of his Personal Estate, it was decreed by Lord *Macclesfield*, and affirmed by your Lordship, that this £6000 paid, was not Part of the Advancement to be brought into Hotchpot, but that the remaining £1000 was a Debt to be paid out of the Personal Estate.

2^{dly}, That the Statute must operate, either at the Time of the Father's Death, or within a Year after at furthest; but in this Case the Plaintiff was not intitled to her £5000 either in her Father's Life-time, or within a Year after; and is the Distribution to wait till it be seen, whether she would attain eighteen, or be married?

Suppose there had been a Son at the Time of the Father's Death, who had after died without Issue, would this Portion have been an Advancement in the mean Time, so as to debar her of her distributory Share? for being contingent at first such Value

cannot be set on it in Equity, as Gamesters do on Chances ; and if Part is to be laid up till the Contingency happens, it is no Advancement in the mean Time ; nor is there any Instance, that one distributory Share should be laid up to make a Heap.

Sdly. This £5000 was not a voluntary Provision moving from the Father, but the Plaintiff was a Purchaser thereof, in Consideration of her Mother's Portion ; and suppose a Child had Money of his own, and agreed with his Father, in Consideration thereof, to have a Portion from his Father, after his Death ; or if a collateral Relation had purchased such a Portion from the Father for his Child, certainly this would not be an Advancement ; and the Intent of the Statute was to make them all equal out of the Father's Personal Estate, not out of what was purchased for them by others, or by the Mother, as in this Case.

[252] And it was likewise argued, that this was not a Debt originally payable out of the Personal Estate, but that it was originally payable out of Lands, notwithstanding the £10,000 Bond for performing of Covenants ; and though the Defendants, who claim under the Settlement made on their Mother's Marriage, shall not be affected as to the Lands thereby settled, for Want of Notice ; yet as to the Lands not comprized therein, they shall be liable in the first place ; and if they are not sufficient, the Personal Estate must be applied in Aid to make it up, by Reason of the Bond.

Besides, no Case can be produced where a Portion settled by Marriage-Articles had been brought into Hotchpot as an Advancement by the Father ; and yet it must often have happened, that Fathers who have made such Settlements have died Intestate, and is therefore of great consequence.

On the other Side it was argued for the Defendants, that in the first place no Settlement being made pursuant to the Articles, and the Bond for Performance thereof, the Land will in no Sort be subject thereto, but in Aid of the Personal Estate, if that were deficient ; and that too by the Assistance of a Court of Equity on the Agreement ; for between the Heir and Executor, the Personal Estate shall be applied in the first Place to discharge Incumbrances, even on the Real Estate, and would have been so in this Case, where it rested barely in Covenant, and on the Bond.

That the £5000 thus provided for by the Settlement was an Advancement within the Meaning of the Statute, which appears throughout to intend and preserve an Equality between the Children ; and if any *Finesse* of Reasoning were to be made Use of in the Construction thereof, it ought rather to be in Support of that Intent.

That the subject Matter of the Statute was chiefly Personal Estate, and yet there is no Reason to exclude a Provision by a Real Estate ; and therefore where the Statute says, other than such Child who shall have an Estate by Settlement, why should not that be extended both to Real and Personal Estate ? it is true, the Statute is not perfectly correct, according to the Rules of Grammar ; and therefore, where Portion is mentioned in the first Part, it is omitted in the Second ; and what is called Estate in the first Part, is called Land in the Second.

That if these Lands are in Equity to be considered as a Settlement of Lands, then it is an Advancement according to the Act ; if they are not to be considered as a Settlement of Lands, then it is an Advancement by a Portion ; and as to the Objection, that this was not a voluntary Provision of the Father, but arose from the Contract of the Parties ; it was answered that the Statute makes no such Distinction ; and therefore neither ought this Court to make it ; for the Act only intended an Equality between the Children, whether the Provision was voluntary, or by Purchase ; and a Child provided for either one Way or other, is provided for ; and it is not like the Cases put, where a Child, either with his own or a Relation's Money, purchases an Estate, or a Sum of Money from the Father ; for this certainly is no Provision by the Father, but a direct Sale, as much as it would have been to any Stranger ; and in the Case of *Newland* and *Shepherd*, the Question was not ; whether the £6000 [253] paid should not be brought into Hotchpot, if she had desired to be let into a further Share ; but whether the £6000, being more than her Share for the Whole, she should, besides, have the other £1000, and it was decreed that she should ; besides, there is no Pretence to say, that the Custom of *London* is to govern an Act of Parliament.

That this Portion, though not payable till after the Father's Death, was, nevertheless, a Provision for her by him, in his Life time, as the Act speaks ; as the principal Part of it, *viz.* the Security, was executed by him in his Life time ; and as he was not at Liberty to controul it ; and suppose he had given such a Portion at his Death, would not this be a good Provision within the Statute ; and here the Portion is payable as

soon as possibly it can be wanted, *viz.* at eighteen, or Marriage, and a Maintenance of £80 *per Annum* in the mean Time ; and though it is true, that a Portion out of Lands sinks in the Inheritance, if the Party dies before it becomes payable : which, if it were of a Personal Estate it would not ; that is not material, since the Statute makes no Distinction, whether the Portion is payable out of the Real or Personal Estate.

That if a Bill had been brought immediately after the Father's Death for a Distribution, there could be no Inconvenience in setting a-part a Sum to answer the Contingency, when it should happen, no more than in the Case of Debts, which is every Day done ; and there are some whose Estates are not got in till several Years after their Deaths ; and a Distribution may very properly be made thereof from Time to Time, as they come in ; neither is the Distribution wholly to wait till they are got in ; and in the Cases of *Finney* and *Finney*, and *Lonoy* and *Hutchinson*, it was decreed, that the Heir at Law should bring into Hotchpot whatever Share he received out of the Personal Estate, if he would have any more ; and in the Case of *Kelway* and *Kelway*, on the Statute 21 *Jac.* 1, it was held, that where a Man dies, leaving a Wife, and no Children, that the Wife being entitled to one Moiety of his Personal Estate, the other Moiety shall be distributed equally between his Mother and Brothers and Sisters ; and yet the Case of leaving a Wife is not mentioned in that Statute.

The Court were all clear of Opinion, that this was an Advancement by the Father in his Life-time within the Meaning of the Statute, though contingent and future, so that she could not have that and her distributory Share likewise ; and the Master of the Rolls said, that the Civil Law made no Difference between a Real and Personal Estate, but only moveable and immoveable ; and the Words of the Act, which speak of a Provision made by the Father in his Life-time, are very proper to distinguish between that and a Provision made by his Will ; and cited the Writ *De rationabili parte bonorum*, and *Swinb.* 200, to prove that a future Provision will exclude the Heir or any other of the Children ; and cited *Pawlett* and *Pawlett*, 2 *Vent.* 366, 1 *Vern.* 321, and the Chief Justice said, suppose the Father had left but £2000 Personal Estate, it would be extremely hard, that the eldest Daughter should have her £5000 and a Share of the £2000 too.

And *per* Lord Chancellor, the Case of *Feast* and *Feast* is not to be cited in this Case, that being a Cause by Consent, and the Question very little considered ; and he said, he thought any Settle-[254]-ment in or out of Lands ; either by Annuity, Rent or Portion, would be a Provision within the Statute ; and that such Provision might be valued and brought into the *Collatio bonorum*, if they think it worth their While ; that the £5000, whether called contingent, or not, is an interest, and such a one as would happen within a reasonable time, *viz.* six or seven Years after the Father's Death, and there was then no Son ; and it was such an Interest as was valuable.

That the Distribution must be made as the Estate stands at the Father's Death, and the Parties are to give Bond to refund, if Debts afterwards appear ; and future Debts due to the Intestate must be distributed as they can be got in ; that here the Contingency has happened, and she is now at Liberty to say, whether she will stick to that Provision, or bring into the Computation of *Collatio bonorum*, in order to have an equal Share with the Rest. But as to the £80 *per Annum* Maintenance, that is not to be brought in, being only for the Education and Maintenance of the Daughter, which the Parents were best Judges of ; and accordingly the Decree was pronounced. *Mich.* 1727, *Edwards* and *Freeman*, *per* Lord Chancellor assisted with *Raymond*, Chief Justice, the Master of the Rolls, and *Price* and *Fortescue*, Justices. (2 *P. Wms. Rep.* 435, *S. C.* ; 2 *Eq. Ca. Abr.* 442, 446.)

[255] CAP. XXX.

FINES AND RECOVERIES.

- (A) What Estate or Interest may be barred or transferred by Fine, or Recovery.
- (B) What Charges and Incumbrances on Lands are barred and destroyed by Fine, and Recovery.
- (C) What Charges and Incumbrances are made good by Fine, and Recovery.
- (D) Where Equity will supply a Defect in a Fine, or Recovery.
- (E) Fines and Recoveries, in what Cases vacated or set aside in Equity.

(A) WHAT ESTATE OR INTEREST MAY BE BARRED OR TRANSFERRED BY FINE, OR RECOVERY.

1. If *Cestuy que Trust* in Tail levies a Fine, or suffers a Recovery, such Fine and Recovery shall have the same Operation, as if it were an Estate at Law, especially if it be on a Consideration paid. *Pasch.* 16 Car 2 [1664]. *Goodrick and Brown*, (a) 1 Chan. Ca. 49; [Washborn v. Downes,] 1 Chan. Ca. 213, S. C. cited, and said to be the first Precedent of the Kind; [Digby v. Langworth,] 1 Chan. Ca. 68, S. P., where it is said to be *Bridgman's* Opinion, that it should not Bar; but it is now well settled; for— (*Vide S. C. cit.* 2 Vern. 56. *Cruise on Fines*, 321.)

(a) 2 Freem. 180, S. C., decreed that a Fine and Recovery of *Cestuy que Trust* should operate as strongly as an Estate at Law, and to the same Purpose, if it were on any Consideration; says Judge *Windham* doubted; for otherwise he said this Court would not give Relief.

2. If A. conveys his Estate to Trustees, in trust that they shall convey to such Persons and for such Estates, as he shall by will direct; and then by Will directs, that the Trustees shall convey to B. his Son in Tail Male, Remainder to C. in Tail Male, Remainder to the right Heirs of the Testator, and B. being in Possession, suffers a Recovery without the Trustees; this shall bar the Estate [256]-Tail in Equity, for a Trust is a Creature of Chancery, and to be governed by the Rules of Equity, and not by the Niceties of the Law. *Mich.* 1688, Sir *Francis North* and *Way*, 1 Vern. 13, 2 Chan. Ca. 78, S. C. a Trust Estate in Tail is not within the Statute *de donis*, and therefore may be barred by Fine or Recovery. 2 Vent. 350; 2 Chan. Ca. 71, S. P.; 2 Vern. 132, S. P.; 1 Vern. 440, S. P. decreed, *Washborn and Downes*, 1686, where it is said, that it was not doubted since Lord *Bridgman's* Time, but that a Fine and Recovery will bar as at Law.

3. If A. be *Cestui que Trust* for Life, Remainder in Trust for B. in Tail, Remainder in Fee to C. B. cannot, by suffering a Recovery, bar the Remainder, if there be no good Tenant to the *Præcipe*. 2 Chan. Ca. 64, Lord *North*, C. J., and *Champernoon*; per Lord Chancellor. (*Called in* 1 Vern. 13, *North v. Wey*.) 1 Vern. 13, S. C. but S. P. does not appear. (*Cruise on Recoveries*, 239.)

4. If *Cestui que Trust* in Tail with Remainder over, levies a Fine and dies without Issue, and five Years pass, and Non-claim; per Lord Keeper, this shall bar the Remainder; *Basket and Peirce*, 1 Vern. 226, but if there be an Entry or Claim, *Quare* whether the Remainder is barred. *Vide* [North v. Williams] 2 Chan. Ca. 64. And vide how Trust Estates are barred or conveyed, and what shall be a Breach of Trust in the Trustees, Title *Trust* [1 Eq. Ca. Abr. 379].

5. If the Trustee sells the Land to a Stranger, that has no Notice of the Trust, and a Fine with Proclamations and five Years pass; and afterwards the Trustee, for valuable Consideration really paid, purchases these Lands again from the Vendee; per Lord Chancellor and Chief Justice *North*, the Trustee shall stand seised as at first, as if there had not been any Fine levied. *Mich.* 34 Car. 2 [1683]. 1 Vern. 60; *Bovey and Smith*, 1 Chan. Ca. 124, S. C. (*S. C.* 1 Vern. 84, 144.)

6. A. seised in Fee, in Trust for B. for full Consideration conveys to C. the Purchaser, having Notice of the Trust; and afterwards C. to strengthen his own Estate, levies a Fine; B. the *Cestui que Trust*, in that Case shall not be bound to enter within the fifth Year. A Case put by my Lord Chancellor, and agreed to by the Counsel; for C. having purchased with Notice, notwithstanding any Consideration paid by him, is but a Trustee for B., and so the Estate not being displaced, the Fine cannot Bar. [*Bovey v. Smith*,] 1 Vern. 149. (*Cruise on Fines*, 318.)

(B) WHAT CHARGES AND INCUMBRANCES ON LANDS ARE BARRED AND DESTROYED BY FINE, AND RECOVERY.

1. If *T. S.* seised in Fee, devises to his Children, and others, several Sums of Money ; to be paid at distinct Times, by £50 *per Annum*, out of Lands ; and one Payment of £50 incurs due, and then the Lands are aliened by Fine, and Five Years and Non-claim pass, the Devises are barred by the Fine of these Sums, which grew due after the levying of it ; but not of the £50 which became due before ; for a Trust is barred by a Fine. *Wakelin and Warner, Hil. 31 Car. 2 [1680], 2 Chan. Ca. 247. Quære* of this Case, for,

[257] 2. If *J. S.* devises Lands to *B.* in Tail, Remainder to *C.* in Tail, subject to the Payment of Legacies ; and *C.* levies a Fine (on which was five Years Non-claim), and grants a Rent charge to *A.* and mortgages the Lands ; yet the Legacies are not barred by the Fine, and Non-claim ; for *C.* having no Title but under the Will, the Purchasers must be presumed to have Notice of the Legacies, and the Contents thereof. *Trin. 1710, The Drapers' Company and Yardley, 2 Vern. 662. (Cruise on Fines, 318.)*

3. To a Bill to redeem a Mortgage, the Defendant pleaded a Fine with Proclamations and Non-claim for five Years ; but the Plea was over-ruled, the Mortgagee having a Right to retain the Land, till his Money was paid ; and this was a new Way of foreclosing a Man of his Equity of Redemption. *Hil. 1682, Welden and The Duke of York, 1 Vern. 132, but vide Lingard v. Griffin, 2 Vern. 189, where it is held, that a Fine and Non-claim shall be a Bar to an Equity of Redemption ; and there said, that it had been so ruled by my Lord Chief Justice Hale, in Sir Nicholas Stourton's Case. (Cruise on Fines, 320.)*

4. A Fine and Non-claim is a good Bar to a Bill of Review, *per* Lord Commissioner *Hutchins. Mich. 1690, Lingard and Griffin, 2 Vern. 189, 190. Q.*

(C) WHAT CHARGES AND INCUMBRANCES ARE MADE GOOD BY FINE, AND RECOVERY.

1. If Tenant in Tail confesses a Judgment, or mortgages the Lands, and afterwards suffers a Recovery to a collateral Purpose, that Recovery shall enure to make good all his precedent Acts and Incumbrances. [*Goddard v. Complin,*] 1 *Chan. Ca. 120.*

But if a Fine is levied for a Particular Purpose, pursuant to a Decree, Equity will not permit any other Use to be made of that Fine. [*Goodrick v. Brown,*] 1 *Chan. Ca. 49. ([Baden v. Pembroke,] S. P. 2 Vern. 56, arg.)*

2. *A.* devised to *B.* the Father for Life, Remainder to *C.* his Son, an Infant in Fee, and devised £400 to the Son to be paid at Twenty-one, and made the Father Executor, and left £2000 Personal Assets ; and *B.* having spent the Personal Assets, mortgaged the Lands to *J. S.* and made Affidavit, that they were free from Incumbrances, and that he was seised in Fee, and levied a Fine for corroborating the Mortgage, and also declared the Use thereof to him and his Heirs ; the Son having entered for a Forfeiture, the Mortgagee brought his Bill to be relieved ; and the Court decreed, that the Mortgagee, notwithstanding the Forfeiture, should hold and enjoy the Lands against the Son, during the Life of the Father. *Hil. 1699, Willis and Finex. (Prec. in Chan. 108, S. C. accord'.)*

[258] (D) WHERE EQUITY WILL SUPPLY A DEFECT IN A FINE, OR RECOVERY.

1. If *Cestui que Trust* in Tail, being in Possession under the Trustee, who had the Freehold in him, suffers a Recovery, in which he himself is Tenant, and so no good Tenant to the *Præcipe* ; yet this shall bar the Remainder in Fee of the Trust. [*North v. Williams,*] 2 *Chan. Ca. 63.* But it seems, that if Tenant in Tail covenants to levy a Fine, and he dies before it is executed, though the Fine has proceeded to a Caption, yet Equity will not make it good, although for valuable Consideration. *Vide in Wharton v. Wharton, 2 Vern. 5.*

2. *A.* has two Sons, *B.* and *C.* *A.* on the Marriage of *B.* covenants, before the End of *Easter Term* then following, to levy a Fine to the Use of *B.* and the Heirs of his Body, Remainder to the Use of *C.* and the Heirs of his Body, Remainder to *A.* in Tail, Remainder to him in Fee ; the Fine was levied as of *Easter Term*, but the Marriage being put off till after *Easter Term*, the Deed was not dated till after neither ; so the Fine

was levied before the Date of the Deed, and by Consequence the Deed was no Declaration of the Uses of that Fine; the Father died, and then *B.* died, leaving Issue *W.* and *W.* having borrowed some Money of *J. S.* mortgages the Lands to him, and dies without Issue. *C.* claiming under the Settlement, brings his Bill to have it established, and that the Defect before-mentioned may be supplied; but in Regard the Consideration of *B.*'s Marriage did not extend to him, the Court refused him any Relief. *Mich.* 1703, *Staplehill and Bully.* (*Prec. in Chan.* 224, S. C.)

(E) FINES AND RECOVERIES, IN WHAT CASES VACATED OR SET ASIDE IN EQUITY.

1. *A.* having prevailed, by the Means of an Attorney, with a Woman to levy a Fine of some Houses, and to execute a Deed, leading the Uses thereof to him and his Heirs; and it being proved that she, at the Time of levying the Fine, declared, that she must make Use of some Friend's Name in Trust; and afterwards by Will declaring, that she only levied such Fine in Trust, the better to dispose of her Estate; and having devised it to *J. S.* subject to the Payment of her Debts, the Court decreed not only the Estate liable to the Debts, but also a Conveyance to *J. S.* the Devisee. *Mich.* 1693, *Woodhouse and Brayfield*, 2 *Vern.* 307. (*S. C. ante* [1 *Eq. Ca. Abr.*] 133. *Cruise on Fines*, 315.)

2. If Lands are devised to Trustees, till Debts paid, and then to an Infant and his Heirs, and *J. S.* a Stranger enters on the Lands, and levies a Fine, and five Years and Non-claim pass; and the Infant when of Age brings an Ejectment, but is barred, because the Trustees ought to have entred; yet Equity will relieve, and not suffer an Infant to be barred by the Laches of his Trustees, nor to be barred of a Trust Estate, during his Infancy; and the Infant in this Case shall recover the mean Profits. *Mich.* 1699, *Allen and Sayer*, 2 *Vern.* 368. (*S. C. post* [1 *Eq. Ca. Abr.*], 281. *Cruise on Fines*, 319.)

* 3. *A.* having inveigled his Wife to levy a Fine of her Land to him, when she lay upon her Death-bed, pretending, as was suggested, [259] he was to have it only for his Life; and a *Dedimus* was sent into the Country to take the Fine, and the Caption was taken about 100 Miles from *London*, the very Day she died; and because the Fine would not have stood, the Party being dead before the King's Silver was paid, the Writ of Covenant was rased in the Teste, and made to bear Date ten Days backwards; and all other Parts of the Fine were rased likewise, and made to correspond with it; and the King's Silver was paid, and so all appeared on the Record to have been done before the Death of the Woman. On a Bill brought to have the Fine set aside, or to have a Reconveyance, it was held by the Court, that though Chancery has a Power to relieve, as much against a Fine obtained by Fraud or Practice, as any other Kind of Conveyance; yet that such Relief was not by decreeing a Vacate of the Fine, but by ordering a Reconveyance; but that for any Error in the Fine, or Irregularity, or ill Practice in the Commissioners, it was a Matter properly cognisable in that Court where the Fine was levied, and for which that Court may vacate the Fine; and there being no Proof of Fraud or Practice in this Case, the Bill was dismissed. *Hil.* 1700, *St. John and Turner.* (*Cruise on Fines*, 315, S. C. but not *S. P. post.* 314; 2 *Vern.* 418. *Cruise on Fines*, 114, 302.)

(Husband and Wife, the Wife being but sixteen Years old, levied a Fine, and they being brought into the Court of Common Pleas by Complaint of the Remainder-Man, a Vacate was entered of the Fine, *quoad* the Woman, and an Information ordered to be exhibited against the Commissioners. *Hutchinson's Case*, 3 *Lev.* 36, *vide* 2 *Vent.* 30, where a Wife being an Infant levied a Fine, and she being dead, it could not be set aside; but the Court held, that they might fine the Commissioners, being in the Nature of Attornies, and liable to the Censure of the Court; but the Wife being twenty, and therefore not to be known by Inspection, it is an Excuse: by two Judges against two.)

[260] CAP. XXXI.

GUARDIAN.

- (A) Of the Appointing and Removing of a Guardian.
- (B) What Acts of his, with Respect to the Infant's Estate, shall be good.
- (C) How to be charged, and how to account.

(A) OF THE APPOINTING AND REMOVING OF A GUARDIAN.

1. If the Father of an Infant is indebted to *J. S.* and the Father by Deed grants him the Guardianship of his Children, with a Covenant not to revoke it, and gives a penal Bond for Performance; and a Bill is brought to bring the Guardian to an Account, and to remove him; though the Guardian is willing to do as the Court shall direct; yet in Regard there is a just Debt due, the Court will not restrain him from receiving the Rents and Profits, only from abusing his Person. *Hil.* 1686, *Lecome and Shiers*, 1 *Vern.* 442.

* 2. If a Person appointed Guardian pursuant to the Statute 12 *Car.* 2 (*a*) dies, or refuses to take upon himself the Guardianship, my Lord Chancellor may appoint a Guardian; but a Guardian cannot be otherwise appointed, than by bringing the Infant into Court, or his praying a Commission to have a Guardian assigned him. *Hil.* 1699, *Loyd and Carew*. (*Prec. in Chan.* 106; *Show. P. C.* 137; 12 *Car.* 2.)

(*a*) A Father under Age, or of full Age, by Deed in his Life-time, or by Will, in Presence of two Witnesses, may dispose of the Custody of his Child under 21 Years of Age, and not married at the Time of his Death; whether then born, or *in ventre sa mere*, during his Nonage, to any in Possession or Remainder, other than Popish Recusants; which Persons may maintain any Action of Trespass, against wrongful Takers away, or Retainers of such Child, and recover Damages for the Child's Use, and may take into their Custody his Lands, Personal Estate, &c., according to such Disposition, and bring Actions as Guardians in Socage might do. This Act shall not prejudice the custom of *London*, nor any other City or Town Corporate, &c.

3. A. devised the Guardianship of his Son, who was seven Years of age, to his Wife, who was Mother-in-law to the Infant; and she marrying meanly with her own Servant, the Uncle gets Possession [261] of the Infant, and sends him to be educated in a Protestant College in *France*; and upon a *Homine Replegiando*, it was held by my Lord Chancellor, that though in case of a Guardian by Common Law (*a*), this Court may remove him; yet here being a Guardian according to the Statute, she could not be removed, but that he would make her give Security not to marry the Infant *inter Anno Nubiles*, and the Uncle was ordered to send for the Boy. 29 *Car.* 2, *Foster and Denny*, 2 *Chan. Ca.* 237.

(*a*) Guardians at Common Law may be removed, or compelled to give Security, if there appears any Danger of their abusing either the Infant's Person or Estate; and there are several Instances of this Kind, as *Stile*, 456; *Hard.* 96; 3 *Chan. Rep.* 58; 1 *Sid.* 424; 3 *Salk.* 177, but there are none where a Statute Guardian has been totally removed. Some, where such Terms have been imposed on the Guardian, as effectually to prevent his doing any thing to the Prejudice of the Infant; but *quære*, whether such Causes may not arise, for which he may be totally removed, notwithstanding the Statute; as if he becomes Mad, Lunatick, &c. A Guardianship is not assignable; neither shall it go to the Executors or Administrators, being a Personal Trust. *Vaugh.* 180.

4. The Court of Chancery may assign one of the Six Clerks to be Guardian to an Infant. [Anonymous,] 2 *Chan. Ca.* 163; [Offley v. Jenny,] *Nel. Chan. Rep.* 8vo, 44 S. P.

(The Spiritual Court may appoint a Guardian to an Infant till he is fourteen Years old, who has only a Personal Estate; but if there be both a Real and Personal Estate, such Appointment is void. *Vide* 2 *Lev.* 162, 217.)

The Testamentary Guardians of an Infant petitioned the Lord Chancellor, that they might be discharged of the Trust, and new Guardians appointed, as the Infant was going abroad on his Travels, and would not be under their Inspection. But Lord Hardwicke, Chancellor, with some Warmth refused to grant the Prayer, as being never

done at the Application of the Guardians themselves, and said that if they would not continue to act in the Trust, as they had accepted it, the Court would compel them. However afterwards on the Application of the Infant, and the Consent of his Mother, other Persons were appointed to have the Care of him, till farther Order. *Spencer v. Chesterfield*, Ambl. 146.

(B) WHAT ACTS OF HIS, WITH RESPECT TO THE INFANT'S ESTATE SHALL BE GOOD.

1. The Plaintiff's Father mortgages to *J. S.* and dies, leaving the Plaintiff and *C.* Heir at Law, both Infants; Defendant as Guardian enters on the Lands, and with the Profits paid off the Mortgage, and took an Assignment to other Persons; the Defendant having married his Daughter to *C.* who died without Issue; it was insisted for the Defendant that he paid off the Mortgage with his own Money, and that he had not enough of the Infant's; and that if he had, he could not justify disposing of it in such Manner (by which it would prevent its coming to the Administrator); but it being proved that he called in Part of the Infant's Rents for that Purpose; and because it was most for the Infant's Advantage to pay off the Mortgage, it was sent to an Account: And if the Profits received were sufficient to pay it, the Defendant was to convey; but if they fell short, the Plaintiff was to lay down as much as, with what the Defendant laid down, would make it up. *Hil. 22 Car. 2* [1671], *Bridget Dennis*, by Sir *Alexander Frazier* her Committee, and Sir *Thomas Badd*, 1 *Chan. Ca.* 156, (a) *vide* [Bressenden v. Decrees] 2 *Chan. Ca.* 197, where my Lord Keeper was of Opinion, that a Guardian should pay off a Judgment by the Profits of the Estate.

(a) 1 *Vern.* 436, S. C. cited, and agreed to by my Lord Chancellor, because the Money would in Equity be liable in his Hands to discharge the Mortgage; so he did the Administrator no Wrong.

* 2. An Estate having descended to an Infant, subject to Incumbrances; and the Question being, whether a Guardian might, without the Direction of a Court of Equity, apply the Profits to discharge the Incumbrances, or the Interest of them, or whether they should not be accounted Personal Estate; and so the Administrator of the Infant be intitled to them, if the Infant died in his Minority; [262] it was held by the Court, that a Guardian, without any Direction, may pay the Interest of any Real Incumbrance, and the Principal of a Mortgage; because that is a direct and immediate Charge on the Land; but not any other Real Incumbrance. *Hil.* 1700, *Palmer and Danby*. (S. C. but not S. P. [1 *Eq. Ca. Abr.*] 219.)

3. But where a Widow, who was Guardian to her Son, received the Rents and Profits of his Estate, and paid off Debts by Specialty, but took Assignments of the Bonds; the Son dying in his Minority, she brought her Bill against the Defendant the Heir for a Discovery of Assets by Discent, to satisfy the Money due by Bond, she claiming the Profits as Administratrix to her Son; and it was held by the Court, that the Guardian was not compellable to apply the Profits of the Estate of the Infant Heir, to pay off the Bond-Debts. *Hil.* 1707, *Waters and Ebrall*, 2 *Vern.* 606.

4. A Guardian to an Infant, having a considerable Sum of Money in his Hands, that was raised out of the Infant's Estate, lays out, with the Consent of his Grandmother, £3000 in a Purchase of Land, which lay contiguous to the Infant's Estate; and takes the Purchase in the Name of *J. S.* for his Benefit, if when he came of Age he should agree thereto, and allow that Money on Account. The Infant dying in his Minority, it was held by my Lord Chancellor, Chief Baron *Atkins*, and Mr. Justice *Lutwich*, against the Opinion of the Master of the Rolls, that though neither the Heir nor Administrator of the Infant were entitled to the Lands, yet the Guardian must account for this £3000 to the Administrator of the Infant; and that it was not in the Power of the Guardian, without the Direction of this Court, to turn the Personal into Real Estate, by which it would descend to the Heir; and that the Objection, that an Infant may make a Will at Seventeen of his Personal Estate, but not of his Real, was not answered. *The Earl of Winchelsea and Norcliff*, 1 *Vern.* 403, 435, S. C.

5. If a Guardian borrows Money of *A.* to pay off an Incumbrance on the Infant's Estate, and promises to give *A.* Security for his Money, but dies before it is done; though *A.*'s Money is applied to pay off the Incumbrance, yet the Court will not decree him Satisfaction out of the Infant's Estate; but if the Sum disbursed exceeds the Profits of the Estate, for so much, *A.* shall have an Account as Money due to the Guardian, and it shall be raised out of the Infant's Estate. *Hil.* 1704, *Hooper and Eyles*, 2 *Vern.* 480.

[263] (C) GUARDIAN, HOW TO BE CHARGED, AND HOW TO ACCOUNT.

1. If a Guardian takes a Bond for the Arrears of Rent, he thereby makes it his own Debt, and shall be charged with it. 25 *Car.* 2 [1673], *Wale* and *Buckley*, 2 *Chan. Rep.* 97. (A Guardian on his Account shall have Allowance of all reasonable Expences; and if he is robbed of the Rents and Profits of the Land, without his Default or Negligence, he shall be discharged thereof, upon his Account. 1 *Inst.* 89, a.)

(2. If a Guardian to an Infant, whose Lands are incumbered, to the Value of £600, buys it off with £100 of the Infant's Money, he shall not charge the Infant with the £600. [Henly v. ———.] 2 *Chan. Ca.* 245.)

3. If a Guardian to an Infant takes an Assignment of the Mortgage, although the Mortgagee never entred; yet *per* Lord Keeper *Wright*, as to the Profits received out of the mortgaged Lands, the Guardian shall be taken to be in Possession as Mortgagee, and not as Guardian; but the Reporter adds a *Q.* *Vide Bishop v. Sharp*, 2 *Vern.* 471. (*Vide S. P. Anon.* 1 *Salk.* 155.)

[264] CAP. XXXII.

HEIR AND ANCESTOR.

(*Vide ante*, Cap. IV. (D) [1 Eq. Ca. Abr. 24].)

(A) By what Acts of the Ancestor shall the Heir General be bound.

(B) By what Acts shall an Heir Special, or Issue in Tail, be bound.

(C) Heir, in what Cases favoured in Equity.

(D) Where Charges and Incumbrances on the Lands shall be raised, or shall sink in Inheritance, for the Benefit of the Heir.

(E) Where the Heir shall have the Benefit and Aid of the personal Estate.

(F) In what Cases there shall be a resulting Trust for the Benefit of the Heir.

(G) What Things shall go to the Heir, and not to the Executor.

(H) What shall be Assets by Descent in the Hands of the Heir.

(I) Unreasonable Bargains and Securities obtained from young Heirs, in what Cases to be set aside.

(A) BY WHAT ACTS OF THE ANCESTOR SHALL THE HEIR GENERAL BE BOUND.

1. If Lands are devised to the Wife for Life, and afterwards to be sold by the Executor for younger Children's Portions, and the Executor and Wife die; the Children may compel the Heir to sell, though the Executor had only an Authority: Ruled upon Demurrer. *Mich.* 15 *Car.* 2, *Garfoot and Garfoot*, 1 *Chan. Ca.* 35. (2 *Freem.* 176, *S. C. accord.*.)

(By the Common Law, if Lands are devised to be sold by an Executor, by which he has only an Authority, and he dies, no Sale can be made; so if an Authority only be given to two, and one dies, the Survivor cannot sell; but it is otherwise when an Authority is given them, coupled with an Interest, as by a Devise of Lands to them to be sold. 1 *Inst.* 112, 113, 181.)

[265] 2. If *J. S.* devises his Lands to his Executors, to sell and pay Debts, the Heir shall be compelled to join in the Sale; *per* Lord Keeper, who said it had been so ruled in the House of Lords. *Trin.* 27 *Car.* 2 [1675], *Fowle and Green*, 1 *Chan. Ca.* 262.

3. If Lands are settled on Trustees for raising of Maintenance and Portions for Daughters, and a Bill is brought for a Sale, and that the Heir might join: he shall be compelled to join, though it is objected that he has no legal Estate in him. *Pasch.* 1689, *Roll and Roll*, 2 *Vern.* 99, where it is said, that several Cases to that Purpose were cited; *vide* the Case of *Pit and Pelham*, 1 *Chan. Ca.* 176, several Precedents quoted, where the Lands were decreed to be sold, though no Executor named, or though he died before any Sale made. And *vide Warburton v. Warburton*, 2 *Vern.* 420, where it is resolved, that the Heir may have the Lands sold, if it appears for his Advantage, as well as the younger Children may insist upon a Sale (*S. C.* 1 *Lev.* 304; 2 *Jon.* 25; 2 *Freem.* 134; 1 *Ch. Rep.* 283.)

4. If *A.* contracts to sell Lands, and receives good Part of the Purchase-Money, but dies before a Conveyance is executed, and a Bill is brought against the Heir, he shall

convey, and the Money shall go to the Executor ; especially if there are more Debts due than the Testator's Personal Estate is sufficient to pay. *Mich.* 1692, decreed, *Hedden and Savoy*, S. P., 2 *Vern.* 213, 215. *Baden and Countess of Pembroke*, S. C. but not S. P. *ante* [1 Eq. Ca. Abr.], 241 ; 2 *Vern.* 52 ; 3 *Ch. Rep.* 217).

(If a Man for £100 assumes to make a Lease for 21 Years, and dies ; his Heir is not compellable, in a Court of Equity, to make the Lease ; for this is against the Common Law. 3 *Jac.* 1, *Chapman and Boier*, 1 *Roll. Abr.* 377, 378. *Quære* (1 *Danv.* 757).)

(B) BY WHAT ACTS SHALL AN HEIR SPECIAL, OR ISSUE IN TAIL, BE BOUND.

1. If Tenant in Tail bargains and sells the Lands, yet this cannot be made good in Equity against the Statute, by which he is disabled to bar his Issue ; resolved *per* Lord Keeper and Lord Hobart. *Carendish and Worsley*, *Hob.* 203.

2. But if Tenant in Tail agrees to convey, he may be compelled in Equity to execute the Agreement ; but if he dies, his Issue is not bound thereby, unless he doth some Act whereby he consents to and confirms the Agreement. *Trin.* 22 *Car.* 2 [1670], *Ross and Ross*, 1 *Chan. Ca.* 171. [Jenkins v. Keymes.] 1 *Lee.* 239, S. P. *in Cancellaria*. (*Vide* *Ross v. Ross*, but not S. P. *ante* [1 Eq. Ca. Abr.], 124.)

3. If Tenant in Tail agrees to sell his Lands, and receives Part of the Consideration-Money, and upon his not making good the Sale by a Fine or Recovery, a Bill is brought to compel him thereto ; and a Decree pronounced accordingly ; and he stands out all Process against him to a Contempt, and then dies without perfecting the Sale ; yet his Issue shall not be compelled to perfect it : Adjudged on a Bill brought against the Issue to revive the Decree. *Hil.* 1708, *Powel and Powel*, S. C. cited, and admitted by my Lord Chief Baron Gilbert, in the Argument of the Earl of *Conventry's* Case, *Pasch.* 1724, for the Heir comes in under the Statute *de donis* singly ; and is not any Way deriving from the Ancestor who contracted (*Prec. in Chan.* 278, S. C. *accord.*).

[266] 4. If Tenant in Tail sells at a full Value, and receives the Consideration-Money, and covenants to levy a Fine, and is decreed to do it ; yet dying (though in Prison and in Contempt for not performing the Decree) the Issue in Tail cannot be bound by it, *Weal and Lover*, *cit.* 2 *Vern.* 306.

(C) HEIR, IN WHAT CASES FAVOURED IN EQUITY.

Vide Title Devise [1 Eq. Ca. Abr. 171]. That an Heir shall not be disinherited by doubtful or ambiguous Words.

1. If *J. S.* devises Lands to his Wife for Life, and the Heir claims the Lands by an Intail, and prays a Discovery of the Writings which by Order are brought into Court, and on a Motion *ex parte* given to the Heir, and among them the Deed of Intail is found ; and the Wife insists on having back the Deed, unless the Heir would confirm her Estate, and that she is more than a bare Volunteer, it being a Provision for her ; yet it not appearing to be pursuant to Marriage-Articles, it shall be considered only as a Bounty ; and the Heir having a good Title shall be aided. *Mich.* 32 *Car.* 2 [1680] [Anonymous], 2 *Chan. Ca.* 4.

2. If Husband and Wife levy a Fine of the Wife's Lands, and by the Deed the Use is declared to the Husband and his Heirs, and the Husband, without any Consideration, devises it to *J. S.*, *J. S.* being a voluntary Devisee shall have no Aid in Equity for the Deed against the Heir of the Mother, but will be left to help himself at Law as he can. *Hil.* 34 *Car.* 2 [1683] [*Coventry v. Hall*], 2 *Chan. Ca.* 134.

3. If *J. S.* by Will devises £3000 to his three younger Children, which Sum was a Mortgage due from *J. T.*, and by his Will adds, that for the more sure Payment of it, in case his Son and Heir, whom he appointed Executor, should not pay the same according to his Will, then he devised the Land for the Payment thereof, and appoints it to be paid them at twenty-one, or Marriage which should first happen, and a Maintenance out of his Land in the mean Time, and *J. T.* obtains a Decree for Redemption of his Mortgage, on Payment of the Money, against the Executor and the Infants, who appeared by their Mother as Guardian ; and the Money is brought into Court, and placed out by the Master, on a Security which proves ill ; yet the Heir shall not be compelled to pay it over again to the younger Children ; for the Lands are made only supplementally chargeable in case *J. T.* had failed, or in case the Heir and Executor had received, and refused to pay it to the Children ; and though a Real Security for

Children's Portions shall not be changed into a Personal one ; yet in this Case it was not in the Power of the Heir to prevent *J. T.*'s redeeming the Mortgage. *Mich.* 1685, *Oldfield and Oldfield*, 1 *Vern.* 336.

4. If an Estate is limited to Trustees for Payment of Debts and Legacies, and the Trustees raise the whole Money, but do not apply it according to the Trust ; yet the Heir shall have the Lands discharged, and the Legatees must take their Remedy against the Trustees ; for the Money being once raised, the Land shall be discharged. *Anon.* 1 *Salk.* 153, in *Domo Procerum*.

[267] 5. But if *A.* being Tenant for Life, Remainder to his first Son in Tail, Remainder over, has a Power to charge the Estate with £250 *per Ann.* Annuity, for any Term not exceeding four Years, and *A.* does by Deed charge the Premises with £250 *per Ann.* for four Years, to commence from his Death, in Trust to raise £1000 Part to be paid to *B.* and the other Part to *C.*, the Son pays *B.* what was due to him, and he delivers up the Deeds, and they are suppressed, and the Son takes the Profits for four Years, and more, and leaves a Daughter his Heir at Law, and leaves no Personal Assets ; the Lands shall be liable in the Hands of the Daughter to pay *C.* with Interest though the Term for Years is expired, and the Person dead who received the Profits. *Vide Smith and Smith*, 2 *Vern.* 178, *Mich.* 1690.

(D) WHERE CHARGES AND INCUMBRANCES ON THE LAND SHALL BE RAISED, OR SHALL SINK IN THE INHERITANCE FOR THE BENEFIT OF THE HEIR.

1. *J. S.* by Settlement charged his Lands with the Payment of £4000 a-piece to his two Daughters, to be paid them at their respective Ages of twenty-one Years, or Days of Marriage, and reserved to himself a Power of otherwise ordering it by his Will ; and by his Will made within a Day after, he confirms their Portions, and that they shall be paid as mentioned in the Settlement ; one of the Daughters dies before twenty-one, and unmarried, and her Mother sued for the Portion as Administratrix to the Daughter ; but it was held, that this Portion should not be raised, but should sink in the Inheritance for the Benefit of the Heir at Law ; though it was admitted, that if it had been a sum of Money devised, and the Legatee had died before the Time of Payment, it would have gone to the Administrator ; but here the Settlement is operative, and the Wife is a Jointress otherwise provided for. *Pasch.* 1 *Jac.* 2, *Pawlet and Pawlet*, 2 *Vent.* 366, 367 ; 1 *Vern.* 204 & 321, S. C. where a Note is added, that it was affirmed in the House of Peers. S. P. admitted in the Case of *Edwards and Freeman*, *Mich.* 1727, and S. C. cited. *Vide* 2 *P. Wms.* 435, *ante* [1 *Eq. Ca. Abr.*], 249 ; 2 *Eq. Ca. Abr.* 442, 446, S. C. (2 *Chan. Rep.* 286, S. C. ; 2 *Freem.* 93, S. C. under the Name of Lord *Pawlet's Case.*)

(This has been the established Rule ever since, though Cases prior in Time may be found differently determined. *Per Hardwicke, C.*, *Mich.* 1738, *Hall and Terry*. *Vide* 2 *Eq. Ca. Abr.* 550, 551 ; 2 *Freem.* 254, S. C. ; *Prec. in Chan.* 195, S. C.)

2. If a Term is created by a Marriage-Settlement, to raise £3000 for Daughters' Portions within twelve Months after the Death of the Survivor of the Husband and Wife ; and there being but one Daughter, the Father by Will devises the Trust Lands to make good his Wife's Jointure, and to raise £3000 for his Daughter's Portion ; the Daughter dies at the Age of five Years ; the Portion being to be raised out of Land, as she could have no Occasion for it at that Age, it shall not be raised for the Benefit of her Administrator. *Pasch.* 1702, *Breuen and Breuen*, 2 *Vern.* 439. *Note* : The Daughter died within the Year, but it does not so appear by this Report. (*Prec. in Chan.* 195, S. C. ; 2 *Freem.* 254, S. C. ; 2 *Eq. Ca. Abr.* 565, S. C. but not S. P.)

3. Upon a Marriage-Settlement a Term was created for raising Portions for younger Children, *viz.* £1000 to the Eldest of the younger Sons, and £500 to every other younger Son, and so for the Daughters, to be paid at such Time as the Trustees in their Discretion should appoint ; the Father leaves two Sons and two Daughters ; the youngest Son, before any Appointment made by the [268] Trustees, dies at seventeen, being then an Apprentice ; and it was held, that though there was no Time limited for the raising of it, by which it was urged to be an Interest vested ; yet as he died before he could have any Occasion for it, and before any Appointment by the Trustees, it should sink in the Inheritance, and not go to his Sisters, who had taken out Administration to him. *Hil.* 1702, *Warr and Warr*. (*Prec. in Chan.* 213, S. C. *accord*.)

4. If one devises £1000 to his Daughter for her Portion, charged upon a Real Estate, and payable at twenty-one, and the Daughter dies before twenty-one, the

Portion shall sink in the Land ; but it is otherwise if no Time had been limited for the Payment of the Portion ; for in that Case it goes to the Executors of the Daughter ; and there is no Difference where the Portion is secured by a Settlement or Will, if secured out of a Real Estate, and the Party die before it is payable ; for in either Case it sinks in the Lands. *Mich.* 1688, *Smith and Smith*, 2 *Vern.* 92. *Vide* [Yates v. Phettiplace] 2 *Vern.* 416. S. P. resolved, and there said, that there was no Difference where the Land was charged by Will, and where by a Settlement. (*Vide* the Case of *Jennings and Looks*, S. P. *Eq. Ca. Abr.* Part 2, probably meaning the Case of *Jennings v. Rock*, 2 *Eq. Ca. Abr.* 551.)

5. So where one by Will charged his Lands with £6000 for the Child with which his Wife was *privement enseint*, if it proved a Daughter, with a Clause of Entry for Non payment ; a Daughter is born, who dies ; and it was decreed that the £6000 should not be raised for the Benefit of her Administrator. *Hil.* 1690, *Norfolk and Gifford*, 2 *Vern.* 208.

6. But where Lands are devised to be sold for Payment of Portions to younger Children, and one of the Children dies after the Portion becomes payable, though before the Land sold, yet his Administrator shall have it, being an Interest vested. *Mich.* 1684, *Bartholomew and Meredith*, 1 *Vern.* 276. *Vide* [Cave v. Cave] 2 *Vern.* 508, (a) where a Portion to be paid pursuant to a Marriage-Settlement, was held an Interest vested, being made to carry Interest, though the Party died before it became payable.

(a) This Case is entirely mistaken by the Reporter. *Vide* 1 *Ath.* 556.

7. So where on a Marriage-Settlement Lands are limited to the Husband for Life, Remainder to the Wife for Life, Remainder to the first, &c., Sons of the Marriage in Tail Male, Remainder to J. S. in Fee ; provided, if there be no Issue Male of the Marriage, and there be one or more Daughters living at the Husband's Death, then the Trustees to stand seised, subject to the Jointure, to the Intent such Daughter or Daughters should receive out of the Rents £10,000 and £100 *per Ann.* Maintenance ; but no Time limited for the Payment of the Portions ; the Husband dies, leaving only one Daughter, who lives to seventeen, and by Will disposes of the £10,000, and it was decreed, that this was a vested Interest in the Daughter, and well disposed of by her Will. *Trin.* 1688, *Earl Rivers and Earl of Derby*, 2 *Vern.* 72.

8. If A. by Will gives £500 to his Daughter, to be paid by his Executors, at the age of twenty-one, out of his Personal Estate and Rents of his Real ; and if not raised by that Time, the Executors to stand seised, and take the Rents till the £500 is raised ; and after Payment gives the Land to his Son ; the Daughter marries at eighteen, and dies under twenty-one, leaving Issue a Daughter ; the Husband takes Administration ; the Portion shall be raised, and that by a Sale, tho' the Land, by reason of Incumbrances, will produce lit-[269]-tle more than the £500. Decreed *Pasch.* 1701, *Jackson and Farrand*, 2 *Vern.* 424. (1 *Bro. P. C.* 61 ; *Precedent in Chan.* 109, *Hil.* 1699, *Jackson and Farrant*, S. C. says Lord Chancellor directed an Account of the Estate, and then he would give his Opinion ; but inclined strongly that the Portion was payable by reason of the Marriage, Marriage being the Cause of Portions. Note : the Portion was not said to be paid at twenty-one, or Marriage. The Authority of this Case is questioned, and the Case itself termed an anomalous Case : *per Hardwicke, C.*, in *Cotton and Cotton*, *Mich.* 12 *Geo.* 2, MS. Notes.)

* 9. An estate was devised to the eldest Son, provided he or his Heirs pay £100 a-piece to his three sisters, at their Age of twenty-one, or Marriage ; one of the Daughters dies before twenty-one unmarried ; after J. S. buys the Estate, and thinking it subject to the dead Daughter's Portion (a Bill being brought for it in this Court) gave Bond to her Executrix to pay it ; but being afterwards advised, that the Land would not be liable, he brings his Bill to be relieved against it ; and it was held by my Lord Keeper, that though by the Law now used in this Court, the Land would not be liable to the Portion ; yet perhaps when the Bond was given, it might have been otherwise taken ; and there being no Fraud in getting the Bond, he would not relieve against it. *Mich.* 1702, *Smith and Avery*.

10. Upon a Marriage-Settlement a Term was created for raising Portions for Daughters at eighteen, or Marriage ; there was a Son and a Daughter of the Marriage ; the Son died, and the Inheritance descended to the Daughter, who attained her Age of eighteen Years, and then fell sick, and in her sickness made her Will, and thereby gave some small Legacies, and then gave all, whatsoever she had Power to dispose of, to her Mother, and made her Executrix, and died, not having attained her Age of twenty-one Years ; and the Question was, whether, by the Descent of the Inheri-

tance to the same Person that was to have the Portion raised, the Land shall be thereby discharged of the Portion, or whether the Defendant should have Right to it by the Will of her Daughter: it was decreed for the Mother: and that the Land could not be discharged of the Portion till the Daughter had been of Age to make her Election to have it so; especially she having made her Will, and in general Words devised it to her Mother: On an Appeal to the Lords this Decree was affirmed. *Hil.* 1701, *Thomas and Kinnis*. (2 *Freem.* 207, *Hil.* 1696, S. C. says, Lord Keeper desired to see Precedents, and afterwards gave his Opinion, that the Portion was not extinguished, but passed by the Will. Decree affirmed in *Dom' Proc'*, *Ibid.* 209.)

11. A Term was created for raising a Daughter's Portion; but it being extinguished by the Descent of the Inheritance on the Daughter, it was revived again in Equity, for the Benefit of Creditors. *Porell and Morgan*, a Case cited. [*Norfolk v. Gifford*,] 2 *Vern.* 208, *vide* Title Creditor and Debtor [1 *Eq. Ca. ABR.* 138].

(E) WHERE THE HEIR SHALL HAVE THE BENEFIT AND AID OF THE PERSONAL ESTATE.

1. If an Heir is sued upon a Bond-Debt of his Ancestor's, in which he is bound, and he pays the Money, the Executor shall reimburse him as far as there are Personal Assets of the Testator's come to his Hand. *Pasch.* 18 *Car.* 2 [1666], *Armitage and Metcalf*, 1 *Chan. Ca.* 74, *vide* [Anon.] 2 *Chan. Ca.* 5. That the Personal Estate in the Hands of the Executor shall be employed in Ease of the Heir, by whatever Means the Heir became indebted as Heir; for the Personal Estate having received the Benefit by contracting the Debt, it is reasonable that Satisfaction should be made out of it.

2. If a Man mortgages Lands, and covenants to pay the Money, and dies, the Personal Estate of the Mortgagor shall, in Favour of the Heir, be applied to exonerate the Mortgage. *Cope and Cope*, 2 *Salk.* 449, *in Canc'*.

[270] 3. But if the Grandfather mortgages, and covenants to pay the Mortgage-Money, and the Lands descend to his Son, and his Son dies, having a Personal Estate and a Son, the Son's Personal Estate shall not go in Aid of this Mortgage. [*Cope v. Cope*,] 2 *Salk.* 450.

4. So where A. mortgages his Land to B., and afterwards sells it to C. for £1000, which includes the Mortgage-Money, C. shall pay the Mortgage, and shall have no Aid of the Personal Estate of A., for he has made it his own debt. [*Cope v. Cope*,] 2 *Salk.* 450, *vide* [*Pockley v. Pockley*] 1 *Vern.* 37, that where the Equity of Redemption is purchased, the Mortgage shall not be discharged out of the Personal Estate.

5. If Lands in Mortgage are devised to J. S., the Devisee shall not have Aid of the Testator's Personal Estate in the Hands of the Executor. *Hil.* 27 *Car.* 2 [1676], *Cornish and Mear*, 1 *Chan. Ca.* 271, *vide* 1 *Vern.* 36. *Pockley and Pockley cont.*, where it is held by my Lord Chancellor, that not only the Heir, but likewise a Devisee, or *Harres Factus*, shall have the Benefit of the Personal Estate; and 2 *Chan. Ca.* 84, S. C. and S. P., and that Debts shall be paid out of the Personal Estate in Favour of a Devisee, though a Widow, who claims a Third by the Custom of the Province of York, is prejudiced thereby. Q.

6. If there be no Covenant in the Deed for the Payment of the Mortgage-Money, yet the Personal Estate shall be liable in the Hands of the Executor. [*Cope v. Cope*,] 2 *Salk.* 449. [*Winchelsea v. Norecliffe*,] 1 *Vern.* 436, S. P. *arguendo*.

7. But if a Mortgage in Fee is made redeemable at Michaelmas 1710, or at any other Michaelmas, on six Months Notice, and no Covenant to pay the Money; and the Mortgagor continues in possession, pays the Interest, and by Will devises his Personal Estate to his Wife and Daughter; the Personal Estate is not liable in Ease of the Real, there being no Covenant either expressed or implied. *Mich.* 1715, *Howell and Price*, 2 *Vern.* 1701.

¶ 1 *Will. Rep.* 291, S. C., says, on arguing the Case, 28 Oct. 1717, on the Equity reserved after the Trial of an Issue that had been directed by the Court, Lord Chancellor seemed to be strongly of Opinion that the Personal Estate should be applied in Ease of the Real, the Testator having said in his Will that his Executors should, by his Personal Estate, pay and levy his Debts; and this Mortgage-Money plainly appearing to be a Debt, wherefore his Lordship decreed in Favour of the Heir. *Ibid.* 295.—*Pr. in Ch.* 423, S. C. no Decree, but Precedents to be searched. Note: This was a *Welsh* Mortgage, and the last Book says it is a common Practice in Wales to make Mortgages in this Manner with Design to keep the Estate for ever in their own Family. *Ibid.* 225.—*Gilb. Eq. Rep.* 106, S. C. *in totidem verbis* with *Prec. in Chan.*)

* 8. If an Heir has Lands descended to him, incumbered with a Mortgage, and he, before any Application made by him to have Aid of the Personal Estate, disposes of them, he cannot afterwards come upon the Personal Estate; for the Equity that an Heir has, is that the Lands may descend clear to the Family. *Mich.* 1702, *Wood and Fenwick*. (S. C. but not S. P. *ante* 170.)

9. If a Man makes a Settlement of his Estate on Trustees, for Performance of his Will, and Payment of Debts and Legacies, and at the same Time makes his Will, and thereby devises that the Trustees shall Pay several Legacies, and that the Surplus shall go to the Heir, and makes his Wife Executrix, but does not expressly devise the Personal Estate to her; the Personal Estate in this Case shall be applied in Ease of the Real. *Hil.* 28 *Car.* 2 [1677], *Lord Grey and Lady Grey*, 1 *Chan. Ca.* 296.

10. If Lands be devised for the Payment of Debts and Legacies, and the Residue of the Personal Estate be given to the Executors, after the Debts and Legacies paid, the Personal Estate shall notwithstanding, as far as it will go, be applied to the Payment of the Debts, and the Land charged no further than is necessary to make up the Residue. *Pasch.* 32 *Car.* 2 [1680], 2 *Vent.* 349.

(By the several Cases adjudged on this Head, the general Rule appears to be, that the Heir at Law shall have the Personal Estate in Exoneration of the Real, unless there be express Words to exempt it, or unless the Intent of the Testator strongly appears that it should be exempt. In the Case of *Tipping and Tipping*, *Mich.* 1721, *Macclesfield, C.*, denied it to be a Rule, that in all Cases the Personal Estate is applicable in Ease of the Real; for it shall not be so applied if thereby the Payment of the Legacy will be prevented, much less where it will deprive a Widow of her *Bona Paraphernalia*. 1 *Will. Rep.* 730.)

[271] 11. If a Man devises Lands for Payment of his Debts, and makes an Executor, and leaves a Personal Estate, no Part of the Personal Estate shall go to the Payment of the Debts: because by making of an Executor, the Testator's Intent appears, that the Executor should have the Goods, the Testator having made another Provision for the Payment of his Debts; but if a Man disposes of Lands for the Payment of his Debts, and after dies Intestate, the Personal Estate shall be chargeable in the Hands of the Administrator; for no such Intent appears, as before; *per* Serjeant *Fountain*, and admitted by the Master of the Rolls. 18 *Car.* 2 [1666-67], *Feltham and Harlston*, 1 *Lev.* 203, *Q.* and *vide* [Mead *v.* Hyde] 2 *Vern.* 120. That a Devisee of Lands charged shall have it before an Executor, unless it be expressly devised to him.

12. If a Man devises his Fee-farm Rents to be sold for Payment of his Debts, and the Surplus to go betwixt his Heir at Law and his younger Brother, and devises his Household Goods to go with his House, and the Residue of his Personal Estate to his Sister; the Personal Estate shall not be applied to pay Debts in Ease of the Real. *Mich.* 1716, *Wainwright and Bendlowes*, 2 *Vern.* 718. And *per* Lord Chancellor, there is a Difference where an Estate is only charged with Payment of Debts, and where it is devised to be sold out and out to pay Debts. *Vide* [Anonymous] 2 *Vent.* 359. And that in the first Case, the Residue of the Personal Estate shall not go in Exoneration of the Real. (*Prec. in Chan.* 451, S. C. *accord.* *Gilb. Eq. Rep.* 125, S. C. *in totidem verbis* with *Prec. in Chan.*)

* 13. A. by Will gives several pecuniary Legacies, and after devises Lands to Trustees and their Heirs, in trust that they do and shall, by Mortgage or Sale of the said Premises, or any Part thereof, pay and satisfy his Debts and the said Legacies and Funeral Expences; then he devises all his Goods, Chattels and Household Stuff in such a House to another; and then goes on in these Words, *All the Rest and Residue of my Personal Estate I give and devise to my Wife, whom I make sole Executrix. Per Cur.* The Residue of the Personal Estate belongs to the Wife, in the Nature of a specifick Legacy, exempt from Debts, Legacies and Funerals; for though the Personal Estate is the natural Fund for them, yet here he has expressly provided another for that Purpose, by Words of an imperative Signification, *that the Trustees do and shall, &c.*, which is stronger than a bare Charge of them on his Real Estate, and might be intended only auxiliary to his Personal Estate, which Will, without Words of Exemption, might be liable in the first Place; and though the Words *Rest and Residue of his Personal Estate*, are generally understood, Rest and Residue after Debts, Legacies, and Funerals; yet here they are relative to the last Antecedent of the Devise of his Goods, Chattels and Household-Stuff at such a House, and pass to his Wife as a specifick Devise in the same Manner as the next preceding Devise did to the Devisee thereof, and are to be

understood the Residue of what he had not before particularly devised ; not the Residue after Debts paid. *Hil.* 1724, *Adams and Meyrick* at the Rolls.

[272] (F) IN WHAT CASES THERE SHALL BE A RESULTING TRUST FOR THE BENEFIT OF THE HEIR.

1. If Lands are appointed to pay Debts, the Heir is intitled to have the Lands when the Debts are paid ; if to be sold, he is intitled to the Surplus ; but if there be any Abuse, he must take his Remedy against the Trustee, and not against the Purchaser. 34 *Car.* 2 [1682-83], *Culpepper and Aston*, 2 *Chan. Ca.* 115. *Q.* If not in some Cases against a Purchaser ; and *vide* of what Things a Purchaser must take Notice at his Peril, Title Notice [1 *Eq. Ca. Abr.* 330].

2. If a Term for Years is created for a particular Purpose ; as to raise Portions, &c., the Surplus shall go to the Heir. [*Best v. Stamford*,] 1 *Salk.* 154.

3. But where *J. S.* made her Will in the following Words, *viz.* *I ordain and constitute H. N. to be my Executor of this my last Will, and I do give all my Estate, Real and Personal, to dispose of for the Payment of all my just Debts, and for the performing of all such Legacies as I have herein, or by the Codicil annexed, bequeathed unto my Executor above-named ;* and gives several Legacies in Money, and amongst others £200 to her Uncle, who was Heir at Law ; and by a Codicil gives the Sister of *H. N.* her Executor £500, but gives him nothing ; it was held by my Lord Keeper and four Judges, that there was no resulting Trust for the Benefit of the Heir, and that *H. N.* had a Fee, for otherwise he would reap no Benefit by the Devise. *Hill.* 22 *Car.* 2 [1671], *North and Crompton*, 1 *Chan. Ca.* 196, 197.

4. If Lands are devised to Trustees to sell, and out of the Money arising by Sale, amongst other Sums, to pay £100 to his Heir at Law, and no Disposition is made by the Testator of the Surplus of his Estate, the Land shall not be turned into Personal Estate ; nor more sold than is necessary to pay the Legacies ; and the Heir shall have the Residue as a Resulting Trust. *Pasch.* 1701, *Randall and Bookey*, 2 *Vern.* 425. (*Prec. in Chan.* 162, *S. C. accord*.)

5. So if *A.* by Will devises his Land to Trustees to sell, and to dispose of the Money as he by Writing would appoint ; and for Want of Appointment, to his four Nephews, and *A.* by Writing appoints his Trustees to pay several Sums to several Persons, but not near the Value of the Land ; the Heir shall have the Residue, and not the Nephews, as an Interest resulting and not disposed of. Decreed *Hil.* 1706, *The City of London and Garway*, 2 *Vern.* 571.

6. If *A.* devises his Real Estate to Executors, to be sold for Payment of Debts, the Surplus, if any be, to be deemed Personal Estate, and go to his Executors, to whom he gives £20 a-piece, the Surplus shall be a Trust for the Heirs at Law. Decreed and affirmed in the House of Lords. *Countess of Bristol and Hungerford*, 2 *Vern.* 645. (*Vide S. C. ante* [1 *Eq. Ca. Abr.*] 244, and the books there cited in the margin.)

7. If Lands are devised to three Persons and their Heirs, to the Use of them and their Heirs, upon the Trusts after mentioned, and then the Testator directs them to convey Part to *A.* for Life, and other Part to *B.* in Tail, but gives no Direction as to the Remainder in Fee, though two of the Trustees be related to the Testator ; yet the Remainder will not belong to them, but be a resulting Trust for the Benefit of the Heir. *Hil.* 1709, *Hobart and Countess of Suffolk*, 2 *Vern.* 644.

[273] 8. But where *J. S.* by Will devised to his Cousin *T. M.* by Name, all his Messuage called, &c., to have and to hold to him and his Heirs for ever in trust, to be sold for the Payment of all his Debts and Legacies, within a Year after his Death ; and makes him Executor ; but gives him no Legacy, though he was as nearly related to him as the Heir at Law : And it was held by two Lords Commissioners against one, that there should be no resulting Trust ; for then the Executor, who was taken Notice of as Cousin, would have nothing but his Labour for his Pains. *Mich.* 1691, decreed *Cunningham and Mellish* ; which was affirmed in Parliament. (*Prec. in Chan.* 31 *S. C. accord*), and the Heir to join in a Sale of the Lands, *Ibid.* 32.)

(Lord Hardwicke in the Case of *Hill and Smith*, *Trin.* 12 *Geo.* 2 [1739], said, that he had looked into the Journals of Parliament, and could not find that this Case was affirmed. *MS. Notes.*)

(G) WHAT THINGS SHALL GO TO THE HEIR, AND NOT TO THE EXECUTOR.

1. If there be a Mortgage in Fee, and two Descents cast, and there is more due on it than the Value of the Land; and though the Mortgagor says he will not redeem, yet it shall go to the Executor, and not to the Heir; the Equity of Redemption not being foreclosed or released. *Mich.* 1699, *Tabor and Grover*, 2 *Vern.* 367.

(To whom the Mortgage Money is to be paid, *vide* Title Mortgages, Letter (B) [1 *Eq. Ca. Abr.* 313].)

2. But if a Mortgagee in Fee enters for a Forfeiture, and after seven Years Enjoyment absolutely sells the Lands to *J. S.* and his Heirs; this Estate shall not be looked upon to be a Mortgage in the Hands of *J. S.* so as to make it Part of his Personal Estate; but it shall be for the Benefit of the Heir. *Mich.* 1684, *Cotton and Hes*, 1 *Vern.* 271.

3. If a Man has several Mortgages, one of which is a Mortgage in Fee, on which he entered for a Forfeiture; and he devises those Lands which were mortgaged in Fee, to his two Daughters and their Heirs; and the other mortgages to them, their Executors, &c., and one of the Daughters dies, her Share of the mortgaged Lands in Fee shall go to her Heir, and not to her Administrator; for it was the Testator's Intent, that those Lands should pass as Real Estate, though between him and the Mortgagor they were but a Mortgage. *Hil.* 1706, *Noys and Mordaunt*, 2 *Vern.* 581. (*Prec. in Chan.* 265, *S. C. accord*. *Gillb. Eq. Rep.* 2, *S. C.* and Decree.)

4. If the Heir of the Mortgagee forecloses the Mortgage, yet the Land shall go to the Executor, unless the Heir thinks fit to pay him the Mortgage-Money, and then he may have the Benefit of the Mortgage. 2 *Vern.* 67 [*Clerkson v. Bowyer*].

5. If Money by Marriage-Articles be agreed to be laid out in Land, and settled on the Husband and Wife for Life, Remainder to their Issue, Remainder to the Husband in Fee; with a Proviso, that in case the Husband died without Issue, the Wife might make her Election, whether she would have the Land or Money: The Husband dies before any Purchase made, leaving his Wife *enseint* of a Daughter, who was born soon after his Death, but died at a Month old; this Money shall not be laid out in a Purchase, for the Benefit of the Heir of the Husband, but shall go to the Wife, as Administratrix to her Husband and Daughter; but it would be [274] otherwise, had a Bill been brought in the Life-time of the Infant; *per North*, Lord Keeper, *Hil.* 1684, *Kettleby and Atwood*, 1 *Vern.* 298, 299. But this Decree was reversed by Lord *Jefferies*, who held, that the Money was bound by the Marriage-Agreement. 1 *Vern.* 471. But if Money be agreed to be laid out in Land, in a Marriage-Settlement, and there is no Issue, whether this Money shall be looked upon as Land, and thereby defeat Simple Contract Creditors, *Quære* [*Best v. Stamford*] 1 *Salk.* 154.

6. If the Wife's Portion, and the like Sum of the Husband's Money, is agreed to be laid out in Lands, to be settled on them and the Heirs of their Bodies, without mentioning how the Remainder over should be limited, and they both die without Issue, and before any Purchase made; the Money shall be paid to the Heir of the Husband, and not to the Administratrix of the Wife, though she survived the Husband. *Pasc.* 1687, *Knight and Atkins*, 2 *Vern.* 20, 21.

7. If by Marriage-Articles it is agreed, without any positive Covenant, that £500 being the Wife's Portion, should by the Consent of the Husband and Wife be laid out in Lands, and settled on the Husband and Wife for their Lives, Remainder to the Heirs of their two Bodies, Remainder to the Heirs of the Body of the Wife, Remainder to the Wife's Brother in Fee, and the Wife dies without Issue, and then the Husband dies; the £500 not being laid out; this Money shall not be taken as Land, and therefore go to the Brother, to whom the Fee was limited; *per Trevor and Rowlinson*, Lords Commissioners, against *Hutchins*, *Pasc.* 1691; *Symons and Rutter*, 2 *Vern.* 227. (*Prec. in Chan.* 23, *Easter* 1691, *S. C.* says, *Trevor and Rowlinson* were of Opinion that the Money should not be laid out in Land, but should go to the Administrator of the Husband, for that there was no Child nor Creditor in the Case; and they did not take it to be the primary Intent of the Articles to have Land purchased, there being no express Agreement to purchase, but only that it might be purchased if the Husband and Wife should elect and agree to have it so; but *Hutchins cont.*, he thought that the Intent of the Parties was that Land should be purchased, and that for the Remainder-Man the Court ought to decree; and relied on the Case of *Annand and Honenwood*, *Withwick and Jermy*, *Atwood and Kettleby*, formerly adjudged in this Court.)

8. If a Man purchases Lands in his own Name, and takes an Assignment of a mortgage Term in the Name of a Trustee, yet the Term shall attend the Inheritance, and go to the Heir. *Hil.* 1680, *Tiffin and Tiffin*, 1 *Vern.* 1.

9. So if a Purchaser takes the Mortgage Term in his own Name, and the Inheritance in the Name of a Trustee, yet it shall go to the Heir, though not mentioned to attend the Inheritance. *Mach.* 35 *Car.* 2 [1683]. *North and Langton*, 2 *Chan. Ca.* 156; 2 *Chan. Rep.* 271, S. C. But where a Term attending on the Inheritance shall or shall not be Assets, *vide* what shall be Assets, Title Executor and Administrator [1 *Eq. Ca. Abr.* 235].

10. If a Woman, who is a *Cestui que Trust* of a Term, having the Inheritance in her, marries and dies; the Term shall attend the Inheritance, and not go to the Husband as Administrator of his Wife. *Mich.* 1705, *Best and Stamford*, 2 *Vern.* 520; 1 *Salk.* 154, S. C. (*Proc. in Chan.* 252, S. C.; 2 *Freem.* 288, S. C. *accord'*.)

11. If the Plaintiff's Father seised in Fee of Lands, articles to pay *J. S.* £1000 to build an House on the Premises, and dies before the House is built, the Heir may compel the Builder to build it, and the Father's Executor to pay for it. Decreed between *Holt and Holt*, *Mich.* 1694, 2 *Vern.* 322.

[275] 12. If the Dean and Chapter of ——— make a lease to a Man, his Executors and Administrators, for three Lives; this shall be a descendable Estate, and go to the Heir, and not to the Executor; *per Cur'*; but the Cause ended by Compromise. *St. John's College and Theming*, 2 *Vern.* 320.

13. Pictures and Glasses, tho' generally speaking, Part of the Personal Estate, yet if put up instead of Wainscot, or where otherwise Wainscot would have been put, shall go to the Heir, for the House ought not to come to the Heir maimed or disfigured. *Trin.* 1705, *Cave Domina and Cave Bart.* 2 *Vern.* 508. (*Vide* the Case of *Beck and Rebow*, 1 *P. Wms.* 91; 4 *Ca.* 61, *a.*)

(H) WHAT SHALL BE ASSETS BY DISCENT IN THE HANDS OF THE HEIR.

What shall be Assets, *vide* Title Executors and Administrators [7 *Eq. Ca. Abr.* 235].

1. An Equity of Redemption of a Mortgage in Fee, though not Assets at Law, yet is Assets in Equity; and if aliened or released by the Heir, he shall be answerable for the Value. *Pasch.* 1688, *Sawley and Gower*, 2 *Vern.* 61.

2. If a Man obtains Judgment against an Heir, who has a Reversion in Fee descended on him, the Judgment is only of Assets, *quando acciderint*, and the Creditor cannot by a Bill in Equity compel the Heir to sell the Reversion; but must expect until it falls. *Hil.* 1690, *Fortrey and Fortrey*, 2 *Vern.* 134.

(I) UNREASONABLE BARGAINS AND SECURITIES OBTAINED FROM YOUNG HEIRS, IN WHAT CASES TO BE SET ASIDE. *Vide* TITLE BONDS [1 *Eq. Ca. Abr.* 84].

Vide the Case of *Twisleton and Griffith*, *Eq. Ca. Abr.* Part 2. *p.* 510.

1. If an Heir Apparent be intitled to an Estate tail after the Death of his Father, which, if in Possession, is worth £800, and he is cast off by his Father, and destitute of all Means of Livelihood; and he for £30 paid him in Money, and £20 *per Ann.* secured to be paid him during the joint Lives of him and his Father, absolutely conveys his Remander in Tail to *J. S.* and his Heirs; and the Father lives ten Years after this Conveyance, yet the Heir shall be relieved against this Conveyance, although it was absolute; and though *J. S.* had lost his Money if the Heir had died in his Father's Life-time; *per Nottingham*, L. C., *Trin.* 34 *Car.* 2, *Not.* and *Hill*, 1 *Vern.* 167, 168. But upon a Re-hearing, this Decree was reversed by *North*, Lord Keeper, who said he could not relieve the Heir, unless it be declared a Law in Chancery, that no Man must deal with an Heir in his Father's Life-time; but upon a second Re-hearing, this last Decree was reversed, and the first established by *Jefferies*, L. C., who said, that he took it to be an unrighteous Bargain from the Beginning, and that nothing which happened afterwards could help it. 2 *Chan. Ca.* 120, S. C.; 2 *Vern.* 27, S. C.

2. If one intitled to an Estate, after the Death of two old Lives, takes £350 to pay £700 when the Lives fall, and mortgages the [276] Estate as a Security; though both the Lives die within two Years, yet there shall be no Relief against this Bargain. *Hil.* 1682, *Batty and Loyd*, 1 *Vern.* 141.

Note : These hazardous Bargains, with Heirs or others, are not always set aside in a Court of Equity, for they may be fair ; and it is only upon the Circumstance of Fraud, or being extremely unreasonable, that they can be overthrown : But Bargains of this Kind will not be assisted in a Court of Equity, though there are not sufficient Grounds to set them quite aside. *Vide* 1 *Vern.* 271 ; 2 *Chan. Ca.* 136, 137 ; 2 *Vern.* 15. And *Note*, That regularly the Party, who comes to be relieved, must restore the Money paid, &c., according to that Maxim in Equity, *He who would have Equity done him, must do it to others*. But for this, *vide* where Relief has been given against unreasonable Bonds obtained from young Heirs, Title Bonds and Obligations.

CAP. XXXIII.

OF IDEOTS AND LUNATICKS.

(A) Of Ideots and Lunaticks, who are such, how found, to whose Custody to be committed ; and here of the Power and Duty of their Committees, and of Abuses done them.

(B) What Acts of Ideots and Lunaticks are good, void or voidable.

(A) OF IDEOTS AND LUNATICKS, WHO ARE SUCH, HOW FOUND, TO WHOSE CUSTODY TO BE COMMITTED ; AND HERE OF THE POWER AND DUTY OF THEIR COMMITTEES, AND OF ABUSES DONE THEM.

1. The King by Letters Patent granted to A. the Custody of *C. D. Habendum* to A. his Executors, Administrators and Assigns, during the Ideocy of the said *C. D.* after the Death of A. *P.* obtain'd Letters Patent for the Custody of the said Ideot ; and upon arguing the Point, *viz.* whether the Custody of an Ideot can by Law be granted to a Man, his Executors, Admini-^[277]strators and Assigns, my Lord Chancellor inclined that it could not ; for though it be an Advantage and Emolument to the King, yet it is coupled with a Trust ; and if the Grantee should die intestate, or make an Infant Executor, it would be highly inconvenient ; and he said there was no Precedent of any such Grant from the Time of the making the Statute *de Præsumpt. Regis, Mich.* 1681, *Prodgers and Phrazier*, 1 *Vern.* 9. 1 *Vern.* 137, S. C. where it is said, that Lord Keeper North refused to do any Thing in it, till the validity of the Patent was determined in a legal Way. *Vide* 3 *Mod.* 43, S. C. where in *B. R.* the Grant to the Executors was held good ; for the King has the same Interest in an Ideot that he had in his Ward, which always went to the Executor of his Grantee ; but it was otherwise of a Lunatick.

2. If an Inquisition find that such a one was an Ideot for eight Years last past, such Inquisition is void ; for an Ideot must be found to be so *a nativitate*, otherwise is not an Ideot, but a Lunatick only. *Prodgers and Phrazier*, 1 *Vern.* 12, *per* Lord Chancellor. *Vide* 3 *Mod.* 43, S. C. in *B. R.*, where this Finding was held sufficient ; for the Inquisition finding the Party an Ideot, the adding eight Years was superfluous.

3. A Woman was found a Lunatick, and the Custody of her was committed to a Stranger ; on Application made by her Sister, to have the Custody ; she insisted, that as she was next of Kin, so she was the properest Person for that Purpose ; for being intitled to Administration to the Lunatick, she would be the more careful of her Effects ; and the Objection to a Guardian as next of Kin, who may inherit, will not hold in this Place, because there is no Inheritance. My Lord Chancellor held, that this was not a Matter of Right, but of Prudence, and that he would not remove her from the Custody of the Stranger, nor ever grant the Custody of a Lunatick to one who should make Gain of it ; but he said the Sister should be called to the yearly Account before the Master. *Lady Cox's Case*, 2 *Chan. Ca.* 239. (*Concerning the Custody of Lunaticks, Vide Hargr. Co. Lit.* 88 b, Note 6.)

4. A Lunatick, before he became such, made a Mortgage of a good Part of his Estate for £50, afterwards his Committee transferred this Mortgage, and took up 3 or £400 more upon it ; and my Lord Keeper declared, the Mortgage should stand a Security for £50 only ; and he likewise held that the Committee of a Lunatick has an Estate but during Pleasure, and therefore cannot make Leases, nor any ways incumber

the Lunatick's Estate, without special Order of this Court, where the Profits are not sufficient to maintain the Lunatick. And as to Improvements and Buildings, made by a Committee, on the Lunatick's Estate, that the Heir. upon the Lunatick's Death, must be let into the Estate, without making any Allowance for such Improvements. *Mich. 1684, Foster and Merchant, 1 Vern. 262.*

5. The Committees of a Lunatick, having invested Part of the Lunatick's Personal Estate in a Purchase of Lands, made in the Lunatick's Name, to him and his Heirs; the Question was, whether the Committees had not exceeded their Power, by changing the Personal Estate into a Real Estate, and thereby defeating the next of Kin, in Favour of the Heirs at Law. And after great Debate, and upon reading the Statute made touching the granting of the Custody of Lunaticks, whereby it is provided, that the Surplus shall be safely kept and delivered to him, if he recover; if not, upon his Death to be employed for the Benefit of his Soul, [278] &c. The Court decreed an Account of the Personal Estate, and the Lands purchased to be sold, and the Money to go and be divided as Personal Estate, amongst the next of Kin. *Mich. 1690, Awdley and Awdley, 2 Vern. 192 [Dick. 16].*

6. If a Man forcibly takes away a Lunatick, whilst she is under Commitment, and marries her, this is such a Contempt, for which the Court of Chancery will commit him; but if the Marriage is afterwards held good in the Spiritual Court (as it may be by being consummated in one of her lucid Intervals), and if upon Inspection it appears, that she is restored to her Understanding, the Husband shall be discharged, and the Commission of Lunacy vacated. *Trin. 1702, Mrs. Asher's Case. (Prec. in Chan. 203, Trin. 1702. S. C. under the Name of Mrs. Asher's Case, states it; Mrs. A. who was committed as a Lunatick was forcibly taken away by P. and married to him (for which Contempt P. was committed), and the Marriage controverted in the Spiritual Court; and she was now brought into Court to be inspected, and Lord Keeper was of opinion she was in her right Mind; and the Question was, whether she should be discharged of the Commitment, and left to her Husband, or if she were to be continued under Commitment, if her Husband should be the Committee? Lord Keeper said, though she is not out of Order now, she may be again: the Commitment is Regium munus, not a Prerogative, but a Duty, and the Marriage though good is no Supersedes to it; but he thought she ought not to go back again to the same Commitment, though he would not now discharge her from it; He said, suppose she did contract when mad, and agreed and consummated when sober, it would be good. The Reporter adds, that Sir John Cook being asked, if he had known the Party sequestered, where the Marriage was consummated, answered, Yes, often, how else shall the Marriage be controverted. Ibid. 204.)*

(B) WHAT ACTS OF IDEOTS OR LUNATICKS ARE GOOD, VOID OR VOIDABLE.

1. If a Man who is *Non Compos Mentis* aliens Lands, this shall not be restored to himself in Chancery, upon a Matter of Equity, against the Maxim of the Common Law. *1 Roll. Rep. per Lord Chancellor and J. Dodderidge. Q.*

2. *J. S.* by Inquisition was the 23d of June 1664, found a Lunatick, with a Retrospect of 17 Years; it was likewise found, that he assigned a Debt sufficiently secured to him for the Purchase of a certain Manor; and on a Bill brought in his Behalf by the Attorney General, Justice *Tyrril* held, that he ought to be relieved, and of the same Opinion was my Lord Keeper, on a Rehearing; and said, that it was not necessary, that the Lunatick should be a Party, but gave the Defendant Leave to traverse the Inquisition. *Mich. 20 Car. 2. The Attorney General on Behalf of Smith a Lunatick and Sir Robert Parkhurst, 1 Chan. Ca. 113. Vide [Att.-Gen. v. Woolrich] 1 Chan. Ca. 153. S. C. cited, and there held, that it is necessary, that the Lunatick should be made a Party; secus of an Ideot, and that it was dispensed with in the above Case, because he should not be admitted to stultify himself.*

3. If A. Tenant for Life, with Remainder to his first Son in Tail, Remainder to B. in Fee, and A. being *Non Compos*, surrenders by Deed to B. before he has a Son, this Deed of Surrender is absolutely void, and the contingent Remainder not destroyed. *Thomson and Leach; adjudged in B. R. and affirmed on a Writ of Error in the House of Lords. Shaw. P. C. 150; 2 Salk. 427, S. C.; 3 Lev. 284; 2 Salk. 576, S. C. vide [White v. Small] 2 Chan. Ca. 103, where a Conveyance made by a Person of weak Understanding was set aside; and [Portington v. Eglinton] 2 Vern. 189.*

4. A. obtained a Purchase at a great Undervalue by Deeds, Fines and Recoveries, from one who was a Lunatick, and on Application of his Committee, the Purchase was set aside. [Addison v. Dawson.] 2 Vern. 678. Vide [Clerk v. Clerk] 2 Vern. 414. that a Settlement made by a Lunatick, though not unreasonable, shall be set aside: vide [Ex parte Wright] 1 Vern. 155. where the [279] Court directed that a Settlement, which was intended to be made by one who was found a Lunatick, but it was urged was restored to his Understanding, should be made by Fine in C. B. that the Judges might inspect and examine him: vide [Sackvill v. Ayleworth] 1 Vern. 105. that a Will made by one who afterwards becomes *Non Compos*, is not revoked by his being found afterwards a Lunatick; and that a Bill will not lie to establish the Testimony of the Witnesses to it in *Perpetuam rei Memoriam*.

* 5. A Bill was brought by a Lunatick and his Committee, to set aside a Settlement, which had been obtained from him by the Defendant, before the issuing out of the Commission of Lunacy; but subsequent to the Time, wherein by the Commission he was found to have been a Lunatick; and the Bill charged several Acts of Insanity and Distraction, previous to the making of the Settlement, and the Issuing out of the Commission; and charged likewise that the Commission of Lunacy was still in Force. To this Bill the Defendants demurred, for that 'twas against a known Maxim of Law, that any Person should be admitted to stultify himself, because, during the Continuance of the Lunacy, he cannot be supposed to know what he did: But my Lord Chancellor over-ruled the Demurrer, and said, that Rule was to be understood of Acts done by the Lunatick to the Prejudice of others, that he should not be admitted to excuse himself on Pretence of Lunacy; but not as to Acts done by him to the Prejudice of himself; besides, here the Committee is likewise Plaintiff, and the several Charges of Lunacy are by him, in Behalf of the Lunatick; and it has been always held, that the Defendant must answer in that Case; and so he was ordered to do here, though the Settlement was not unreasonable in itself, being only to limit the Estate in Question to the Defendants, the Uncles, in case of Failure of Issue Male of the Lunatick, with Power for the Lunatick to charge the same with considerable Portions for his three Daughters, and a Power of Revocation. Mich. 1729, *Röller and Röller*, at my Lord Chancellor's.

[280] CAP. XXXIV.

INFANT.

- (A) Infants, how far favoured in Equity.
- (B) How far bound in Equity, or less favoured than at Law.
- (C) What Acts of Infants are good, void, or voidable.

(A) INFANTS, HOW FAR FAVOURED IN EQUITY.

1. If a Man intrudes upon an Infant, he shall receive the Profits but as Guardian, and the Infant shall have an Account against him in Chancery, as Guardian. Vide *Newburgh v. Bickerstaffe*, Vern. 295, 296.

(The Interest of Infants is so far regarded and taken care of in this Court, that no Decree shall be made against an Infant, without having a Day given him, to shew Cause, after he comes of Age: an Infant may by *Prochein Amy* call his Guardian to an Account, even during his Minority: If a Stranger enters and receives the Profits of an Infant's Estate, he shall, in Consideration of this Court, be looked upon as a Trustee for the Infant. Per Lord Ch. in his Argument of the Case of Lord *Fulford* and *Bertie*, 2 Vern. 342, this Court will decree building Leases for sixty Years, of Infants' Estates, when it appears to be for their Good. 2 Vern. 225.)

* 2. If a Man, during a Person's Infancy, receives the Profits of an Infant's Estate, and continues to do so for several Years after the Infant comes of Age, before any Entry is made on him; yet he shall account for the Profits throughout, and not during the Infancy only. Decreed *Pasch. 1699, Yallop and Holworthy*.

(S. C. ante [1 Eq. Ca. Abr.] 7.)

3. An Infant cannot be foreclosed, without a Day to shew Cause after he comes of Age; but the proper Way in such a Case is to decree the Lands to be sold to pay the Debts, and that will bind the Infant; *per Cur.* Booth and Rich, 1 Vern. 295. But if there be a Mortgage, and it depends upon a disputable Title, so that no Money can be had by an Assignment of it over, Equity will not decree an Infant to be foreclosed till he comes of Age. [Sayle v. Freeland,] 2 Vent. 351.

4. If Lands are devised to be sold for Payment of Debts, the Lands may be decreed to be sold without giving the Heir, who is an Infant, a Day to shew Cause, when he comes of Age, for nothing descends to him; but if he is decreed to join in the Sale, he [281] must have a Day after he comes of Age. Decreed on a Bill of Review, *Hil.* 1701, Cooke and Parsons, 2 Vern. 429. (*Prec. in Chan.* 184, S. C. and P.)

5. If an Infant puts in an Answer by Guardian, and there is a Decree against him, without any Day given him to shew Cause, such Answer shall not be read, or admitted as Evidence against him when he comes of Age; but if a superannuated Defendant puts in an Answer by his Guardian, it shall be read against him at any Time after; for he is supposed to grow worse, and is not to have a Day to shew Cause. *Per* Lord Keeper, *Trin.* 1704, *Sir Richard Lering and Lady Caverly.* (*Prec. in Chan.* 229, S. C. accord.)

6. If A. devises Lands to Trustees until Debts paid, and then to an Infant and his Heirs, and J. S. enters and levies a Fine, and five Years pass, and the Infant, when of Age, brings an Ejectment, but is barred, because the Trustees should have entered; yet Equity will relieve, and not suffer an Infant to be barred by the Laches of the Trustees, nor to be barred of a Trust Estate during his Infancy; and the Infant, in this Case, shall recover the mean Profits. Decreed *Mich.* 1699, *Allen and Sayer*, 2 Vern. 368. (S. C. *ante* [1 Eq. Ca. Abr.], 258.)

7. A Court of Equity may, by the Approbation of an Infant's Relations, allot the Infant Maintenance out of a Trust Estate, though there be no Provision in the Trust for that Purpose; and this is founded on natural Equity. *Trin.* 1691, *Englefield and Englefield*, 2 Vern. 236.

(B) INFANTS, HOW FAR BOUND IN EQUITY, OR LESS FAVOURED THAN AT LAW.

1. Infants have been obliged to answer in Equity, when the Parol should have demurred at Law. *Toth.* 108.

2. A Sequestration may issue against an Infant. [Anonymous,] 2 *Chan. Ca.* 163.

3. Infants may be foreclosed of the Equity of Redemption. *Vide* 2 Vent. 350. *Vide* [Booth v. Rich] 1 Vern. 295, *not without a Day to shew Cause after coming of Age.*

4. If an Ancestor dies indebted by Bond, in which the Heir is expressly bound, and leaves no Personal Assets, and the Lands descend on an Infant Heir, whether Equity will, during the Minority of the Heir, decree Satisfaction, *Quare*; & *vide* *Creed v. Corile*, 1 Vern. 172, where it is said, that Infants may be sued in Equity, and that there is no Precedent, that the Parol should demur; and [March v. Bennett] 1 Vern. 428, where the Master of the Rolls said, that he thought such a Decree reasonable; but the Reporter adds a *Dubitatur* to it.

5. If one gives her Son other Lands in Lieu of Lands intailed, and by her Will gives her intailed Lands to her Daughter, and takes a Bond from her Son to permit her Daughter to enjoy the intailed Lands, and the Son dies, leaving an Infant Son, who being in Possession of the Lands that came in Recompence, brings an Ejectment for the intailed Lands; but by Reason of the Infancy of the Grandson, the Bond cannot be sued; if the Daughter brings a Bill, she shall by Decree be quieted in Possession of the intailed [282] Lands, until six Months after the Infant comes of Age, and then the Infant may shew Cause. *Trin.* 1691, *Thomas and Gyles*, 2 Vern. 232.

6. If Lands are given by Will to a Woman and the Heirs of her Body, and it is declared, that if she left no Sons, and only two Daughters, the eldest should pay the youngest £300 and have the whole Estate; if there are two Daughters only, and the £300 is not paid, and the younger brings a Bill for an Account of Profits, and for Possession of Half the Estate; the Court will decree the eldest Sister, though an Infant, to pay the £300 in six Months, with Interest from the Mother's Death, or in default, to account for Profits of a Moiety, and the Moiety to be set out by Commissioners, and to be held and enjoyed by the younger Sister; but the elder, being an Infant, must

have a Day to shew Cause when she comes of Age. *Hil.* 1704, *Gouldry and Baynard*, 2 *Vern.* 479.

7. An Infant shall be bound by Conditions in Fact, and such Conditions as he can perform, in Equity as well as in Law. *Vide Fry and Porter's Case*, 1 *M. & S.* 509; 2 *Vern.* 343.

(An Infant is bound by all Conditions, Charges and Penalties in an original Conveyance, whether he comes to the Estate by Grant or Descent. 1 *Iust.* 233 *b.*)

8. A. gave Lottery-Tickets amongst her Servants, on Condition, that if any of them came up a Prize of £20 or more, they should give one Half to her Daughter: the Ticket given the Foot-Boy, who was an Infant, came up £1000 Prize; and it was held, that the Daughter was well intitled to a Moiety; for a Gift to an Infant, on Condition, binds him as well as another Person. *Trip.* 1706, *Scot and Haughton*, 2 *Vern.* 560. (*Cujus est dare, ejus est disponere.*)

(C) WHAT ACTS OF INFANTS ARE GOOD, VOID, OR VOIDABLE.

1. If an Infant sells Lands for Money, and purchases other Lands with the Money; yet this Sale made by the Infant shall not be helped in Chancery, because the Person of the Infant is disabled by a Maxim in Law. 16 *Jac.* 1 [1618-19], *per* Lord Chancellor, *Dodderidge and Hutton*, 1 *Roll. Abr.* 376.

2. But if an Infant makes an Agreement, and receives Interest under it after he comes of full Age, such Agreement shall be decreed against him. *Hil.* 1682, *Franklin and Thornebury*, 1 *Vern.* 132.

3. So if an Infant makes an Exchange of Lands, and continues in Possession after he comes of Age, he shall be bound by it. [*Cecil v. Salisbury.*] 2 *Vern.* 225, *per Curiam.*

4. If A. an Infant, desires that Lands subject to a Trust for Payment of younger Children's Portions might not be sold, and offers by his Answer to settle other Lands for raising the Portions: A. shall be bound by the Offer made by him in his Answer, if the other Side are thereby delayed, and if the Infant A. does not immediately after his coming of Age apply to the Court in order to retract his Offer, and amend his Answer. Decreed, *Cecil and The Earl of Salisbury*, 2 *Vern.* 224.

5. If an Infant borrows a Sum of Money, for which he gives a Bond, and devises his Personal Estate (being of sufficient Capacity) [283] for the Payment of his Debts, particularly those he had set his Hand to, this Bond-Debt shall be paid. Decreed 1651, *Hampson and Lady Sydenham*, *Nel. Chan. Rep.* 55.

6. If an Infant Executor assents to a Legacy, such Assent shall be good, if there are sufficient Assets besides to pay Debts; *secus* not. [*Chamberlain v. Chamberlain.*] *Per* Lord Keeper *Finch*, 1 *Chan. Ca.* 256.

(An Infant Executor, before seventeen Years of Age, cannot bind himself by his Assent to a Legacy. 5 *Rep.* 29; *Cro. Eliz.* 719.)

7. An Infant may administer at seventeen, but cannot commit a *Deceit* till he is of full Age. [*Whitmore v. Weld.*] *Per* North, Lord Keeper, 1 *Vern.* 328.

Where an Infant is made Executor, Administration must be granted *cum Testamento annexo* to his Guardian, or next Friend, *durante Minoritate*; but the Administration ceases when the Infant is seventeen Years of Age: so if an Infant Executrix, before seventeen Years of Age, taketh a Husband of full Age, the Administration presently ceaseth. 5 *Rep.* 29; 6 *Rep.* 67; 2 *Iust.* 398. But if an Infant is intitled to an Administration of the Goods of an Intestate, Administration shall be granted to another till he is twenty-one; because a *Minor* cannot enter into a Bond, with Sureties, to administer faithfully, as required by the 22 & 23 *Car.* 2.

8. An Infant Female may make a Will, and dispose of her Personal Estate at twelve: an Infant Male at seventeen, or at fifteen, if proved to be of Discretion; agreed in the Case of *Bishop and Sharp*, 2 *Vern.* 469, by the Civil Law at fourteen: and this Age is now admitted of in Chancery.

9. An Infant may be a Trustee. [*Scot v. Haughton.*] 2 *Vern.* 561.

(And by the 7 *Ann.* cap. 19, Infants seised or possessed of Estates in Fee, in Trust, or in Mortgage, are enabled to make Conveyances of such Estates.)

* 10. In this Case it was urged, that by the Custom of Merchants, Infants were compellable to account as Factors; but the Court held, that though an Infant may be an Executor, and shall be charged, because the Law enables him; and may also be

charged in Trover, because a Tort ; yet neither on a Contract, nor as Bailiff, nor for Goods to carry on a Trade, can he be charged ; and therefore when they are made Factors, Security ought to be taken from their Friends, for their accounting. *Trin.* 1700, *Smally and Smally*. (*S. C. ante* [1 Eq. Ca. Abr.], 6.)

11. A. had married an Heiress, who was but eighteen Years of Age, and she being with Child, A. petitioned the King, that he would be pleased by *Privy Seal* to direct his Justices of the *Common Pleas* to take a Fine or Common Recovery, so that the Petitioner may be sure of an Estate for Life in the Premises. The King in Answer said, that he was satisfied of the Petitioner's Merit, but referred it to the Lord Chancellor, to report what was fitting to be done therein ; who, upon hearing Counsel, declared he thought the Petition reasonable, and that he would report the same to the King accordingly. *Sir Humphry Mackworth's Case*, 1 *Vern.* 461. Note : *Serj. Maynard* observed, that the Petition was inartificially drawn, in praying, that a Fine or Common Recovery may be taken, for that a Fine cannot be taken from an Infant, but a Recovery may, by the King's special Direction.

(An Infant, either by himself, or Guardian, cannot suffer a Common Recovery ; but if he obtains a Privy Seal for that Purpose, he may suffer a Recovery. 10 *Rep.* 43. Where such Recoveries have been, *vide Hob.* 199 ; *Cro. Car.* 307 ; 1 *Roll. Abr.* 731. And *vide* 2 *Salk.* 567, where *J. S.* being of the Age of nineteen Years, his sister, who was the next in Remainder, and also his Heir, married one of his Footmen, and he petitioned the King for Leave to suffer a Common Recovery, who referred it to the Judges of the Common Pleas, before whom several Precedents of Recoveries suffered by Infants upon Privy Seals, were cited : but the Judges having observed, that seven of the Petitions were by Fathers, upon the Marriage of their Sons, and an equal Recompence given, and that here was neither Father nor Marriage in the Case, they disallowed it, and said, that this Matter had been carried too far already.)

[284] CAP. XXXV.

INJUNCTION.

- (A) Injunctions, in what Cases, and when to be granted.
- (B) What shall be a Breach thereof.

(A) INJUNCTIONS, IN WHAT CASES, AND WHEN TO BE GRANTED.

1. A Trustee having contracted to sell an Estate to one Person, and the *Cestui que Trust* having actually sold it to another, who moved for an Injunction to quiet him in the Possession, being disturbed by the Trustee ; it was held by my Lord Keeper that an Injunction for quieting the Possession, is only grantable where the Plaintiff has been in Possession for the Space of three Years before the Bill exhibited, upon a Title yet undetermined ; or in case the Cause hath been heard, and Judgment passed upon the Merits of the Cause by the Court. *Lady Poines's Case*, 1 *Vern.* 156.

(Injunctions to stay Waste, *vide* Title Waste : Injunctions to stay Proceedings at Law, *vide* Title Courts, and their Jurisdiction. That Chancery will not grant an Injunction, unless a Right appears, *vide* 1 *Vern.* 127 ; 2 *Chan. Ca.* 165 ; 1 *Vern.* 276, 120 ; will grant a perpetual Injunction, *vide* 2 *Chan. Ca.* 80 ; 1 *Chan. Ca.* 75 ; 2 *Chan. Ca.* 165.)

The Lessee of an ancient Mill on the River R. filed his Bill, praying to be quieted by Injunction in the Possession of his Mill, and that the Defendant might be decreed to pull down several Works erected by him, to the Obstruction of the Plaintiff's Enjoyment, and be restrained by Injunction from building other Works, &c. Upon a Demurrer for that Plaintiff ought to have established, at Law, his Right in the Premises, before he required the Aid of this Court ; Lord Thurlow, Chan., said, I take it to be a Head of Equity to interpose, by Way of Injunction, when a Party is erecting new Works upon an old Possession, but, that when the Works have been permitted to remain Three Years, it is considered as such a Laches as to preclude the Party from having Relief here, without going first to Law. In this Case it has been put upon this Ground, that

it is within the Equity of this Court to take ex ab origine a Question whether a Right is violated or not. It struck me immediately from a general Recollection of the Cases, that the Court has exercised no such Jurisdiction. And he accordingly allowed the Demurrer. Weller v. Smeaton, [1] Bro. Chan. Ca. 572.

2. If a Person is sued at Law for irregularly serving the Process of this Court, an Injunction will be granted to stay the Proceedings at Law, for the Irregularity is only punishable in this Court. *Baily v. Devereux, 1 Vern. 269.*

3. An Injunction is never to be granted before a Bill filed. 4 *Inst. 92, vide [Lady Poines's Case] 1 Vern. 156*, where it is said, that the Defendant cannot have an Injunction, because he has no Bill filed.

4. But where a Mortgagee brought a Bill to foreclose, and pending the Suit, an Advowson appendant to the mortgaged Manor became void; and the Mortgagee being hindered from presenting, brought his *Quare Impedit*; the Court granted an Injunction on the Application of the Mortgagor, who was ready and offered to pay the Principal, *Interests and Costs*, though he had no Bill filed. [*Amhurst v. Dawling.*] 2 *Vern. 401.*

[285] * 5. So where a Cause abated by the Death of the Lady *Gerrard*, and the Defendant was her Executor, who being served with a Copy of the Bill of Revivor, and my Lord Keeper's Letter, would not appear, being in Privilege; upon Motion an Injunction was granted, though the Cause was not revived; and the Case of *Armstrong and Jackson* was cited, where, before a Demurrer determined, the Plaintiff had an Injunction on Motion. *Trin. 1700, The Duke of Hamilton and The Earl of Macclesfield.*

* 6. So where the Lord *Wharton* had an Injunction to quiet him in the Possession of the Mines in Question; and upon Hearing of the Cause, an Issue was directed, to try whether the Mines in Question were within the Plaintiff's or Defendants' Manor; the Issue was tried at Bar, and found for the Plaintiff; then the Plaintiff died, and a Bill of Revivor was brought; and before the Time for answering was out, or the Cause revived, the Plaintiffs moved for an Injunction to stay the Lord *Wharton's* working the Mines, having Affidavits, that since the Verdict against him, he had trebled the Number of Workmen, and between that and *Candlemas* would work out the Mines; an Injunction was granted, though the Cause was not revived. *Mich. 1702, Robinson and Lord Wharton.*

(B) WHAT SHALL BE A BREACH THEREOF.

1. If there be a Suit in Equity concerning Title to a Close, and thereupon an Order is made, that the Defendant shall suffer the Plaintiff to enjoy the Close, till, &c., and notwithstanding the Defendant, upon a Title of Common, puts in his Cattle; this is no Breach of the Injunction, for the Common was not in question by the Bill. *Hil. 8 Jac. 1, Bent's Case, Lane, 96.*

2. In this Case, the Question was, whether the Plaintiff was intitled to Relief for mesne Profits received by the Defendant whilst a Cause was pending in this Court; and the Defendants had an Injunction; and my Lord Keeper held he was not intitled, but from the Time of Entry; for if the Plaintiff entered, he might recover at Law, and the Injunction did not prevent his Entry. *Mich. 1705, Tilly & Ur and Bridger & al', 2 Vern. 519.*

[286] CAP. XXXVI.

INTEREST MONEY.

(A) What Debt shall carry Interest, and from what Time.

(B) Where there may be Interest upon Interest.

(C) Where the Interest may exceed the Penalty.

(D) How Debts, contracted before the Statutes that restrain Usury, shall carry Interest.

(E) What Interest a Debt contracted in a Foreign Country shall carry here.

(A) WHAT DEBT SHALL CARRY INTEREST, AND FROM WHAT TIME.

1. If A. gives a Legacy to his Grandaughter an Infant, to be paid at such Time, and in such Manner as his Wife, who was his Executrix, should think fit and best for his

Granddaughter ; and the Executrix lives near twenty Years, and dies without paying the Legacy ; the Legacy shall be paid with Interest from the Death of A. though there was no Demand made of it in the Life of the Executrix. Decreed *Trin.* 1687. *Church-hill* and *Lady Speake*, 1 *Vern.* 251. A Legacy payable at a certain Day, shall carry Interest from that Day. *Vide in Palmer v. Trevor*, 1 *Vern.* 262, but *Quare*, whether there must not be a Demand ; for,

2. Where a Legacy was devised to J. S. to be paid at a certain Time, yet it was held, *per* Lord Keeper, that it should not carry Interest, but from the Time of a Demand made ; though otherwise of a Debt. *Pasch.* 1701, *Joliff* and *Crew*. And *vide* [Smell v. Dee] 2 *Salk.* 415, where it was held *per* *Cowper*, Lord Chancellor, that in case of a Person of full Age, he shall not have Interest but from the Time of Demand ; *secus* of an Infant, because Laches shall not be imputed to him. (*Precedent in Chan.* 161, S. C. and P.)

3. If a Mortgage is forfeited, and the Mortgagor meets the Mortgagee, and says to him, *I have Money now, I will come and redeem the Mortgage* ; and the Mortgagee replies, that *he would hold the mortgaged Premises as long as he could, and when he could hold* [287] *them no longer, let the Devil take them if he would*. And afterwards the Mortgagor goes to the Mortgagee's House with Money, more than sufficient to redeem the Mortgage, and tenders it there ; but it does not appear, that the Tender was to the Mortgagee, or that he was within ; yet a Redemption will be decreed, and the Mortgagee shall have no Interest from the Time of the Tender, because of his Wilfulness. Decreed *Mich.* 15 *Car.* 2, *Manning* and *Burges*, 1 *Chan. Ca.* 29, and a like Case said to be *Peckham* and *Legay*, about a Year before. (2 *Freem.* 174, *accord*.)

But for this *vide* Title Mortgages, Letter (D) [1 *Eq. Ca. Abr.* 317].

(B) WHERE THERE MAY BE INTEREST UPON INTEREST.

* 1. J. S. mortgaged his Estate to the Plaintiff, and died, leaving the Defendant his Daughter and Heir, who was an Infant, and had nothing to subsist on but the Rents of the mortgaged Estate ; and the Interest being suffered to run in Arrear three Years and a Half, the Plaintiff grew uneasy at it, and threatened to enter on the Estate, unless his Interest might be made Principal ; upon which the Defendant's Mother, with the Privy of her nearest Relations, stated the Account, and the Defendant herself (who was then near of Age) signed it ; and the Account being admitted to be fair, it was held by my Lord Chancellor, that though regularly Interest shall not carry Interest, yet that in some Cases and some Circumstances it would be Injustice if Interest should not be made Principal ; and the rather in this Case, because it was for the Infant's Benefit, who, without this Agreement, would have been destitute of Subsistence. Decreed *Pasch.* 1699, *The Earl of Chesterfield* and *Lady Cromwell*, and affirmed by my Lord Keeper *Wright*, *Mich.* 1701.

[*Mews' Dig.* Mortgage, C, 4, a. See *Cottrell v. Finney*, 1874, L. R. 9 Ch. 548.]

2. If a Mortgagee assigns over the Mortgage, all the Money due to the Mortgagee for Principal and Interest being paid by the Assignee, the Interest shall be accounted Principal in the Hands of the Assignee, but the Account between him and the Mortgagee shall not include the Mortgagor ; neither shall the Interest be accounted Principal, unless there was a fair and actual Assignment, and the Money really paid. *Pasch.* 17 *Car.* 2, *Smith* and *Pemberton*, 1 *Chan. Ca.* 67 ; *vide* [Anonymous] 1 *Chan. Ca.* 258, S. P. *per* Lord Keeper, and by him said to be the constant Rule in Equity ; and that there was not a Case to contradict it, except that of *Porter* and *Hobart* in Lord *Shaftsbury's* Time ; *vide* [Macclesfield v. Fitton] 1 *Vern.* 168, 169, S. P., where my Lord Keeper said, that he thought it reasonable that the Interest should carry Interest with Respect to an Assignee ; and that though it was resolved otherwise in the House of Lords, in the Case of *Porter* and *Hobart* ; yet it was on account of the particular Hardships which attended that Case in all its Circumstances.

3. If A. mortgages for £450, payable at the End of five Years, with Interest at £5 *per Cent.* in the mean Time ; and about two Months before the End of the five Years, the Mortgagee assigns over the Mortgage for £560 being the Principal and Interest then due ; the £560 shall carry Interest, though the five Years were not elapsed, the Mortgage being forfeited by the Non-payment of Interest. Decreed *Hil.* 1690, *Gladman* and *Henchman*, 2 *Vern.* 135 ; *vide* [Anonymous] [288] 1 *Chan. Ca.* 258, where it was declared by my Lord Chancellor, that it should be a Rule, that a Mortgagee (the Mortgage being forfeited) should have Interest for Interest ; but *Q.*

(C) WHERE THE INTEREST MAY EXCEED THE PENALTY.

1. If one by Will or Deed subject his Lands for the Payment of his Debts, and there is a Debt due by Bond, the Interest of which hath out-run the Penalty, yet it shall not carry Interest beyond the Penalty; for the Design of subjecting the Lands was not to increase the Debt, but to give a farther Security; but if the Devisee or Trustee neglects to pay in a reasonable Time, he shall, after such Neglect, pay Interest Beyond the Penalty; *per Cowper*, Lord Chancellor [Anonymous], 1 *Salk.* 154.

(Though it be the regular Practice in Equity, as well as at Law, that an Obligor should not pay more than the Penalty of the Bond, the Obligee having chosen his own Security, and made himself Judge. *Vide* 1 *Vern.* 342; 2 *Vern.* 509. (Note: to this Case the Reporter makes a Quare.) Yet the Court of Equity will sometimes extend the Debt beyond the Penalty; as where the Obligee has been delayed by Injunction; *vide* 1 *Vern.* 350, so if delayed by Privilege of Parliament; *vide* *Show. P. C.* 15, but Note: a Diversity is often taken, where the Obligee and where the Obligor sues in Equity: For in the last Case the Court will sometimes upon relieving against the Penalty, decree Principal and Interest, though the Interest exceed the Penalty, pursuant to that Rule, that *He who would have Equity done him, must do it to others*. And this seems to be the Reason, why an Obligee shall have Interest after he has entered up Judgment: for though in Strictness, it may be accounted his own fault, why he did not take out Execution; yet as by the Judgment he is intitled to the Penalty, it does not seem reasonable that he should be deprived of it, but upon paying him Principal, and the Interest which incurred as well before as after the entering up of the Judgment.)

(D) HOW DEBTS, CONTRACTED BEFORE THE STATUTES THAT RESTRAIN USURY, SHALL CARRY INTEREST.

1. If a Mortgagee receives Interest upon an old Mortgage, after the Rate of £8 *per Cent.* after such Time as the Interest is reduced to £6 *per Cent.* by the Statute, yet he shall not be obliged to allow or discount the £2 *per Cent.* towards Satisfaction of the Principal. Decreed *Trin.* 1688, *Walker and Peoria*, 2 *Vern.* 78; 2 *Vern.* 145, S. C., where upon a Bill of Review, *Randolph and Hatchings*, Lords Commissioners, held the Decree should be reversed, against Lord *Treco*; but it seems to be now settled, that the Statute of 12 *Ann. cap.* 16, which reduces the Interest of Money to £5 *per Cent.* has not a Retrospect to any Debts contracted before, but that they should carry Interest according to the Interest allowed, or Agreement made at the Time the Debt was contracted.

(E) WHAT INTEREST A DEBT CONTRACTED IN A FOREIGN COUNTRY SHALL CARRY HERE.

* 1. *J. S.* contracted a Debt in *Ireland*, for which he gave a Bond, and coming into *England* he was arrested here for the Debt; and having brought a Bill for Relief, he insisted among other Things, that he should not be obliged to pay *Irish* Interest, the Money being now to be paid here; but the Court held that he [289] must pay *Irish* Interest, and that in all Cases Interest must be paid according to the Law of the Country where the Debt was contracted, and not according to that where the Debt is sued for; but held it reasonable, as the Money was now to be paid here, that the Plaintiff should have an Allowance for the Return of it out of *Ireland*. *Trin.* 1702, *The Earl of Bunnannon and Hackett*, and several Precedents were cited to this Purpose, as the Case of *Lane and Nichols*, in which *Turkish* Interest was allowed on a Contract made there, though both Parties had been long in *England*; so *Indian* Interest was allowed on a Contract made there, *Harvey* and *The East India Company*; and a Case on the Earl of *Dowry*'s Will, who living in *England* devised a Rent charge out of his Estate in *Ireland*; and it was held that it should be according to the *Real Value*, the Will being made here.

(*Vide* *Ekins* and *East India Company*, *Eq. Ca. Abr.* Part 2, p. 533, S. P. decreed Note, the Case of *Harvey v. East-India Company* is reported in 2 *Vern.* 395; 2 *Eq. Ca. Abr.* 281, but neither of those Reports relate to this Point.)

2. If a Debt be contracted in *Ireland*, and a Bond given for securing it in *England*, it shall carry *English* Interest, *Mich.* 1700, *L. Ranelagh* and *Sir John Champant*, 2 *Vern.* 395, but *Quare* of this Report; for it appears, that *Sir John Champant* was Deputy Receiver to *L. Ranelagh*, who was Vice-Treasurer of *Ireland*; and that he had accepted and paid several Bills drawn on him by my Lord from *England*, amounting to a great deal more than the Fees and Profits of his Place; and that my Lord sent him over a Bond for the Overplus payable there; and it was held, that this Bond, on a Suit here, should carry *Irish* Interest.

* 3. The Plaintiff being a Merchant, had Sugars due to him in *Neris* on Bond, with Interest at £10 *per Cent.* being the Common Interest of the Country; he intrusted one *J. S.* his Agent there, to receive those Sugars, and to return them hither. *J. S.* receives the Sugars, but never returns them, but dies, leaving the Defendant his Executor, against whom the Plaintiff brought his Bill; and though it was urged, that *J. S.* being an Attorney, should be excused from Interest, or at most should only pay the Interest this Country allows; yet it was held, that the Defendant should pay £10 *per Cent.* Interest, and that *J. S.*'s being only an Agent or Attorney, did not excuse him, because he had misbehaved himself. *Trin.* 1701, *Ellis* and *Loyd*.

[290] CAP. XXXVII.

JOINTENANTS AND TENANTS IN COMMON.

(A) What shall be a Jointenancy, and not a Tenancy in Common.

(B) What shall amount to a Severance of the Jointenancy.

(A) WHAT SHALL BE A JOINTENANCY, AND NOT A TENANCY IN COMMON.

1. If two Persons advance a Sum of Money by Way of Mortgage, and take the Mortgage to themselves jointly, and one of them dies; when the Money comes to be paid, the Survivor shall not have the Whole, but the Representative of him who is dead shall have a Proportion. Decreed 7 *Car.* 1 [1631–32], *Petty* and *Styward*, 1 *Chan. Rep.* 57.

2. But if two take a Lease jointly of a Farm, the Lease shall survive; but the Stock on the Farm, though occupied jointly, shall not survive; neither shall a Stock used in a joint Undertaking in the Way of Trade survive; and therefore not necessary in Articles of Copartnership to provide against it; *per* Lord Keeper, *Hil.* 1683, *Jeffereys* and *Small*, 1 *Vern.* 217. And *per* Lord Keeper, where Survivorship is to take place, is where Two become interested by Way of Gift, or the like (a). *Vide* [Hayes v. Kingdome] 1 *Vern.* 33. [Usher v. Ayleward, *ibid.*] 361, whether if Two joint Purchasers pay Share and Share alike for a Purchase, and one dies, the Whole shall survive.

(a) Accordingly it has been decreed, that if *A.* devises the Residue of his Estate to his two Executors, or makes several Men Executors, the Survivor shall carry all. 2 *Chan. Ca.* 64. Though Note, the Lord Chancellor's Expression, why the Survivor shall carry all, because all the Judges will have it so. *Ibid.* 65.

* 3. The Commissioners of Sewers had sold and conveyed Lands to five Persons and their Heirs, who afterwards, in order to improve and cultivate these Lands, entred into Articles whereby they agreed to be equally concerned as to Profit and Loss, and to advance each of them such a sum, to be laid out in the Manurance and Improvement of the Land; and it was held, that they were Tenants in Common, and not Jointenants, as to the beneficial Interest or Right in these Lands, and that the Survivor should not go away with the Whole, for then it might happen that some might have paid, or laid out their Share of the Money; and others, who had laid out nothing go away with the whole Estate. Decreed at the Rolls, *Trin.* 1729, *Lake* and *Gibson*: And his Honour held, that where Two, or more, purchase Lands, and advance the Money in equal Proportions, and take a Conveyance to them and their Heirs, that this is a Jointenancy, that is, a Purchase by them jointly of the Chance of Survivorship, which may happen to the one of them as well as to the other; but where the Proportions of the Money are not equal, and this appears in the Deed itself, this makes them

in the Nature of Partners ; and however the legal Estate survive, yet the Survivor shall be considered but as a Trustee for the others, in Proportion to the Sums advanced by each of them. So if Two, or more, make a joint Purchase, and afterwards one of them lays out a considerable Sum of Money in Repairs or Improvements, and dies, this shall be a Lien on the Land, and a Trust for the Representative of him who advanced it ; and that in all other Cases of a joint Undertaking or Partnership, either in Trade, or any other in Dealing, they were to be considered as Tenants in Common, or the Survivors as Trustees for those who were dead.

4. If a Man covenants to stand seised to the Use of A. for Life, and after to Two, equally to be divided, and to their Heirs and Assigns for ever, the Inheritance shall be in Common, (a) as well as the Estate for Life ; and there is no Difference where it is to Two, equally divided, and where to Two, equally to be divided. [Anonymous.] 2 Vent. 365, 366 ; vide [Swayne v. Fawkener] Show. P. C. 210. where it is admitted, that there is no Difference between *divided* and *to be divided* ; and that Distinction is now exploded.

(a) Copyhold Lands were surrendered to the Use of A. B. and C. and their Heirs, equally to be divided between them and their Heirs respectively ; and Gould and Turton Justices held it a Tenancy in Common, by Reason of the apparent Intent of the Parties ; but Holt, Ch. Just., held it a Jointenancy, and that the Word *equally*, imported no more than to have alike ; and as to the Word *divided*, he held, that did not import a Tenancy in Common, for their Possession must be intire, & *pro indiviso* ; to divide would be to destroy it ; and it is strange to create an Estate from a Word which implies only, what would destroy it. Fisher and Wigge (1 Will. Rep. 14, Hil. 1700, S. C. in B. R.) 1 Salk. 391. But the same Case being cited Mich. 1730, in the Case of Stringer and Philipps, was said by Counsel to be reversed, according to my Lord Holt's Opinion ; in which Case it was held by the Master of the Rolls, that there was a Difference between Words which create a Tenancy in Common in a Will and in a Conveyance ; for that though the Words, *equally to be divided*, in a Will, create a Tenancy in Common ; yet it is not by force of the Words *themselves*, but by the Intent of the Testator, that there should be no Survivorship ; and he said there were but two Ways of creating a Tenancy in Common by Conveyance, viz. either by limiting it to them expressly as Tenants in Common, or else, by limiting a Moiety, or a Third, or other undivided Part, to one ; and the other Moiety, or Third to another, &c., for if otherwise, though the Words, *equally divided*, be used ; yet they shall signify only an equal Division and Proportion of the Profits. Vide post, 292, c. 11.

5. If a Man conveys his House and four Farms to Trustees, upon Trust that his two Sisters might cohabit in the Capital House, and equally divide the Rents and Profits of the four Farms betwixt them, and the Whole to the Survivor of them, this shall be a Jointenancy. Decreed Mich. 1694, Clerk and Clerk, 2 Vern. 323, for although the Words, *equally to be divided between them*, do some[292]-times in a Will make a Tenancy in Common ; yet it is only by Way of Construction. (S. C. but not S. P. post [1 Eq. Ca. Abr.], 293.)

(If a Man devises Lands to his two Sons and their Heirs for ever, and the longer Liver of them, to be equally divided between them after his Wife's Death ; this shall be a Tenancy in Common in the Sons ; adjudged 3 Lev. 373, by three Judges against one ; and that the latter Words being in a Will shall controul the former.)

6. If A. devises Lands to Trustees and their Heirs, in trust that the Profits should be equally divided between his Wife and Daughter, during the Wife's Life ; and after her Death he devises the same to the Use of his Daughter in Tail, with Remainders over, and the Daughter dies during the Mother's Life ; this being a Tenancy in Common shall go to the Administrator of the Daughter, during the Mother's Life, and shall not be a resulting Trust for the Benefit of the Heir. Decreed Mich. 1701, Phillips and Phillips, 2 Vern. 430 ; vide [Peiton v. Banks] 1 Vern. 65, where the Words, *equally to be divided*, was decreed a Tenancy in Common. (Prec. in Chan. 167, S. C. says, by the Opinion of all the Judges of C. B., the Mother and Daughter being Tenants in Common during the Life of the Mother ; at the Daughter's Death her Moiety belongs to her Executors or Administrators, by the Statute of Frauds and Perjuries. Ibid. 168 ; 1 Will. Rep. 34, S. C. says, that the Daughter was Testator's Heir at Law, and that the Master of the Rolls held that the Mother and Daughter were Jointenants, and that all survived to the Mother. Afterwards on Appeal Lord Somers held, that the Mother and Daughter were Tenants in Common, and that the Daughter's Estate determining by her Death, the Remainder-man or Reversioner had a Right to that Moiety. After-

wards *Wright*, Lord Keeper, upon a Rehearing, was of Opinion, that an Estate by Implication did arise to the Mother in the Daughter's Moiety after her Death ; but the Judges of *C. B.* (on a Reference to them) were of Opinion, that the Mother and Daughter were Tenants in Common, and that the Daughter had an Estate *pur auter eo.* which upon the Statute of Frauds (which takes away Occupancy) ought to go to the Daughter's Administratrix, *viz.* the Mother, and that the Daughter had not an Estate tail in Trust, for that *Mergers are odious in Equity*, and never allowed unless for special Reasons. *Ibid.* 40, 41.)

7. *J. S.* devised a Term for Years, and all her Interest therein, to her two Daughters, they paying yearly to her Son £25 by quarterly Payments, *viz.* each of them £12, 10s. yearly, out of the Rents of the Premises, during his Life, if the Term so long continued ; and my Lord Chancellor held it clearly to be a Tenancy in Common, the £25 being to be paid by the two Daughters equally, in Moieties. *Mich.* 1685, *Kew and Rouse*, 1 *Vern.* 353.

8. If *J. S.* directs by Will, that £240 shall be laid out in the Purchase of Lands, and settled on *M.* and the Heirs of her Body ; and if she die without Issue, then on the Children of *E.* which she should leave behind her, and *M.* dies without Issue, before any Purchase had, and afterwards the Trustees lay out the Money in a Purchase, and convey the Lands to the two Children of *E.* and their Heirs, who hold it for several Years, and then one of them dies, the Survivor shall not have the Lands. Decreed *Pasch.* 1688, *Saunders and Browne*, 2 *Vern.* 46. 3 *Chan. Rep.* 214, S. C. reported contrary, and there said, that if the Money had not been invested in a Purchase, it would not survive. *Vide* [*Aston v. Smallman*] 2 *Vern.* 556, where it is held, that Survivorship must take place as well in Equity as at Law.

9. A Man having a Mortgage for Years makes his Will, and thereby devises all his Personal Estate, of what Nature soever, to his Executors, in trust for the Payment of his Debts, and afterwards devises the Residue and Overplus of his said Personal Estate to his two Daughters, equally to be divided between them, and dies ; the Debts being satisfied, the Daughters contract with the Mortgagor for the Purchase of the Equity of Redemption to them and their Heirs ; one of the Daughters devises her Share and Interest to the Plaintiff, and dies ; and it was held that this Purchase of the Equity of Redemption and Inheritance was a Tenancy in Common, the Mortgage devised to the two Daughters being so, and this Purchase being founded on the said Mortgage. Decreed *Pasch.* 11 *Ann.* *Edwards and Fashion*. (*Prec. in Chan.* 332, S. C. and Decree, *per* Master of the Rolls.)

10. *J. S.* devised his Leasehold House to his Wife for Life, and after her Death, he devised it to *A.* and her three Sons, equally amongst them ; and it was decreed, that they took it as Tenants in Common, though there was no Mention of any Division to be made. *Pasch.* 1718, *Warner and Hone*. (*Prec. in Chan.* 491, S. C. and Decree ; *Gilb. Eq. Rep.* 146, S. C. *in totidem verbis* with *Prec. in Chan.*)

* 11. One devised £100 to Five, equally to be divided between them and the Survivors and Survivor of them ; and if *A.* (one of the Five) died before Marriage, her Share to go over to another Person ; and it was decreed, that they took this £100 as Tenants in Common, and that the Words, *and the Survivors and Survivor of them*, to make them Jointenants (*vide ante* [1 *Eq. Ca. Abr.*], 291, *note b*), would be a Contradiction to the first Words, whereby they were made Tenants in Common, and that they should be construed to extend only to such who were Sur[293]-vivors at the Death of the Testator, and therefore inserted to prevent a Lapse ; and this is the stronger, by the Limitation over of *A.*'s Share upon a Contingency, by which it is plain the Testator did not intend her to be a Jointenant with the Rest ; and as the Devise was to all Five, they must all take alike ; and not *A.* to be Tenant in Common, and the other four Jointenants. *Mich.* 1730, at the *Rolls*, *Stringer and Phillips*.

[Questioned, *Re Gregson's Trust Estate*, 1864, 2 *De G. J. & S.* 428 ; 34 *L. J. Ch.* 41.]

(B) WHAT SHALL AMOUNT TO A SEVERANCE OF THE JOINTENANCY.

1. Three Persons being jointly interested in the Trust of a Term for Years, one of them mortgaged his third Part ; and the Question was, whether the Jointenancy was severed ; and though it was admitted to be a settled Point in Chancery, that if one devises his Lands in Fee, and afterwards mortgages them to another in Fee, that it is but a Revocation *pro tanto* only ; yet my Lord *Cowper* held that this was not like

the Case of a Will, in which it may be for the Mortgagor's Advantage, not to have it construed a Revocation : but that in the Case of a Jointenancy, which is a Thing odious in Equity, it would be a Disadvantage to the Mortgagor not to have it construed a Severance ; for if he should die first, all must go from his Representative to the Survivor. *Mich. 8 Ann. [1709], York and Stone, 1 Salk. 158.*

(Jointenancy (of an Inheritance) is to be favoured, for the *Law loves not to divide and multiply Tenures. Per Holt, Ch. Just., 1 Salk. 392.*)

2. The Plaintiff's Husband and Defendant had enjoyed a Church-Lease in Moieties under an Agreement, that there should be no Benefit of Survivorship; but upon the last Renewal the Lease was taken in both their Names, and no express Agreement against Survivorship : the Plaintiff's Husband falling sick, by Deed assigned his Moiety of the Lease to his Wife, and by his Will devised it to her : but there being no Proof of the Agreement, and the Grant to the Wife being void, it was decreed, that the Will could not sever the Jointenancy. *Mich. 1700, Monse and Gyles, 2 Vern. 385. (Prec. in Chan. 124, S. C., states it thus : One joint Tenant of a Church Lease makes a Deed of Gift of his Moiety to his Wife as a Provision for her, and with Intent to sever the Jointure, and then dies ; this being to the Wife, and void in Law, and voluntary and without Consideration, Equity would not relieve.)*

3. If A. and B. are Jointenants, and A. makes a Lease for Years of his Moiety, to commence upon his Death, if B. shall so long live; this is a Severance of the Jointenancy, and the Lease will bind B. if he survives. *Clerk v. Clerk, 2 Vern. 323. (S. C. but not S. P. ante, 291.)*

4. If one Jointenant agrees to alien, and does it not, but dies ; this will not sever the Jointenancy, nor bind the Survivor. *Musgrave v. Baskwood, 2 Vern. 63. (Ante [1 Eq. Ca. Abr.], 25, 120, S. C. But see Lord Hardwicke's observations upon this Case, in Hinton v. Hinton, 2 Ves. 631, 638 ; Ambl. 278.)*

[294] CAP. XXXVIII.

LEGACIES.

- (A) Of vested or lapsed Legacies, being to be paid at a future Time or certain Age, to which the Legatees never arrived.
- (B) Of a lapsed Legacy, by the Legatee's dying in the Life-time of the Testator ; and here, in what Cases it shall be good, and vest in another Person to whom it is limited over.
- (C) Of specifick and pecuniary Legacies, and here of Abating and Refunding.
- (D) Of the Time of Payment of a Legacy.
- (E) To whom to be paid.
- (F) Where Legatees shall have Interest and Maintenance.
- (G) Ademption of a Legacy.

Of Devises of Things Personal, to whom, and by what Description good, and where it shall be in Satisfaction, *vide* Title *Devise* [1 Eq. Ca. Abr. 171]. Legacies given upon Condition, *vide* Title *Conditions and Limitation* [1 Eq. Ca. Abr. 105]; and *vide* Title *Remainder* [1 Eq. Ca. Abr. 359], for Legacies limited over.

(A) OF VESTED OR LAPSED LEGACIES, BEING TO BE PAID AT A FUTURE TIME OR CERTAIN AGE, TO WHICH THE LEGATEES NEVER ARRIVED.

1. If a Sum of Money is bequeathed to one of the Age of twenty-one Years, or Day of Marriage, *to be paid to him with Interest* (it is a *Legacy vested because it carries Interest. Vide Stapleton and Cheek, p. 295, pl. 4.*) and he dies before either, yet the Money shall go to his *Executor*. Decreed *per Finch, C., 29 Car. 2, Clabber's Case, 2 Vent. 342. 2 Chan. Ca. 155 ; S. C. by the Name of Lampen and Cloberry. [Smell v. Dec.] 2 Salk. 415, S. C. cited. [Anonymous.] 2 Vern. 199, S. C. cited, and says, it was decreed that the Administrator should have it, but that he should expect for it till B. should have been twenty-one ; and that this was confirmed on Appeal*

to the House of Lords, though Lord *Nottingham* for some time doubted if it should not be paid presently; but it was said this was but an Invention to encourage *Administrations*. 2 *Vent.* 673, S. C. cited as reported in 2 *Vent.* [342]. (2 *Freem.* 24, *Trin.* 1677, *Cloberry* and *Lampen*, S. C., for this is a present Duty though the *solvendum* be *in futuro*, and is not a contingent Gift, as it would have been if the Words *to be paid with Interest* had been omitted; and in this Case the Executor being of full Age, shall have it presently—Says nothing of an Appeal to the House of Lords.)

[295] 2. But if Money is bequeathed to one at his Age of twenty-one Years, and he dies before that Age, the Money is lost. [*Lampen v. Clowberry*.] 2 *Chan. Ca.* 155; [*Smell v. Dee*] 2 *Salk.* 415. S. P.

(The Rule and Distinction in these Cases is agreeable to the Civil Law, which is, that if a Legacy be devised to one generally, to be paid or payable at the Age of twenty-one, or any other Age, and the Legatee dies before that Age; yet this is such an Interest vested in the Legatee, that his Executor or Administrator may sue for and recover it; for it is *debitum in presenti*, though *solvendum in futuro*, the Time being annexed to the Payment, and not to the Legacy itself; so if the Legacy is made to carry Interest, though the Words, *to be paid*, or *payable*, are omitted, it shall be an Interest vested. But if a Legacy be devised to one at twenty-one, or if, or when he shall attain the Age of twenty-one, and the Legatee dies before that Age, the Legacy is lapsed. *Dyer*, 59; 1 *Leon.* 177; *Off. Exec.* 347; *Swinb.* 311, 312. *Vide* 2 *Vern.* 416, where my Lord Keeper *Wright* was of Opinion, that there was no Foundation for this Distinction, and that the Testator's Intention was equal in both Cases: But *note*, that was in a Case wherein the Legacy was to arise out of the Real Estate; which by the better Authorities, shall not go to the Representative of the Legatee, but shall sink in the Inheritance, for the Benefit of the Heir, as much as if it were a Portion provided by a Marriage Settlement; for which *vide* Title *Heir*, and 2 *Vern.* 92, 617, 508, and 2 *Vent.* *Pawlet* and *Pawlet*; but when it was to be paid out of the Personal Estate, the above Distinction has been allowed of, as well before, as by all the subsequent Chancellors; and my Lord *Cowper* said, that though it was at first introduced upon very slender Reasons, and probably upon no other, but from a constant Willingness in the Civil Law, to stretch in Favour of a particular Legatee against the Residuary Legatee, who went away with the whole Surplus of the Personal Estate; yet as Chancery has now a concurrent Jurisdiction with the Spiritual Court in Matters of this Nature, he thought it highly reasonable, that there should be a Conformity in their Resolutions, that the Subject might have the same Measure of Justice in which Court soever he sued.)

3. If a Portion is devised to a Child, with Interest, but not to be paid, or payable, until the Child attain twenty-one Years, or was married; and the Child dies under twenty-one Years, and unmarried; yet the Portion shall go to the Administrator of the Infant. *Trin.* 1687, *Collins* and *Metcalf*, 1 *Vern.* 462, decreed.

4. So if a Legacy of £50 is devised to *J. S.* when of the Age of sixteen Years, and Interest in the mean Time to be paid quarterly; this is a *Legacy vested, because it carries Interest*. *Mich.* 1711, *Stapleton* and *Cheele*, 2 *Vern.* 673, decreed.

(*Vide* *Cloberie's Case* [1 *Eq. Ca. Abr.*], p. 294, pl. 1; *Prec. in Chan.* 317, 318, *Stapleton* and *Cheales*, S. C.; *Skin.* 147, seems to be S. C.; *Gilb. Eq. Rep.* 76, S. C. *in totidem verbis* with *Prec. in Chan.*)

5. But if *A.* devises in these Words, *viz. I give £100 a-piece to the two Children of J. S. at the End of ten Years after my Decease*, and the Children die within the ten Years; this is a lapsed Legacy, and is so in all Cases where the Time is annexed to the Legacy itself, and not to the Payment of it. *Snell* and *Dee*, (a) 2 *Salk.* 415, *Per Cowper*, *Ld. Chan.*, though it was objected, that this differed from the Case, where a Man devises £100 to *J. S.* at his Age of Twenty-one, because it is a Contingency, whether he will attain to that Age; but the Expiration of the ten Years is inevitable.

(a) *Trin.* 1735, *Talbot*, C., in the Case of *King* and *Withers*, said, that this Case weighed but little with him, for 1st, he did not think it well reported; and 2dly, the Reason seems idle, for why may not an Uncertainty be transmissible as well as a Certainty, tho' perhaps not so beneficial. *Ca. in Eq. Temp.* *Tal'ot*, 124.

* 6. So where one being possessed of a very considerable Personal Estate, Part in *Jamaica*, and Part in *England*, and being himself residing in *Jamaica* made his Will, and thereof several Executors, some for his Estate in *Jamaica*, and others residing in *England*, for his Estate here, and amongst other Things devised in these Words, *viz.*

*I give and bequeath to J. S. now under the Custody of R. D. the Sum of £2000 at the Age of twenty-one Years, to be paid by my Executors in England, and devised all the Rest and Residue of his Estate to the Plaintiff, and died; J. S. having attained his Age of eighteen made his Will, and thereby devised this Legacy, and all his Estate, to the Defendant, and Id. Chan. held this a lapsed Legacy, and that it was a vain Endeavour in the Defendant's Counsel to construe it a present Legacy, and therefore vested by the Word *Now*, because it was a plain Description of the Condition [296] of the Legatee, viz. *Now* under the Custody of, &c., for otherwise they must stop at *Now*, which would be playing with the Words; and though the Word *paid* was made Use of, yet it was plainly intended a Designation of the Persons by whom the Legacy was to be paid, viz. by his Executors in *England*, which was proper, he having two Sets of them. *Trin.* 1710, *Onslow* and *South* decreed.*

(B) OF LAPSED LEGACY, BY THE LEGATEE'S DYING IN THE LIFE-TIME OF THE TESTATOR :
AND HERE, IN WHAT CASES IT SHALL BE GOOD, AND VEST IN ANOTHER TO WHOM IT IS LIMITED OVER.

1. A. By Will, reciting, that B. owed him £100, gave and bequeathed that £100 to him, provided he, out of the £400, paid several Sums in the Will mentioned, to his Wife and Children, and the Rest and Residue he freely and absolutely gave to him, and willed and required the Executor to deliver up the Security immediately upon his Death, and not to claim or meddle with the Debt, or any Part thereof; but to give such Release or Discharge as B. his Executors or Administrators should require or think fit; B. died in the Life-time of the Testator; and it was held, that the Money directed to be paid the Wife and Children was well devised; but as to the Residue devised to the Debtor himself, that it was a lapsed Legacy, he dying in the Life time of the Testator; although it was admitted, that if the Testator had said, *I forgive such a Debt*, or, that my Executor shall not demand it, or shall release it, that would have been a good Discharge of the Debt, though the Debtor died in the Life-time of the Testator. *Mich.* 1705, *Elliott* and *Davenport*, 2 *Vern.* 521. decreed. (1 *Will. Rep.* 83, S. C. and Decree, *per Lord Keep.*, B. dying in the Life of A. the Reporter says, the Master of the Rolls was of another Opinion; and Lord Keep. said it was a doubtful Case. An Appeal was brought from this Decree to the House of Lords, but before Hearing the Parties agreed. *Ibid.* 86.)

* 2. A. devised an Estate to his Wife for her Life, and after to the Plaintiff, his Niece, and her Heirs, upon Condition, and to the Intent that she pay £400 to such Person as his Wife, by her Will in Writing, or any other Writing, should direct and appoint, and dies; the Wife after marries a second Husband, and then makes a Will in Writing, and thereby reciting the Power given her by her former Husband's Will, appoints the £400 to be paid to her Husband, his Executors or Administrators; and that when he shall have fully received the £400 he shall pay £100 out of it to B., £50 to C., and £50 to D., and makes her Husband her Executor, and then goes on, and says, that she has published this her last Will and Testament, in the Presence of three Witnesses; and the Husband subscribed that he does approve of this Will; afterwards the Husband died before her, and makes her Executrix of his Will and Residuary Legatee; then B. and C. die both Intestate, and afterwards the Wife dies; and the Defendants take out Administration to her, with the Will annexed, and also Administration to B. and C., and the Question was, whether this Appointment being made by Will, and the Appointee dying before the Appointor, this should be in the Nature of a Legacy, and so the Appointment void, the Testatrix surviving the Nominee; and my Lord Keep. held, that if it was a Thing purely Testamentary [297] tary it would be plainly a lapsed Legacy; but that in this Case the £400 was not in its own Nature testamentary, but they take as Nominees; and it is but the Execution of a Trust; and decreed the Money to be paid. *Mich.* 1700, *Burnet* and *Helgrave*.

3. E. made her Will, and devised in these Words, *I give unto my loving Kinsman R. H. the Sum of £300, one £100 Part whereof, he doth owe me, which I do intend to give to my Cousin S. H. his youngest Daughter; but my Will and Desire is, that he will give the said £300 to his Daughter S. H. at the Time of his Death, or sooner, if there be Occasion for her better Advancement and Preferment*; the Testatrix, at the making of her Will, was in *England*, and it so fell out, that R. H. died in *Ireland*, eight Days before the Death of the Testatrix; afterwards S. H. died at the Age of Sixteen, and un-

married, and the Plaintiff was her Administrator; and it was decreed at the *Rolls*, and affirmed by my Lord Chan., that the Words, *I desire* or *I will*, amount unto an express Devise, and that the *One hundred Pound Bond* to the Testatrix, should be assigned to the Plaintiff, and the £200 paid with Interest from the exhibiting the Bill. *Mich.* 1704, *Earles* (Called in *Vern.* *Eacles*) and *England*, 2 *Vern.* 466, 467. Although it was insisted upon, that a Benefit was designed *R. H.*, and that he was not a bare Trustee, for he was to have the Interest of the £300 for his Life, unless his Daughter had Occasion for it before his Death, which she had not. (*Prec. in Chan.* 200, *Trin.* 1702, *Eales* and *England*, S. C. And said *per* Master of the *Rolls*, that Words of *Recommendation* or *Desire* in a Will are always expounded as a *Devise*.)

4. But where A. devised to his Sister £350, upon Condition that she, at or before her Death, should give to her Children £200 thereof, and the Sister died in the Life-time of the Testator; it was held, that the whole £350 was lapsed; for it being a Devise of Money, the absolute Property vested in the first Legatee. *Mich.* 1689, *Birkhead* and *Coward*, 2 *Vern.* 116, ruled on Demurrer. (2 *Freem.* 107, *Birkett* and *Coward*, S. C., says, that the Devise was thus: *I give to my Sister H. £300, upon Condition that she give Security to leave £100 a piece to her two Children, and £50 a-piece to A. and B. H. died before the Testator, and per Cur.* the Legacy is clearly lost, for it was to vest in H. first, and she was to secure the like Sum to the Children.)

5. If A. devises £1500 a-piece to the four Children of J. S. by Name, to the Sons to be paid at their Age of twenty one Years, and to the Daughters at eighteen, or Days of Marriage; and in Case one or more of the aforesaid Children shall happen to die before his, her or their respective Legacy or Legacies shall become due, then such Legacy or Legacies shall go to the Survivors of them; and in case three should die, then the Survivor to take the Whole; if one of the Children dies in the Life-time of the Testator, the Survivors shall take that Share, and it shall not be a lapsed Legacy. *Hil.* 1690, *Miller* and *Warren*, 2 *Vern.* 207, decreed. 2 *Vern.* 611, S. P. decreed in the Case of *Ledsome* and *Hickman*.

6. So where a Legacy of £50 was given to A. at Twenty-one or Marriage, and £50 to B. at Twenty one or Marriage; and in the Close of the Will, the Testator added, if any Legatee dies before his Legacy is payable, the same shall go to the Brothers and Sisters of such Legatee; A. dying in the Life-time of the Testator, it was adjudged no lapsed Legacy, but that it should go to the Brothers and Sisters. *Trin.* 1700, *Darrel* and *Molseworth*, 2 *Vern.* 378; *Bretton v. Lethulier*, 2 *Vern.* 653; and *Bird v. Lockey*, 744, S. P. decreed; *Cock v. Berrish*, 1 *Vern.* 425, S. P.; 2 *Chan. Rep.* 187, S. P.; *Northey* and *Burbage*, *Hil.* 1617, S. P. decreed. (S. C. but not S. P. ante 231; S. C. but not S. P. 2 *Eq. Ca. Abr.* 331, *Prec. in Chan.* 470. *Vide Northey v. Strange*, 1 *P. Wms.* 340, 343, S. C. and S. P.)

[298] 7. So where a Man devised £100 to A. and B., the two Daughters of his Brother G., to be paid within a Year after the Death of his Wife, *viz.* £50 to A. and £50 to B. if they shall both be alive at the Time of Payment; but if either of them shall die before, then the said £100 to the Survivor of the said two Daughters; one of the said two Daughters died in the Life-time of the Testator; and the only Question was, whether the surviving Daughter should have the whole £100 or only the £50, and *Rawlinson* and *Hutchins*, Lords Commissioners, were clearly of Opinion, that she should have the whole £100, they said, that by the first Clause of the Will, it is a joint Devise to them of the £100, in which Case, if the Will had gone no further, if one had died, it would have survived to the other; then the *viz.* that comes after is only a Severance of it, in case they should both live to the Time of Payment, which they did not; and then the last Clause of the Will, in case either died before the Time of Payment, is a new substantive Devise of the whole £100 to the Survivor; and decreed accordingly. *Mich.* 1691, *Scolding* and *Green*. (*Prec. in Chan.* 37, S. C. *in totidem verbis*.)

(C) OF SPECIFICK AND PECUNIARY LEGACIES, AND HERE OF ABATING AND REFUNDING.

1. If A. by Will devises to his Wife all his Personal Estate at a Place called W., and devises to B. a Legacy of £500 and several other Legacies, and Assets prove deficient to pay the £500 and other Legacies; yet the Wife's Legacy being a specifick Legacy shall take place. *Mich.* 1714, *Sayer* and *Sayer*, 2 *Vern.* 688, that a specifick Legatee shall not abate in Proportion with a pecuniary One, *vide* [Webb v. Webb] 2 *Vern.* 111; [Strode v. Ellis] *Nels. Chan. Rep.* 203; [——— v. Wilkinson] 2 *Chan. Ca.* 25; [Comyns v. Comyns, *Ibid.*] 171; *Brown v. Allen*, 1 *Vern.* 31; [Hern v. Merick] 2 *Salk.* 416.

* 2. *J. S.* having £4000 secured to him by Bond, in the Names of *A.* and *B.* in trust for himself, devised it to his Daughter (now married to the Plaintiff) and made her Residuary Legatee; and by the same Will devised a Lease he had in a Farm to *R. D.*, and there not appearing Assets at his Death to pay his Debts, this Farm devised to *R. D.* was sold for Payment of Debts; afterwards, by Decree of this Court, the £4000 was adjudged to be Assets to pay Debts, and was brought into Court, there to remain for that Purpose; the Plaintiff proposed to have what remained of the £4000 paid out of Court to him, all Debts being (as was said) paid; and the Defendant *R. D.* opposed it, till he had first had Satisfaction out of it, for the Value of the Farm devised to him, and sold for Payment of Debts. The Court held, that the Devise of this Sum of Money was a specifick Legacy, and therefore *R. D.* can have but a proportionable Part of the Value of his specifick Legacy out of it. *Mich.* 1790, *Lord Castleton* and *Lord Fanshawe*. (*S. C. but not S. P. post* 305, 2 *Eq. Ca. Abr.* 254, 259, *Prec. in Chan.* 99.)

3. If a Man devises a Specifick Legacy, and likewise other Legacies, tho' the other Legacies fall short, yet the Legatee must have his specifick Legacy intire; but if a Man devises several Legacies, as £100 to one, and £50 to another, &c. there, altho' he directs the Legacy of £100 to be paid in the first Place, yet if the other Lega-[299]cies fall short, then the Legatee of the £100 must make a proportionable Abatement of his Legacy. *Hil.* 1681, *Brown* and *Allen*, 1 *Vern.* 31; [*Cotton v. Cotton*,] 2 *Chan. Rep.* 138, *S. P.*

4. A Creditor shall make Legatees refund, when Assets become deficient, tho' there be no Provision made for refunding. *Per Lord Chan. in Noel v. Robinson*, 1 *Vern.* 94; [*Hodges v. Waddington*,] 2 *Vent.* 360, *S. P.*; *Newman v. Barton*, 2 *Vern.* 205, *S. P.*

5. So where *A.* being indebted to *B.* made *C.* his Executor, and *C.* wasted the Estate and died, having devised several Legacies, and made *D.* Executor, which Legacies *D.* paid; and *B.* having exhibited a Bill against *D.* the Executor of *C.* for his Debt due from the first Testator, and against the Legatees in the Will of *C.* to compel them to refund their Legacies, there not being sufficient Assets of the first Testator; it was decreed accordingly. [Anonymous,] 1 *Vern.* 162. That a Creditor shall follow the Assets in Equity, into whose Hands soever they come. *Vide* [*Newman v. Barton*] 2 *Vern.* 205.

6. One Legatee shall compel another to refund where the Assets become deficient, tho' there be no Provision made for refunding (*a*): [*Noel v. Robinson*,] 1 *Vern.* 94, but if the Executor is solvent, and he voluntarily paid the Legacy, the unsatisfied Legatee may come upon him, and oblige him to pay it out of his own Purse. [*Vintner v. Pix*,] 1 *Chan. Rep.* 133; [*Tilsly v. Throckmorton*,] 2 *Chan. Ca.* 132, and therefore the Executor is always to be made a Party to the Suit. [*Nelthrop v. Hill*,] 1 *Chan. Ca.* 136, [*Hixon v. Wytham*,] 248; 2 *Vent.* 360.

(*a*) 1 *Will. Rep.* 495, *S. P.* If the Defect of Assets arises by the Wasting of the Executor, in such Case the Legatee who has recovered his Legacy shall not be compelled to refund, but shall retain the Advantage of his legal Diligence. *Ibid.* 495.

7. If an Executor pays out the Assets in Legacies, and afterwards Debts appear, of which he had no Notice at the Time of Payment of the Legacies, he by a Bill in Equity may compel the Legatees to refund, [*Nelthrop v. Hill*,] 1 *Chan. Ca.* 136, if he had been compelled by a Decree in Equity to pay the Legacies, he may make the Legatees refund. [*Newman v. Barton*,] 2 *Vern.* 205, *per Cur'*.

8. But if an Executor voluntarily pays a Legacy, or assents to the Devise thereof, he cannot, either in Favour of other Legatees or Creditors, compel the Legatee to refund. *Vide* [*Newman v. Barton*] 2 *Vern.* 205. [*Hodges v. Waddington*,] 2 *Chan. Ca.* 9. [*Noell v. Robinson*,] 2 *Chan. Rep.* 248; 2 *Chan. Ca.* 145 [*S. C.*]; 1 *Vern.* 90, 453, 460 [*S. C.*]. But for this *vide* *Tit. Executors and Administrators*, Letter (A).

(D) OF THE TIME OF PAYMENT OF A LEGACY.

1. If a Legacy is given to a Child, payable at Twenty one, and the Child dies before, tho' his Administrator shall have the Legacy, yet he must wait for it till such Time as the Child, if he had lived, would have come to Twenty-one. *Anon.* 2 *Vern.* 199, but if it had been payable to the Infant with Interest, *Q. Saunders's case* *et. d. l. s. s.* if the Legacy were to be paid with Interest, it shall be paid to the Administrator presently.)

2. But if a Legacy is devised to *J. S.* to be paid at Twenty three Years of Age, and if he die before, to go over to *A.* and *B.* and *J. S.* dies an Infant, the Legacy shall be

paid presently. *Hil.* 1692, *Passworth* (called in *Vern.*, *Pap-worth*) and *Moore*, 2 *Vern.* 285, devised.

3. A. by Will gives a Legacy to B. at Twenty one, and if he died before Twenty-one, then to the Plaintiff : B. dies before Twenty one : and the only Question was whether the Plaintiff was intitled to the Legacy presently, or must wait till B., if he had lived, would have been Twenty one : and on Time taken to consider of it, *King*, C., was of Opinion, the Plaintiff was intitled to the Legacy presently : but where a Legacy is given to one to be paid at Twenty one, so as to be an Interest vested in him presently, tho' not payable till Twenty one : if the Party dies before that Age, [300] his Executors or Administrators shall not have it till the Legatee, if he had lived, would have been Twenty one Years of Age. *Trin.* 1728, *Laundy* and *Williams*. Decreed at my Lord Chancellor's. (2 *Will. Rep.* 478, S. C., where it is said that the *Rule* in Equity seems by this Resolution to be settled accordingly.)

4. A Legacy of £500 was given to the Defendant's Testator when he should be 24 Years old : the Plaintiff being his Sister, and Executrix to the Testator that gave the Legacy, paid the Legatee £250 of it at Twenty one, to put him out into the World, and gave him a Bond to pay him the other £250 at a Day certain, which was the very Day he would attain his Age of 24 Years : He died before that Age. To a Bill to have the £250 repaid, and the Bond delivered up, the Defendant pleaded the Payment, and the Bond which was for Payment at a certain Day, and became a Duty thereby : and upon Debate, the Plea was ordered to stand for an Answer, the Lord Chancellor declaring it was fit to be heard on the Merits. *Mich.* 1687, *Luke* and *Alderne*, 2 *Vern.* 31.

(E) TO WHOM TO BE PAID.

1. If a Legacy of £125 is devised to an Infant, who is but ten Years old, and at that Age paid by the Executor to the Infant's Father for his Benefit : and the Father afterwards becomes insolvent, yet the Executor shall not be obliged to pay it over again : but if the Executor took Security to be indemnified, then he paid it at his own Peril, and shall pay it over again. *Hil.* 26 & 27 *Car.* 2 [1676], *Holloway* and *Collins*, 1 *Chanc. Ca.* 245, but this Matter seems well settled by the following, as well as several other Resolutions.

2. A Legacy of £100 was devised to an Infant of about ten Years of Age ; the Executor paid this Legacy to the Father, and took his Receipt for it : when the Infant came of Age, the Father told him he had such a Legacy of his in his Hands, but could not pay it immediately : but however would not have him trouble the Executor about it, for that he would give it him : Upon this the Son rested satisfied for about 14 or 15 Years, and he and his Father carried on a Joint Trade together, and then became Bankrupts. And upon a Commission taken out against the Son, this Legacy of £100 was assigned amongst other Things for the Benefit of his Creditors, and the Plaintiff, the Assignee of the Commission, brought this Bill against the Executor, to have an account, and Payment of the Legacy : and for the Defendant it was insisted, that this would be an Extreme Hardship on him, if he should be obliged to pay it over again : that he had already fairly and honestly paid it to the Father whilst he was in good Circumstances. And if Application had been made sooner, he might have had his Recompence over against the Father : that the Father was by Nature Guardian to his Children, and such Payments to him have formerly been allowed good ; though now indeed this Court has thought fit to extend their Care farther for such Children, and disallowed such Payments ; but the Circumstances of this Case were such, that the Defendant, it was hoped, would not be answerable again for it. My Lord Chancellor said, that if the Father had not made his Son such Promise of Recompence, and the Son had required all that Time (in *Gillb. Rep.* 103, it is said, and the Son had required the Money in Time), the Case might have been more doubtful ; but this Promise of his Father drew him to forbear ap [301] plying to the Executor sooner ; and since his Father had not, nor could now make good his Promise, being a Bankrupt likewise, the Reason of the Son's Forbearance was at an End ; and he thought the Rule of this Court, in not suffering Parents to receive their Children's Legacies, was founded on very good Reason : and therefore, lest this Case might hereafter be cited as a Precedent, when the Circumstances attending it were forgotten : and to discountenance, and deter others from paying such Legacies to the Parents, (tho' he did not deny the Hardships of this particular Case) he decreed against the Executor ; which was

affirmed on a re-hearing. *Mich.* 1715, *Dogley and Tolferry*. (*Gillb. Eq. Rep.* 103, *Dawley and Ballfrey*, S. C. *in totidem verbis*. 1 *Will. Rep.* 285. *Mich.* 1715, *Dogley and Tolferry*, S. C., and *Decree affirmed on Appeal*. Note : This Case was thought hard, and the more so, it being proved that the Testator on his Deathbed gave Directions that the Executor should pay the Legacy to the Father, that he might improve the Money for the Infant's Benefit. Note also, that this particular Circumstance (omitted in *Gillb. Rep.*) appears in the Register Book, and from whence it also appears that this Case is rightly stated by Mr. P. Williams, and that great Stress was laid on this Circumstance in the Petition of Appeal. *Ibid.* 286. *Sid vide Philips v. Paget*, 2 *Atk.* 81.)

3. If a Legacy be bequeathed to a Feme Covert, Payment of it to her alone is not good, and the Executor shall pay it over again to the Husband. *Palmer v. Trevor*, 1 *Vern.* 261.

(F) WHERE LEGATEES SHALL HAVE INTEREST AND MAINTENANCE.

1. Legatees exhibit a Bill against the Executor, and by their Guardian pray, that he may be obliged to allow them Maintenance : to which the Executor demurred, because the Legatees were under age, and their Legacies not payable till they were 21 Years of Age : but the Demurrer was over-ruled. *Mich.* 16 *Car.* 2 [1664], *Rennesey and Parrot*, 1 *Chan. Ca.* 60.

(Where a Legacy shall carry Interest, and from what Time, *vide* Title *Interest Money*, Letter (A) [1 *Eq. Ca. Abr.* 286].)

2. If a Father devises Legacies or Portions to his Daughters or younger Children, to be paid or payable at their respective Ages of 21 Years, or any other Time certain, without making any Provision for their Maintenance in the Mean Time, and die ; in this Case they shall have Interest for their Portions from her Death, till paid, because the Father was obliged to have provided for them if he had lived ; but if such Portions had been devised to them by a Stranger, to be paid or payable at such an age, their Legacies should not carry Interest in the mean Time ; because he being a Stranger, was under no such Obligation to provide for them. *Trin.* 1712, *The Attorney General and Thompson*. (*Proc. in Chan.* 337, S. C. and P. agreed *per* Court and Counsel.)

3. *A Father by his Will gave £2000 a-piece to his two Daughters, payable at twenty-one, and charged on Land and Personal Estate ; and the Personal Estate being exhausted in Debts, my Lord Chancellor held, they should have a reasonable Maintenance out of the Real Estate, until their Legacies became payable, and allowed them £80 *per Annum* each. *Trin.* 1729, *Conway and Longville*.

(G) ADEMPION OF A LEGACY.

1. A. devised to his Daughter £200. *Item*, I give to her my Household Goods, if she shall not be married in my Life-time, and afterwards in his Life he gives with his Daughter in Marriage above £200 and dies, not having revoked or altered his Will ; and the Court held, that the Legacy was extinguished by the Portion. *Mich.* 1689, *Jenkins and Powell*, 2 *Vern.* 115. *Vide* [*Pit v. Pidgeon*] 1 *Chan. Ca.* 301, and *Husbands v. Husbands*, 1 *Vern.* 95.

[302] 2. The Defendant's late Husband made his Will in Writing, and thereby amongst other Things devises as followeth : *viz.* I give and devise to A. my good and only Uncle, the Sum of £500, that is to say, that Bond and Judgment he gave me for £400 and £100 in Money, and makes the Defendant his Executrix, and desires her to be kind and assisting to his Uncle, that he might live as became a Gentleman : The Uncle some Time after sold an Estate, and with the Money paid off £320 and took up the Bond, and had the Judgment vacated, and gave a new Bond for the remaining £80, and some Time after the Testator died : and the Uncle having Notice of this Will, brought his Bill for this Legacy of £500. The Defendant insisted, that this was a specific Legacy of that particular Bond and Judgment : and they being cancelled and altered before the Testator's Death, was an Ademption of the Legacy, as to so much : and besides they urged, that this Payment of the £320 amounted to a Release of so much of the Legacy, and therefore the Plaintiff would have no Right but to the remaining £100. On the other Side it was insisted, that the Diversity is where the Money is voluntarily paid in by the Person who owes it, and where the Testator sues for and recovers it : In the first Case the Legacy continues still good, because the Money comes only home to the Personal Estate : but in the other Case, the Testator by suing for it

shows that he intended to make it his own, and therefore would not leave it to the Plaintiff to recover, and the Justice of the Uncle ought not to prevent the Affection of the Nephew, and no Alteration of his Intention appeared. Lord Keep. was clear of the same Opinion, and decreed the 280 Bond to be delivered up, and the Residue of the Legacy to be paid. *Hill, 1711, Orme and Smith, 2 Vern. 681, S. C. (Gillb. Eq. Hill, 82, S. C.)* and Decree; but Lord Keep. gave no costs. *Vide* the following Case of *Ford and Fleming.*)

3. One by Will devised thus: *Item*, I give and bequeath to my Grandaughter *Mary Ford* (the Plaintiff) the Sum of 240, being Part of a Debt due and owing to me for Rent from *G. M.*, she allowing what charges shall be expended in getting in the same. *Item*, I give and bequeath unto my Grandsons *A.* and *B.* the Rest and Residue of what is due and owing to me from the said *G. M.*, which is about £40 more, to be equally divided between them, they allowing Charges as aforesaid; after the Testator received the whole Debt owing for Rent from *G. M.* For the Plaintiff it was insisted, that there was a Difference between a specifick and a pecuniary Legacy: that tho' the disposing of a specifick Legacy might be an Ademption of it, yet this being a pecuniary Legacy, the paying the Money to the Testator would be no Loss of it. On the other Side was insisted upon the Difference between a voluntary and compulsory Payment, that tho' the first was no Ademption, yet the second was, and that the Testator obliged *G. M.* to pay in the Money. But my Lord Chan. was of Opinion, that there was no Foundation for the Difference taken in the Books between a voluntary and compulsory Payment, for the latter might be with an Intent to secure the Legacy on all Events: and decreed the Plaintiff the £40 Legacy. *Trin. 1728, Ford and Fleming. Vide 1 Roll. 614; Moor, 789; Raam, 335; Savinb. Part 7, Sect. 20; Went, 64. (2 Will Rep. 469, S. C.)* says, it was held by Lord Chan. that the Testator receiving the Debt himself, tho' upon his suing for it, was no Ademption of the Legacy. *Vide Drinkwater v. Falconer, 2 Ves. 623.*)

[303] CAP. XXXIX.

LIMITATION OF SUITS AND DEMANDS.

- (A) What Rights, Actions or Demands, are deemed out of the Statute of Limitations in Equity, and where such Rights, Actions or Demands, tho' once barred, may be revived, and set up again.
- (B) Length of Time, how far regarded in Equity.

- (A) WHAT RIGHTS, ACTIONS OR DEMANDS, ARE DEEMED OUT OF THE STATUTE OF LIMITATIONS IN EQUITY, AND WHERE SUCH RIGHTS, ACTIONS OR DEMANDS, THO' ONCE BARRED, MAY BE REVIVED AND SET UP AGAIN.

1. A Trust is not within the Statute of Limitations (*a*). *March 129. 2 Will. Rep. 145, S. P. per* the Master of the Rolls. (*Vide Blakeway v. Stafford, 2 P. Wms. 373.*)
an By the 21 *Jac. 1, cap. 16*, all Actions upon the Case, other than for Slander, Actions of Account (other than what concerns Merchandize between Merchant and Merchant), Actions of Trespass, *Quare Clausum Frequit*, Debt upon lending or Contract, without Specialty or Arrearages of Rent, for Detinue, Trover, Replevin, shall be commenced within Six Years after the Cause of Action, and not after. But the Right of Infants, Feme Coverts, *Non Compos Mentis*, Persons imprisoned, or beyond Sea, is saved: so that they commence their Suits within the Time above limited, after their Imperfections removed: Provided that if in any such Actions Judgment is given for the Plaintiff, and the same is reversed for Error: or if a Verdict pass for him, and upon Motion in Arrest of Judgment, it is given against him: or if the Defendant is outlawed in the Suit, and does after reverse the Outlawry: in these Cases the Plaintiff, his Heirs, &c., may commence a new Action within a Year, and not after: by 4 & 5 *Ann. cap. 16*, the Plaintiff's Right is as much saved, when the Defendant is beyond Sea, as if he were so himself: provided he brings his Action within such Time after his Return, as is limited by the 21 *Jac. 1*.

2. The Plaintiff, who was Son and Executor of *C. J. Heath*, who was made *C. J.*

at *Oxon* during the Difference between the King and Parliament (but never sat at *Westminster Hall*), exhibited a Bill against the Defendants, Prothonotaries of the K. B. at that [304] Time, to have an Account of the Money, &c., received by them during that Time, by an implied Trust *virtute Officii* : to which the Defendants pleaded the Statute of Limitations : but upon Argument the Plea was overruled. 15 *Car.* 2 [1663], *Sir Edward Heath and Henley & al.*, 1 *Chan. Ca.* 21 : 3 *Chan. Rep.* S. S. C.

3. So where the Plaintiff exhibited a Bill, to have an Account of Money received by the Defendant from his Father (whose Executor he was), who gave it to him to compound for his Estate, sequestered for Delinquency at *Goldsmiths Hall* : it was ordered accordingly : the Court declaring it a Trust, and therefore not within the Statute of Limitations. *Mich.* 15 *Car.* 2 [1663], *Sheldon and Wellman*, 2 *Chan. Ca.* 26. (2 *Freem.* 156, S. C. and decreed *accord*), but says, the Bill was dismissed for another Reason.)

4. So where my Lady *Hollis* lent £100, and in the Note which was given for it, Mention was made, that it should be disposed of as my Lady should direct : a Bill being exhibited for it, the Court held it a *Depositum*, or Trust, and decreed Payment of it, though otherwise it was barred by the Statute of Limitations. 2 *Vent.* 345.

5. A Charity is not barred by Length of Time, or within the Statute of Limitations [*Att-Gen. v. Coventry*,] 2 *Vern.* 399.

6. A Legacy is not within the Statute of Limitations. [*Parker v. Ash*,] 1 *Vern.* 256.

7. The Statute of Limitations is no Plea in Bar to an open Account. *Pasch.* 1687, *Scudmore and White*, 1 *Vern.* 456.

(Accounts current or open are not within the Statute of Limitations : but Accounts stated between Merchant and Merchant are barred by the Statute. 1 *Vent.* 89, 90 : 2 *Saund.* 124.)

8. If a Man recovers a Judgment or Sentence in *France* for Money due to him, the Debt must be considered here only as a Debt by Simple Contract, and the Statute of Limitations will run upon it. [*Dupeix v. De Roven*,] 2 *Vern.* 540, 541, *per Cur.*

9. A Bill was exhibited to be relieved touching a Rent charged upon Lands by Will : the Defendant pleaded the Statute of Limitations, and that there had been no Demand or Payment in forty Years ; and the Court held, that the Case in *Coke's Reports*, (4 *Co.* 10, 11.) on the Statute *Hen.* 8. concerned only Customary Rents between Lord and Tenant, and not any Rent which commenced by Grant, or whereof the Commencement could be shewn. *Trin.* 1691, *Collins and Goodal*, 2 *Vern.* 235.

10. If one receives the Profits of an Infant's Estate, and six Years after his coming of Age he brings a Bill for an Account, the Statute of Limitations is as much a Bar to such a Suit, as if he had brought an Action of Account at Common Law ; for this Receipt of the Profits of an Infant's Estate is not such a Trust, as being a Creature of the Court of Equity, the Statute shall be no Bar to : for he might have had his Action of Account against him at Law ; and therefore no Necessity to come into this Court for the Account. For the Reason why Bills for an Account are brought here, is from the Nature of the Demand ; and that they may have a Discovery of Books, Papers, and the Party's Oath, for the more easy taking of the Account, which cannot be so well done at Law : but if the Infant lies by for six Years after he comes of Age, as he is barred of his Action of Account at Law, so shall he be of his Remedy in this Court : and there is no Sort of Difference in Reason between the two Cases. *Trin.* 1719, *Lockey and Lockey*, *per Curiam*. (*Proc. in Chan.* 518, S. C. says, Lord *Macclesfield* was clearly of this Opinion, S. C. but not S. P. 2 *Eq. Ca. Abr.* 48.)

[305] 11. If there is no Executor against whom the Plaintiff may bring his Action, he shall not be prejudiced by the Statute of Limitations, nor shall any Laches in such Case be imputed to him. *Joliffe v. Pitt*, 2 *Vern.* 694.

(If one brings an Action before the Expiration of six Years, and dies before Judgment, the six Years being then expired, this shall not prevent his Executor. 2 *Salk.* 424, 425 : 2 *Salk.* 421. But if an Executor sues upon a promissory Note to the Testator, and dies before Judgment, and six Years from the original Cause of Action are actually expired, and the Executor of the Executor brings a new Action in four Years after the first Executor's Death, the Statute of Limitations shall be a Bar to such Action. For though the Debt does not become irrecoverable by an Abatement of the Action after the six Years elapsed by the Plaintiff's Death, yet the Executor should make a recent Prosecution, to which the Clause in the Statute, that provides a Year after the Reversal of a Judgment, &c., may be a good Direction ; or shew, that he came as early

as he could, because there was a Contest about the Will or Right of Administration; for the Statute was made for the Benefit of Defendants, to free them from Actions when their Witnesses were dead, or their Vouchers lost. *Trin. 5 Geo. 27, Willcox and Hoppins*, adjudged in *B. R. Vide 2 Str. 907.*)

12. If a Man sues in Chancery, and pending the Suit there, the Statute of Limitations attaches on his Demand, and his Bill is afterwards dismissed, the Matter being properly determinable at Common Law; in such Case the Court will preserve the Plaintiff's Right, and will not suffer the Statute to be pleaded in Bar to his Demand. [Anonymous,] 1 *Vern.* 73, 74. But if in such Case the Plaintiff was not stayed by the Act of the Court, as Injunction, &c. *Q. d. vide* [Anonymous] 2 *Chan. Ca.* 217; [Craddock v. Marsh,] 1 *Chan. Rep.* 205; [Hurdred v. Calladon, *ibid.*] 214.

* 13. If a Man devises all the Rest and Residue of his Personal Estate, after Debts and Legacies paid, to *J. S.*, and several of the Creditors are barred by the Statute of Limitations, who notwithstanding bring Actions against the Executor, and he refuses to plead the Statute of Limitations, yet Equity will not, in Favour of *J. S.* to whom the Surplus is devised, compel the Executor to plead the Statute. *Mich. 1699, Lord Castleton and Lord Fanshawe* adjudged. (S. C. but not S. P. *ante* 298; 2 *Eq. Abr.* 254, 259. *Prec. in Chan.* 99.)

14. If a Man by Will or Deed subject his Lands to the Payment of his Debts, Debts barred by the Statute of Limitations shall be paid; for they are Debts in Equity, and the Duty remains; the Statute hath not extinguished that, though it hath taken away the Remedy. [Anonymous,] 1 *Salk.* 154. (*Goston v. Mill*, 2 *Vern.* 141, S. P.)

* 15. If a Man has a Debt due to him by Note, or a Book-Debt, and has made no Demand of it for six Years, so that he is barred by the Statute of Limitations; yet if the Debtor, or his Executor, after the six Years, puts out an Advertisement in the *Gazette*, or any other News-Paper, that all Persons who have any Debts owing to them, may apply to such a Place, and that they shall be paid; this (though general, and therefore might be intended of legal subsisting Debts only) yet amounts to such an Acknowledgment of that Debt which was barred, as will revive the Right, and bring it out of the Statute again. *Pasch. 1714, Andrews and Brown* decreed. (*Gilb. Eq. Rep.* 41. *Prec. in Chan.* 385, S. C.)

* 16. So if after the six Years the Debtor, upon Application for that particular Debt, acknowledges it, and promises Payment, this revives the Debt, and brings it out of the Statute; because, as the Note itself was at first but an Evidence of the Debt, so that being barred, this Acknowledgment and Promise is a new Evidence of the Debt; and being proved, will maintain an *Assumpsit* for Recovery of it. *Pasch. 1714, Andrews and Brown, per Cur'.*

[306] (B) LENGTH OF TIME, HOW FAR REGARDED IN EQUITY.

1. If a Person has enjoyed an Estate twenty-five Years, though he cannot prove that Livery and Seisin was made of it, yet he shall not be molested; for Equity, after such Length of Time, will presume Livery. [Anonymous,] *Toth.* 54; *Biden v. Loveday*, *cit.* 1 *Vern.* 196.

2. So if a Person is in Possession of a Copyhold Estate forty Years, under a Will, though he cannot prove that there was any Surrender to the Use of that Will, yet Equity will supply that Defect after such Length of Time. *Vide Lyford v. Coward*, 1 *Vern.* 195; 2 *Chan. Ca.* 150, S. C.

3. The Plaintiff exhibited a Bill to set aside a Conveyance made by his Father twenty Years ago, and alledged, that at that Time his Father was *Non-Compos*; but the Court dismissed the Bill, and said, that after twenty Years it was not proper to examine, whether a Person was *Non Compos*, or not. [Wincheomb v. Hall,] 1 *Chan. Rep.* 40.

4. The Plaintiff exhibited a Bill against the Executors of a Purchaser of certain Lands from him, to have £500 Part of the Purchase Money paid, which was decreed to be paid him thirty three Years before; but the Executors having pleaded, that the Plaintiff and Defendant lived near each other, and that no Suit was commenced against their Testator in his Life time, though the Plaintiff might have easily done it, the Court held the Plea good. [Hunton v. Davies,] 2 *Chan. Rep.* 44.

5. So where a Bond of twenty two Years old came to the Hands of an Executor; and in as much as the Obligee, till about seven or eight Years past, lived near the

Testator, and never demanded any Interest, the Court conceived the Bond was satisfied, and ordered it to be cancelled. [*Carpenter v. Tucker*,] 1 *Chan. Rep.* 78. *Vide* [*Geoffrey v. Thom*] 1 *Chan. Rep.* 88, S. P.; [*Dennis v. Nourse*] 1 *Chan. Rep.* 106.

6. A. exhibited a Bill to have a Specifick Performance of a Covenant, whereby the Plaintiff was to have a Pit in the Defendant's Ground for digging of *black Stones*, and that when the old one failed, he might sink a new one, and that there should be no other Pit for digging *black Stone*; but it appearing that the Defendant, and those under whom he claimed, had been in Possession of a Pit there above *sixty Years*, the Bill was dismissed. *Hil.* 1690, *Scofield and Whitehead*, 2 *Vern.* 127. (S. C. *ante* [1 *Eq. Ca. Abr.*], 26.)

7. A Common which had been inclosed for thirty Years, shall not afterwards be thrown open. *Silway v. Compton*, 1 *Vern.* 32.

8. The Defendant held a Copyhold of the Manor of *Ipsing*, at the Rent of 8s. *per Ann.* and so it appeared by the Court Rolls of *Hen.* 8, of *Phil.* and *Mary*, and down to *Car.* 1, and in the 12 *Car.* 1 [1636-37] The Defendant's Mother was admitted, as of the Manor of *Ipsing*. The Owner of the Manor of *Dean*, which he purchased from *J. S.* who formerly was Owner of both Manors, brought his Bill to compel Payment of the 8s. *per Ann.* and although he admitted that the Copyhold was held of the Manor of *Ipsing*, and not of the Manor of *Dean*; yet the Rent having been paid to him for near twenty years, which was the only Evidence he had to shew for it, the Arrears and growing Rent were decreed to him; and a Trial at Law denied, though prayed by the Defendant. *Mich.* 1705, *Steward and Bridger*, 2 *Vern.* 516.

[307] 9. A. devises his Estate to B. his Son, charged with £500 to his Granddaughter, the Daughter of B. payable at Twenty-one, or Marriage; B. on the Marriage of his Daughter, gives her £1500 Portion, but no Notice is taken of the £500 Legacy, nor any Release given for it; twenty Years afterwards, the Daughter and her second Husband bring a Bill against the Father for the £500, and the Bill was dismissed, for the £1500 shall be presumed a Satisfaction, especially after such a Length of Time. *Mackdowell v. Halfpenny*, 2 *Vern.* 484. A Legacy presumed to be paid after a great Length of Time. *Fotherby v. Hartridge*, 2 *Vern.* 21.

CAP. XL.

MASTER AND SERVANT.

(A) What Remedy they have against each other.

(B) How far answerable for each other to others.

(A) WHAT REMEDY THEY HAVE AGAINST EACH OTHER.

1. A Bill was exhibited to be relieved against an Apprentice Bond and Articles, and to have them up; and upon hearing, it was ordered, that the Defendant do within a certain Time, *viz.* one Year, bring his Action, and go to Trial thereupon for his Damages; or in default thereof, the Bond and Articles to be delivered up; and the Reason given was, that if it were in the Defendant's Choice to stay his Action as long as he pleased, he would stay till the Plaintiff's Witnesses were dead; and this Practice of putting the Master to sue, or to deliver up the Indentures, was said to be usual. *Hil.* 17 & 18 *Car.* [1666], *Baker and Shelbury*, 1 *Chan. Ca.* 70. (2 *Freem.* 184, S. C. and *P. Semble in auters Cases*, for Witnesses may die. *Ibid.* S. C. *ante*, 78.)

2. A. put his Son Apprentice to an Apothecary, and gave with him a Sum of Money, and allowed the Youth £10 *per Ann.* for his Clothes; the Defendant having put away his Apprentice, after he had lived some Time with him, by Reason of Negligence and Misdemeanors laid to his Charges, the Court decreed the Master to refund £30 of the Money, and the rather, because the Indentures were not [308] intolled, (a) so as the Matter was not properly cognisable before the *Chamberlain of London*. *Trin.* 1688, *Therman and Abell*, 2 *Vern.* 64.

(a) That the Indentures must be intolled, *vide* 2 *Vern.* 492.

[308] 3. A. placed his Son with an Attorney at the Time he lay ill of the Sickness whereof he afterwards died, and gave £120 with him, and Articles were executed, by which it was provided, that in case the Master died within one Year, that then £60 of the Money should be returned; it happened that the Master died within three Weeks

after sealing of the Articles and Payment of the Money ; and on a Bill brought against his Executor, the Court decreed 100 Guineas to be paid back to the Father, notwithstanding the Agreement of the Parties. *Trin.* 1687, *Newton and Rouse*, 1 *Vern.* 460.

4. If an Apprentice marries without the Privity of his Master, yet that will not justify his turning him away, but he must sue his Covenant. *Stephenson v. Houlditch*, 2 *Vern.* 492.

5. But by the Custom of *London*, a Freeman may turn away his Apprentice for Gaming. [*Woodroffe v. Farnham*,] 2 *Vern.* 291.

6. A. gave the Defendant B. a *Spanish Merchant* £600 to take his Son Apprentice, and entered into a Bond of £1000 for his Fidelity, and at the same Time took a Covenant from his Master, that he should at least once a Month see his Apprentice make up his Cash; the Defendant brought an Action on the Bond, alledging, that the Apprentice had run out £800. And on a Bill to be relieved, my Lord Keeper held, the Meaning of the Covenant was, that the Defendant should not only see to the casting up of the Cash, that it was right in Figures, but to see the Cash effectually made up; and therefore decreed the Plaintiff should be answerable for no more than the Master could prove the Apprentice imbeziled in the first Month, when the Imbezilment began. *Mich.* 1705, *Montague and Tidcombe*, 2 *Vern.* 518.

(B) HOW FAR ANSWERABLE FOR EACH OTHER TO OTHERS.

1. A. as Master of a Ship, of which the Defendants were Part-Owners, bought several Goods of the Plaintiffs, as Beef, Bisket, Sails, &c. A. failed, and on a Bill to compel the Defendants to pay, they insisted that A. only was liable, because he had Money from the Part Owners to pay the Plaintiffs; but the Court held, that the Master was but a Servant to the Owners, and where a Servant buys, the Master is liable; and though the Owners paid their Servant, yet if he paid not the Creditors, they must stand liable, and therefore decreed the Owners to pay the Plaintiffs their Debts in Proportion to their respective Shares and Interests in the Ship. *Hil.* 1709, *Speering and Degrave*, 2 *Vern.* 643. (S. C. *post* [1 Eq. Ca. Abr.], 373.)

(Whatsoever comes within the Compass of a Servant's Business, the Master shall be chargeable therewith, as of his Command, and shall likewise have Advantage of the same against others; but if a Servant borrows Money in his Master's Name, or takes it up of a Creditor of his Master's without Order, that does not bind the Master. *Noy's Max.* 93, 94. *Dr. & Stud. Dial.* 2, cap. 42.)

2. The Plaintiff *Graham* was *Privy Purse* to King *James* the Second, and also Master of his *Buck Hounds*; the Defendant *Stamper* was a *Laceman*, and by his Friends made Interest to the Plain [309]-tiff, that he might be made use of to furnish Lace, &c., for the King's Hunt, and was employed accordingly, and *Graham* did likewise deal with him on his own private Account, and he was from Time to Time paid for what he furnished for the King's Liveries, &c., out of the *Privy Purse*; but on King *James's* going away, the Defendant brought an *Indebitat. Assump.* against *Graham*, as well for what he had furnished for the King's Use, as for what he had furnished for *Graham's* own particular Use, and recovered for both; and on a Bill brought to be relieved, the Circumstances of the Case appeared to be, that *Stamper* had been permitted to furnish Lace and Fringes, &c., for the King, on his Desire and Application made to *Graham*, on his Behalf; that the Entries in the Day-Book of such Goods as were delivered for the King's Use, was without Price, that they may be added in the *Leger Book*, higher or lower, as they had a Prospect of sooner or later Payment; that the Defendant from Time to Time had been paid out of the King's *Privy Purse*; and one Witness swore, that he said he expected Payment from the *Privy Purse*, and not elsewhere; that the Account of the Goods delivered to the King's Use had been paid off to about ten Months, but the Account of Goods delivered on *Graham's* private Score, was of four Years Continuance, which shews that he kept them as distinct Accounts; that none of the Goods delivered for the King's Use came to *Graham*, nor was there any particular Promise to pay for any of them; and the Court held, that if the Law should be, that he that speaks for, or fetches Goods for his Master without any particular Promise of paying for them, is liable to pay for them (which they seemed to doubt); yet on these Circumstances the Plaintiff was intitled to Relief, and accordingly ordered, that the Defendant should only take out Execution for so much as the Plaintiff was indebted to him on his Account. *Trin.* 1692, *Graham and Stamper*. (2 *Vern.* 146, S. C.)

[310] CAP. XLI.

MORTGAGES.

- (A) Of the Nature and different Kinds of Mortgages; and herein of the Power of Equity in supplying Defects in Favour of the Mortgagee, and in making that a Mortgage which otherwise would be an absolute Conveyance.
- (B) Of the Equity of Redemption, at what Time.
- (C) Of the Persons to redeem.
- (D) Of Foreclosure; and here of opening the Foreclosure, Parties foreclosed, and Tender and Refusal of the Mortgage Money.
- (E) Where there are several Mortgagees of the same Estate; what Remedy they have against the Mortgagor, and against each other.
- (F) Where a Mortgagee may protect himself by buying in precedent Incumbrances.
- (G) Where a Person who comes to redeem must do Equity to the Mortgagee before he will be admitted.
- (H) Mortgage-Money, to whom to be paid.
- (I) Mortgagee answerable for the Profits, and how to account.
- (K) How the Assignee of the Mortgagee is to account.

(A) OF THE NATURE AND DIFFERENT KINDS OF MORTGAGES; AND HEREIN OF THE POWER OF EQUITY IN SUPPLYING DEFECTS IN FAVOUR OF THE MORTGAGEE, AND IN MAKING THAT A MORTGAGE WHICH OTHERWISE WOULD BE AN ABSOLUTE CONVEYANCE.

1. A *Mortgage* is the same Thing as the *Hypotheca* of the Civilians, and may be defined a Pledging of Lands, or other [311] immoveable Thing, for Money lent in such Manner, that the Profit or *Usufructus* of the Thing pledged remains with the Debtor till such Time as Default is made in Payment of the Money at the Time appointed.

(The Civil Law distinguished between the *Pignus* and *Hypotheca*; the *Pignus* was when any Thing was obliged for Money lent, and the Possession passed to the Creditor; the *Hypotheca* was when the Thing was obliged for Money lent, and the Possession remained with the Debtor; and in case of Goods pignored, the Creditor was obliged to the same Diligence in keeping them, as he used about his own; so that if the Goods were lost by the Negligence of the Creditor, an Action lay; for the Property being transferred to the Creditor for a particular Purpose, he was to keep them at his Peril: If the Debtor did not redeem the Thing pledged, the Creditor was to foreclose the Redemption of the Debtor: or if the Money was not paid, the Creditor had his *Actio Pignoratitia* or *Hypothecaria*; but if the Money was tendered or paid to the Creditor, the Contract of Pignoration was dissolved, and the Debtor might have the Pledge back as a Thing lent: *Justin. Vin.* 592, and this seems to have introduced the Notion among us of the Debtor's Right of Redemption.)

2. There were no Mortgages of Lands whilst the ancient feudal Tenures continued, because the Feud was filled with a Tenant from the Lord's original Bounty; but when a Liberty of Alienation was given, two Manners of Ways of mortgaging were made Use of, which *Littleton* distinguishes between, and calls by the Names of *Vadium vivum* and *Vadium mortuum*. *Co. Lit.* 205.

3. The *Vadium vivum* is where a Man borrows £100 of another, and makes an Estate of Lands to him, till he hath received the said Sum of the Issues and Profits of the Lands; and it is called *Vadium vivum*, because neither the Money nor the Land dieth; for the Lands are constantly paying off the Money, and they are not left as a dead Pledge, in case the Money be not paid; and this seems to have been the most ancient way of pledging. *Lit. Sect.* 205.

4. The *Vadium mortuum* is so called, because it is doubtful whether the Feoffor will pay the Money at the Day limited, or not; and if he do not pay, the Land which is but in Pledge, upon Condition for the Payment of the Money, is taken from him for ever, and so dead to him; and if he do pay it, then the Pledge is dead to the Tenant of the Land. The ancient Way of making these Mortgages was by a Charter of Feoffment on Condition, that if the Feoffor, or his Heirs, paid the Sum to the Feoffee, or his Heirs, he should re-enter and re-possess, and sometimes the Condition was contained in the Charter of Feoffment, and sometimes it was defeasanced by another Charter made at the same Time. *Lit.* 332; *Mablow.* 318.

5. These Sort of Conveyances were subject to these Inconveniences, that if the Money were not paid at the day, the Estate became absolute, and was subject to the Dower of the Wife of the Feoffee, and all other his Real Charges and Incumbrances, though he were afterwards permitted to perform the Condition. *Co. Lit.* 221; [Nash & Preston,] *Cro. Car.* 190.

6. But the Courts of Equity have set this Matter right, and have maintained the Right of Redemption not only against Tenant in Dower, and the Persons that come under the Feoffee, but even against Tenant by the *Curtesy* and the Lord by *Escheat*, that are in the Post; because the Payment of the Money doth, in Consideration of Equity, put the Feoffor *in statu quo*, since the Lands were originally only a Pledge for the Money lent. [Pawlett v. Att.-Gen.] *Hard.* 465, 469.

7. If Tenant in Tail demises Lands for ninety-nine Years by Way of Mortgage, under a Condition of Redemption, and on his Marriage suffers a Recovery, and in Consideration of the Portion settles a Jointure, and then borrows more Money of the Mortgagee, and appoints the Term as a Security, the Recovery inures to make good the Term; and if the Mortgagee had no Notice of the Jointure, he [312] shall be allowed the second Money lent as well as the first. [Goddard v. Complin.] 1 *Chan. Ca.* 119, 120.

8. If a Copyholder in Fee surrenders to the Use of the Mortgagee in Fee, and the Copyholder becomes a Bankrupt before Presentment, and there is no Presentment; yet *per Cooper*, Lord Chan., though the Surrender was void in Law for want of a Presentment, and that might be the Laches of the Mortgagee in not procuring of it, yet the Surrender was a *Lien*, and that bound the Land in Equity; and the Assignee under the Commission of Bankruptcy ought not to be in a better Case than the Bankrupt, who was plainly bound in Equity by this defective Conveyance. *Mich.* 8 Ann. [1709] *Taylor and Wheeler*, 2 *Salk.* 449. (S. C. *ante* 122; 2 *Vern.* 564; 1 *P. Wms.* 280; *Prec. in Chan.* 524.)

* 9. The Plaintiff lent a Sum of Money on the Mortgage of some Houses, and had a Bond for Payment of the Money, as usual in such Cases; afterwards he lent a farther Sum of £2000 on the Equity of Redemption, and had a Bond for that likewise; afterwards the Mortgagor becomes a Bankrupt, and by some Accident the Value of the Houses sunk so much, that they were not sufficient to raise the Mortgage-Money first lent; and on a Bill brought to have them sold, and that as to so much as they fell short to answer the first Mortgage-Money, the Mortgagee might come in upon his Bond as a Creditor; it was so decreed; and as to the £2000 lent upon the Equity, which was worth nothing, it must stand singly upon the Bond. *Pasch.* 1695, *Wise-man and Carbonell*.

10. A. lends Money to B. to carry on certain Buildings, and takes a Mortgage from him to secure £16,000 with Interest, and by another Deed executed at the same Time, takes a Covenant from B. that he should convey to him, if he thought fit, Ground-Rents to the Value of £16,000, at the Rate of twenty Years Purchase; and on a Bill brought to redeem, the Master of the Rolls decreed a Redemption, on Payment of Principal, Interest and Costs, without Regard to that Agreement, but set aside the same as unconscionable; for a Man shall not have Interest for his Money, and a collateral Advantage besides for the Loan of it, or clog the Redemption with any By-Agreement. *Mich.* 1705, *Jennings and Ward*, 2 *Vern.* 520.

11. If the Condition of a Mortgage is, that the Mortgagor should redeem during his Life, or that the Mortgagor, and the Heirs of his Body, should redeem; yet Equity will admit the General Heir of such Mortgagor to a Redemption, because this can be no Purchase, since there is a Clause of Redemption; and when the Land was originally only a Pledge for Money, if the Principal and Interest be offered, the Land is free; and it would be very hard, that it should be in the Power of the Scrivener, or griping Usurer, by such impertinent Restrictions, to elude the Justice of the Court. 1 *Vern.* 33, 190, S. C.; 2 *Chan. Ca.* 147, S. C. (*Vide Bonham v. Newcomb, infra. pl.* 13.)

12. But if a Man borrows Money of his Brother, and agrees to make him a Mortgage, and that if he has no Issue Male, his Brother should have the Land; such an Agreement made out by Proof, may well be decreed in Equity. [Howard v. Harris.] 1 *Vern.* 193, *per North*, Lord Keeper. (*Vide Bonham v. Newcomb, infra. pl.* 13.)

13. A. in consideration of £1000 made an absolute Conveyance to B. of the Reversion of certain Lands after two Lives, which at that Time were worth little more; and by another Deed of the same Date, the Lands are made redeemable any Time during

the Life of [313] the Grantor only, on Payment of the £1000 and Interest ; A. died, not having paid the Money ; and it was held by my Lord Nottingham, that his Heir might redeem, notwithstanding this restrictive Clause ; and that it was a Rule, *once a Mortgage and always a Mortgage*, and that B. might have compelled A. to redeem in his Life-time, or to have foreclosed him ; but on a re-hearing, Lord Keep. North reversed the Decree on the Circumstances of this Case ; for it appeared, by Proof, that A. had a Kindness for B. and that he had married his Kinswoman, which made it in the Nature of a Marriage-Settlement ; he likewise held, that B. could not have compelled A. to redeem during his Life ; which made it the more strong. 33 Car. 2 [1681-82], *Newcomb and Bonham*, 1 Vern. 7, 214, S. C. ; 232, S. C. ; 2 Vent. 364, S. C. where it is said, that Lord North's Decree was affirmed in the House of Lords. (2 Freem. 67, S. C. and Decree says, it was thought hard by several at the Bar that the Heir should be permitted to redeem against the express Agreement of his Ancestor. *Ibid.* 69.) *Vide* 1 Vern. 268, *Barrell v. Sabine*.

14. If A. mortgages Land to B. worth £15 *per Ann.* for securing £200, and at the same Time B. enters into a Bond, conditioned, that if the £200 and Interest is not paid within a Year, then he to pay to A. his Executors or Administrators, the further Sum of £78 in full for the Purchase of the Premises, &c., and A. dies within the Year, and the Money is paid the next Day after the Mortgage is forfeited to his Administrator ; yet A.'s Heir may redeem, paying the £200 and likewise the £78 that was paid the Administrator. *Mich.* 1687, *Willet and Winnell*, 1 Vern. 488, decreed.

15. So where A. for £550 made an absolute Assignment of a Church-Lease for three Lives to B., and B. by Writing under his Hand agreed, that if A. paid £600 at the End of the Year, B. would reconvey ; B. died, leaving C. his Son and Heir ; two of the Lives died, and the Lease was twice renewed by C. and his Father ; and though it was near twenty Years since the Conveyance was made, yet the Master of the Rolls decreed a Redemption on Payment of the £550 and the two Fines, &c. *Mich.* 1688, *Manlove and Bull*, 2 Vern. 84 ; *vide Talbot v. Braddill*, 1 Vern. 183, 394, where a Mortgagee was allowed to redeem before the Time agreed on.

(B) OF THE EQUITY OF REDEMPTION, AT WHAT TIME.

1. At a re-hearing before my Lord Keep., assisted with Justice Vaughan and Turner, concerning the Redemption of a Mortgage which had been made above forty Years, my Lord Keep. declared that he would not relieve Mortgages after twenty Years, for that the Statutes of Limitations did adjudge it reasonable to limit the Time of one's Entry to that Number of Years, unless there are such particular Circumstances as may vary the ordinary Case, as Infants, Femes Covert, &c., who are provided for by the very Statute, though those Matters in Equity are to be governed by the Course of the Court ; and that it is best to square the Rules of [314] Equity as near the Rules of Reason and Law as may be. *Eure and White*, 2 Vent. 340.

(Though there is no Time limited for Redemption of Mortgages ; yet where a Man comes in at an old Hand, it hath been sometimes decreed, that the Possessor should account no farther than for the Profits made in his own Time, to discourage the stirring in such dormant Titles ; but the Common Doctrine in the Courts of Equity is, that Mortgages are not within the Statute of Limitations, though that Statute is mentioned sometimes as a proper Direction to go by ; for the Courts of Equity are tender of settling any set Time, because a Man can never be injured if he receives Principal, Interest and Costs ; but the Proprietor of the Land is injured if he parts with his Possession, under the true Value ; but sometimes the Court hath allowed Length of Time to be pleaded in Bar, where the mortgaged Estate hath descended as a Fee, without Entry or Claim from the Mortgagor, and where the Possessor would be intangled in a long Account. *Vide* 1 Chan. Ca. 102 ; 1 Chan. Rep. 97, 98, 184, 206.)

2. A Bill was exhibited to redeem a Mortgage ; to which the Defendant demurred, because by the Plaintiff's own shewing, it appeared the Mortgage was sixty Years old ; but upon Argument the Demurrer was over-ruled, because it was charged in the Bill, that the Mortgagor agreed the Mortgagee should enter, and hold till he was satisfied ; which is in the Nature of a *Welsh Mortgage* ; and in such Case the Length of Time is no Objection. *Mich.* 1686, *Orde and Herning*, 1 Vern. 418.

3. So where a Bill was exhibited to redeem a Mortgage made in 1642, though the Mortgage entered in 1650, and there were three Descents on the Defendant's

Part, and Part on the Part of the Plaintiff; yet the Length of Time being answered for the greatest Part by Infancy or Coverture; and for as much as in 1686, a Bill was brought by the Mortgagee to foreclose, and an Account then made up by the Mortgagee, the Court decreed a Redemption, and an Account from the Foot of the Account in 1686. *Trin.* 1700, *Procter and Cowper*, 2 *Vern.* 377. (*Prec. in Chan.* 116, S. C.; 2 *Eq. Ca. Abr.* 611, S. C. but not S. P.)

4. But where a Mortgage was made to A. in the Year 1639, to indemnify him against Debts, for which he was engaged for the Mortgagor, and in the Year 1649, he entered into the mortgaged Premises, and had Possession, and afterwards conveyed away several Parts of the mortgaged Premises to several Persons, and several Sales and Marriage Settlements had been made of them; and in the Year 1663, a Bill was brought to redeem, but all the Assignees were not Parties; and a Decree to an Account, and a Report made, and Exceptions taken to that Report; and so it rested for about eighteen Years, and then another Bill was brought, and another Decree to redeem, but no Prosecution upon it from the Year 1676 till 1697, and then the Plaintiff having purchased the Equity of Redemption of those Lands (*inter alia*) from the Heirs of the Mortgagor, brought his Bill to redeem; the Objections against it were, the Length of Time, the many derivative Titles that had been made, and when no Suit was depending, and the Difficulty of taking the Account: to which it was answered, that there had been fresh Pursuits, and that the Difficulty of the Account had been occasioned by the Mortgagees themselves, and that there were Infants in the Case: My Lord Keep. held, there ought to be no Redemption, and that Length of Time excuses the Mortgagee from taking the Estate for his Own, and using it accordingly; and none that have come in under him have done amiss; and though there were Infants in the Case, yet the Time having begun upon the Ancestor, it shall run even upon Infants, as it is at Law in the Case of a Fine; and there is one great Objection to a Redemption in this Case, that it does not appear that the Plaintiff paid any Thing for this Equity of Redemption, only had it thrown into his Bargain. *Hil.* 1700, *St. John and Turner*, 2 *Vern.* 418, S. C. (S. C. but not S. P. *ante* [1 *Eq. Ca. Abr.*], 258.)

[315] * 5. The Plaintiff's Grandfather in the Year 1686 had made a Mortgage of the Estate in Question, which proved to be about nine or ten Pounds *per Annum*, for securing £100. In the Year 1696, this Mortgage was assigned over to the Defendant, who by Agreement was then let into Possession, and had continued so ever since, and was now about ninety Years of Age; the Mortgagor died several Years since, leaving the Plaintiff's Father, his eldest Son and Heir of full Age, who likewise died in the Year 1711, leaving the Plaintiff his eldest Son and Heir, then about twelve Years of Age, who brought this Bill for an Account, and to be let into a Redemption of the Estate in Question, but which the Defendant had been in Possession of thirty-three Years, and so was greatly overpaid his Principal and Interest; but my Lord Chan. dismissed his Bill, and ordered it to be entered down, as one of the Reasons for dismissing the Bill, that the Plaintiff had no Remedy by Ejectment at Law to recover the Possession, being barred by the Statute of Limitations, and he thought that a reasonable Guide for this Court to follow, as to the Redemption in Equity; and though the Plaintiff was an Infant at his Father's death, yet the Computation of Time began long before, when there was no Infancy in the Case, and therefore will run on against Infants after. *Mich.* 1729, *Knowles and Spence*.

(C) OF THE PERSONS TO REDEEM.

1. A Person who comes in by a voluntary Conveyance may redeem a Mortgage. [*Howard v. Harris*.] 1 *Vern.* 193, admitted. He who comes to redeem a Mortgage, must shew a Title. *Vide Lomax v. Bird*, 1 *Vern.* 182.

* 2. If a Man enters into a Bond, in which he binds himself and his Heirs, and dies, leaving a Real Estate to descend to his Heir, subject to a Mortgage for Years, and the Heir sells the Equity of Redemption; the Oblige cannot redeem the Mortgage, without first having a Judgment at Law against the Heir. *Pasch.* 1702, *Bateman and Bateman*. [S. C. *Pre. Ch.* 198.] (S. C. but not S. P. *ante* [1 *Eq. Ca. Abr.*], 149, 218, *post*, 382.)

3. The Mortgagee in Fee after Forfeiture was attainted, and the King seised, and whether the Mortgagor should redeem *Dubitat*. *Hard.* 465.

4. A. mortgaged his Lands upon Condition, that if he or his Heirs repaid £100

at such a Day, he should re-enter : before the Day he dies, leaving Issue a Daughter, his Wife *ensient* with a Son ; the Daughter pays the Money at the Day, and then the Son is born : the Daughter shall keep the Lands, and the Son shall not recover against her, for the Daughter is in nature of a Purchaser, where she hath regained the Land by her own Vigilance, which otherwise had lapsed at Law to the Mortgagee. [Kirton's Case,] *Cro. Car.* 87. [Shelly's Case,] 1 *Co.* 99.

5. If a Man devises Lands which are in Mortgage to A. for Life, Remainder to B. in Fee ; A. shall contribute one Third towards the Discharge of the Mortgage. [Cornish *v.* Mew,] 1 *Chan. Ca.* 271 ; *vide* [Thynn *v.* Duvall] 2 *Vern.* 117, and Title *Contribution and Average*, Letter (B) [1 *Eq. Ca. Abr.* p. 117].

6. If a Jointress, who is to hold the Land free from Incumbrances, pays off a precedent Mortgage, her Executors shall hold over till they are satisfied, because such Tenant for Life ought to be reim-^[316]bursed the Money she paid to set her Estate free, and in the Condition she ought to have been. [Cornish *v.* Mew,] 1 *Chan. Ca.* 271. [Brond *v.* Brond,] 2 *Chan. Ca.* 100 ; 1 *Chan. Rep.* 19.

7. But if a Jointress after Marriage join with her Husband in a Fine, and mortgage the Land, and the Husband dies, there her Land is charged, and she shall pay her Part towards the disburthening the Land ; and her Executors shall not hold the Lands till satisfied thereof, because she herself concurred in the laying on the Charge, and therefore must join in the disburthening of it, according to the Value of her Interest. [Cornish *v.* Mew,] 1 *Chan. Ca.* 271. [Brond *v.* Brond,] 2 *Chan. Ca.* 99, 100 ; 1 *Chan. Rep.* 19.

8. If a Man marries a Jointress of Houses which are burnt down, and the Husband and Wife borrow £1500 to build on the Ground, and levy a Fine *sur concessit* for ninety-nine Years, if the Wife lived so long, and a Deed is made between the Conuzee and the Husband, wherein the Husband covenants to repay the Mortgage-Money with Interest, and the Equity of Redemption is limited to the Husband and his Heirs ; and the Husband expends 3 or £4000 in building upon this Ground, and dies ; the Wife shall redeem, and not the Heir of the Husband. Decreed by *Nottingham*, Lord Chan., and affirmed on a rehearing by *North*, Lord Keep., *Brend* and *Brend*, 1 *Vern.* 213, for the Wife was no Party to the Deed of Redemise, by which the Redemption was limited to the Husband ; and the Wife being a Jointress, and having granted a Term for Years only out of her Estate for Life, there rests a Reversion in her, which naturally attracts the Redemption. (S. C. *ante* [1 *Eq. Ca. Abr.*,] 62.)

9. A. on his Marriage agreed to leave his Wife £1000 if she survived him ; the drawing of the Agreement was left to the Parson of the Parish, who made a Bond from A. to his intended Wife in £2000, conditioned to leave her £1000 if she survived him ; the Marriage was had, and A. died, leaving a Freehold and a Copyhold Estate in Mortgage, and which were mortgaged together ; and it was held, that the Wife should redeem as well the Freehold as Copyhold, and hold over till she was satisfied. *Hil.* 1704, *Acton* and *Pierce*, 2 *Vern.* 480. (S. C. *ante* [1 *Eq. Ca. Abr.*,] 63 ; *Proc. in Chan.* 237 ; 2 *Eq. Ca. Abr.* 594.)

10. A. joins with B. her Husband, in making a Mortgage for Years of her Inheritance for £1500, to supply the Husband's Occasions, to pay for the Place of Captain of the *Band of Pensioners*, and subject to the Mortgage ; the Estate was settled in A. for Life, Remainder to her Son in Tail. B. in the Mortgage Deed covenants to pay the Money, and the Proviso was, that on Payment of the Mortgage Money, the Term was to cease ; the Mortgage was several Times assigned, and particularly in 1683, and the Wife joined in it ; and there the Proviso was, that on Payment of the Money by them, or either of them, the Mortgage-Term was to be assigned, as they, or either of them should direct or appoint. A few Days after the Mortgage was made, B. by Letter thanked his Wife for having sealed it, and added, that the Profits of the Office should be religiously applied to pay off the Incumbrance ; but afterwards when Money came in, though he paid off the Mortgage, yet he took an Assignment thereof in Trust for himself, and by Will devised his Personal Estate, and the Benefit of this Mortgage, to his second Wife ; and on a Bill by the Son of the first Wife, to have this Mortgage assigned him, it was declared by my Lord Keep. that he could not decree for him, but ^[317] upon the usual Terms of Redemption, on Payment of Principal, Interest and Costs, discounting Profits ; but upon an Appeal to the Lords, the Son obtained a Decree to have the Mortgage assigned to him. *Pasc.* 1702, *The Earl and Countess of Huntingdon*, 2 *Vern.* 437. (S. C. *ante* [1 *Eq. Ca. Abr.*,] 62 ; *Vide* S. C. 2 *Eq. Abr.* 672.)

11. So where A. and his Wife mortgaged the Wife's Estate, and A. covenanted to pay the Money, but the Equity of Redemption was reserved to them and their Heirs; the Husband dying, it was decreed, that the Mortgage should be discharged out of the Husband's Estate. *Hil. 1707, Pocock and Lee, 2 Vern. 604.*

(D) OF FORECLOSURE: AND HERE OF OPENING THE FORECLOSURE, PARTIES FORECLOSED, AND TENDER AND REFUSAL OF THE MORTGAGE MONEY.

1. A Mortgagee obtained a Decree against a Mortgagor and all the Creditors whose Debts affected the Estate, that they should redeem, or be foreclosed. One of the Creditors pays the Money by the Consent of the Rest, and has the Mortgage assigned to him; and agrees with them, that if they would pay his Money at a further Day, they should redeem him; otherwise, that he should have the Lands absolutely. The Creditors failed to pay the Money at the Time agreed on, nevertheless it was held, on a Bill brought by the other Creditors, that they should redeem, tho' the Creditor who paid the Money had been in Possession 20 Years, and had made great Improvements, they allowing only necessary Repairs, and lasting Improvements. *Hil. 1682, Exton and Greaves, 1 Vern. 138.*

2. There being a first and second Mortgage made of the same Estate, the first Mortgagee brought a Bill against the second, to compel him to redeem, or to be foreclosed, and foreclosed him accordingly; it so happened that the first Mortgagee, by his Will, devised the Premises to the Mortgagor; and thereupon the second Mortgagee brought a new Bill to set aside the first Mortgage, and to be let in to a Satisfaction of his Money; the Defendant pleaded the former Suit and Decree of Foreclosure; but the Plea was over-ruled. *Trin. 1691, Cook and Sadler, 2 Vern. 235. (Vide Bovey v. Smith, 1 Vern. 60, 84, 144.)*

* 3. If a Mortgagee has a Decree of Foreclosure, tho' that Decree be signed and enrolled, yet if he after brings an Action of Debt on the Bond given at the same Time for Payment of the Money and Performance of the Covenants in the Mortgage Deed, such Action opens against the Foreclosure, and lets in the Equity of Redemption of the Mortgagor. *Trin. 1729, Dashwood and Blythway, at the Rolls.*

4. A Man makes a Mortgage, and afterwards makes a Marriage Settlement of the Equity of Redemption, wherein he limits it on the Wife, and then on the Issue of his Body, with Remainder in Tail to his Brother; the Mortgagee exhibits his Bill against the Mortgagor to have his Money, or that he may stand foreclosed, without making the Brother a Party, and has a Decree accordingly; and afterwards the Mortgagor dies without Issue, and the Lands remain to the Brother by the Marriage Settlement, who prefers his Bill to redeem; and it was dismissed; for having made those Parties to the Bill of Foreclosure, who were Parties to the Mortgage, he did as much as was necessary; for perhaps it was impossible for him to know all the Parties against whom to seek a Foreclosure; and this would keep him an eternal Bailiff to the Mortgagor; besides, to open an Account after Length of Time against a Person, who by Law was obliged to keep no Account, in Favour of a meer Volunteer, is unreasonable. [*Roscarrick v. Barton,*] 1 *Chan. Ca.* 217, 220.

5. Tenant for Life, the Reversion in Fee; he in Reversion mortgages his Estate in Fee, and the Mortgagee deviseth it; the Devisee may bring his Bill against the Mortgagor, and need not make the Heir of the Devisor a Party, because he hath no Interest in the Lands at all, it being all devised away from him, and he need only foreclose the Mortgage. [*Williams v. Day,*] 2 *Chan. Ca.* 32.

6. If a Man mortgages Lands, and then confesses several Judgments, and some of the Persons that have Judgments give the Mortgagee Notice, and after he obtains against the Mortgagor a Decree to foreclose; such Persons, that gave Notice of their Interest, shall notwithstanding redeem, because they are Creditors for a valuable Consideration, and the Mortgagee had Notice of them, so that he might have made them Parties to his Bill; but the Persons, that gave no previous Notice of their Judgment, are totally barred of all Redemption by the former Decree. [*Smith v. Valence,*] 1 *Chan. Rep.* 170, [*Welden v. Rallison, Ibid.*] 171.

7. But when a Bill was exhibited by a second Mortgagee to redeem, and the first Mortgagee pleaded his Mortgage, and a Decree to foreclose the Mortgagor, without Notice of the second Mortgage, yet the Plea was over-ruled. *Mich. 1707, Godfrey and Chadwell, 2 Vern. 601.*

8. If the Mortgagor tenders the Money, and the Mortgagee refuses, he loses the Interest from the Time of the Tender, because it is but a Pledge for the Money; and if the Money be tendered, he ought not to keep the Pledge; and no Man ought to pay for the Forbearance, when he hath the Money ready. [Manning v. Burges,] [1] *Chan. Ca.* 29. [Lutton v. Rodd,] 2 *Chan. Ca.* 206, S. P.

(If upon a Mortgage a Tender be made of the Money at the Place appointed for Payment, at any Time of Day specified in the Condition, and the Mortgagee refuses, the Condition is saved for ever, and the Mortgagor need not stay at the Place appointed till the last Instant of the Day, because by the express Letter of the Condition, the Money is to be paid on the Day indefinitely; nor needs there be any new Tender afterwards within a convenient Time, because by the Words of the Contract both Parties ought to acquiesce; and upon such Refusal the Land is discharged, because upon the Tender the Demise is void; and if it be on a Feoffment the Condition is performed, and the Feoffor may re-enter; but the Money lent doth yet remain a Debt or Duty, because it was a Debt by the original lending of the Money, whether it had been so secured or not; and though the Security fails according to the Words of the Agreement, yet there is the same natural Justice that the Money should continue. *Co. Lit.* 209; 5 *Co.* 114; *Plow.* 173.)

* 9. The Plaintiff had made a Mortgage in Fee of his Estate, which by several mesne Assignments was come to Sir William *Dodwell*; and there being likewise two several Terms for Years standing out, they were assigned to Trustees, in Trust for Sir William *Dodwell*, to protect the Inheritance, and subject to the same Equity of Redemption; the Plaintiff and Sir William *Dodwell* settled an Account of what was due; and there appearing to be due thereon £4400 Principal Money, the Interest was then paid off, and at the same Time Sir William *Dodwell* gave a Note, whereby he promised, [319] that on Payment of the Sum of £4479 or thereabouts, on the 23d of *October* then next, being the Interest computed to that Time, he would re-convey the Inheritance to the Plaintiff and his Heirs, and would procure his Trustees to assign the two Terms for Years, as the Plaintiff should direct. In August following Sir William *Dodwell* died, and the Defendants were his Executors; and he likewise left the Defendant *Mary*, his only Child, and Heir at Law, an Infant of about eight Years of Age; the Plaintiff provided the Money, and on the 23d of *October* tendered a Bank-Bill of £4500 to one of the Executors, (there being four in all) for him to take thereout what was then due for Principal and Interest; but the Executors having none of them proved the Will, he refused to accept of the Tender; upon which the Plaintiff asked him, if he objected to the Legality of the Tender, being in a Bank-Bill and not in Money, and that if he did, he would presently turn it into Money; to which the other answered, he had no Objection to the Tender, but not having proved the Will, he would not accept of the Money. Afterwards the Plaintiff made the like Tender to another of the Executors, who likewise refused to accept of it, not having proved the Will; but he objected to the Legality of the Tender not being in Money: Afterwards all the four Executors proved the Will; and the Bill was brought to redeem on Payment of £4400 and Interest to the 23d of *October*, being the Time mentioned in the Note; and that the Plaintiff might not be obliged to pay Interest beyond that Time, as the Defendant's Executors insisted he ought: And it was held by my Lord Chancellor, that this Tender in a Bank-Note was not, strictly speaking, a legal Tender; but since it was proved the Plaintiff offered to turn it into Money, that made it a good Tender. 2dly. It was clearly agreed, that any, or either of the Executors, before Probate, might have received and given a good Discharge for the Money, especially when, as appeared in this Case, they afterwards proved the Will, and so were Executors *ab initio*. 3dly. That tho' they were Executors only in Trust for the Daughter who was an Infant, yet none of them could be in a better Case than Sir William *Dodwell* himself could have been, if he had been living; and such Tender under these Circumstances would have bound him; so it will his Executors and Devisee; and therefore decreed a Redemption on Payment of the £4400 and Interest to the 23d of *October*, the Time mentioned on the Note, and no longer, and no Costs on either Side; and the Infant Heir at Law, on Payment of the Money to the Executors, was to convey the Inheritance descended to her according to the Act 7 *Ann.* for obliging Infant Trustees to assign and convey. *Hil.* 1729, *Sir John Austen and the Executors of Sir William Dodwell*, at My Lord Chancellor's.

[320] (E) WHERE THERE ARE SEVERAL MORTGAGEES OF THE SAME ESTATE, WHAT REMEDY THEY HAVE AGAINST THE MORTGAGOR, AND AGAINST EACH OTHER.

1. If a Man mortgages Lands by a defective Conveyance, and afterwards mortgages to a second Person, by an Assurance, that is good and effectual, with Notice, the Second shall prevail, because that carries the legal Title ; and Equity will not interpose, when both are equally upon a valuable Consideration ; but if a Man mortgages by a defective Conveyance, and there are subsequent Creditors, whose Debts did not originally affect the Land, Equity will supply such defective Conveyance against such subsequent Incumbrances, who acquired a legal Title afterwards ; for since the subsequent Creditors did not originally take the Lands for their Security, nor had in view an Intention to affect them, when afterwards the Lands are affected, and they come in under the very Person that is obliged in conscience to make the defective Security good, they stand in his Place, and shall be postponed to such defective Conveyance. *Mab.* 1670, *Burgh and Francis*, by Sir *Heneage Finch*, Lord Keep. [S. C. Rep. Temp. *Finch*, 28 ; *Nelson*, 183 ; 1 P. Wms. 279 ; 3 Swans. 536 n.]

2. The Mortgagor being Son-in Law to the Mortgagee, having entered, and afterwards suffered the Mortgagor to take the Profits for several Years, without requiring Interest ; it was held by the Court, that the Interest of the first Mortgagee should not affect the Lands, so as to keep out the second Mortgagee longer than he would have been, had the Interest been duly paid ; it was likewise held, that if a Mortgagee, after Notice of a subsequent Mortgage, joins with the Mortgagor, in a Sale of the Lands to a Stranger, the Money received by either, for the Purchase, shall sink so much of the Mortgage Money. *Mich.* 1691, *Bentham and Haincourt*. (*Proc. in Chan.* 30 S. C.)

3. If A. has a first Mortgage, and B. a second, and subject to these Mortgages, the Estate is settled on C. for Life, Remainder on D. an Infant : A. may bring a Bill to foreclose, though B. has not the like Remedy over against D., who because of his Infancy cannot be foreclosed. *Mich.* 1705, *Draper and Jennings*, 2 *Vern.* 518.

4. If a first Mortgagee brings a Bill to foreclose the Mortgagor, and an Account is directed and taken between them, such Account shall bind the second Mortgagee, tho' he was no Party to the Bill, if there was no Fraud or Collusion in the taking of it. *Trin.* 29 *Car.* 2, *Needler and Deeble*, 1 *Chan. Ca.* 299. (S. C. ante [1 Eq. Ca. Abr.], 12.)

5. If a Man mortgages certain Lands to one Man, and mortgages those Lands, with some others to another, tho' this seems to be a Case omitted out of the Statute against clandestine Mortgages ; yet if it appears to be a Contrivance to evade it, as if an Acre or two of Land were only added, this will not exempt it ; but a Person who will take Advantage of the Statute, must be an honest Mortgagee ; and therefore if a Man has used any Fraud or Practice in obtain[321]ing a second Mortgage, he shall not have the Benefit of the Statute. [*Stafford v. Selby*,] 2 *Vern.* 589, 590.

(By the 4 & 5 W. & M. cap. 16, if any Person shall borrow any Money, &c., and for the Payment thereof shall suffer a Judgment or Recognizance, and shall afterwards borrow any other Sum of another, or for other valuable Consideration, and for securing the Repayment and Discharge thereof, shall mortgage Lands to the second Lender, or to any other Person in Trust for him, and shall not give Notice to the Mortgagee of such Judgment, &c., in Writing before the Execution of the said Mortgage, such Mortgagor shall have no Benefit in Equity of Redemption of the Lands mortgaged, unless such Mortgagor, or his Heirs, upon Notice given by the Mortgagee in Writing, under Hand and Seal, attested by two Witnesses, of such former Judgment, &c., shall within six Months pay off and discharge the same, and cause the same to be vacated and discharged. And if any Person who shall once Mortgage Lands for valuable Consideration, shall again mortgage the same Lands, or any Part thereof, to any other Person, the former Mortgage being in Force, and shall not discover in Writing to the second Mortgagee the first Mortgage, such Mortgagor shall have no Relief, or Equity of Redemption, against the second Mortgagee, but such second or third Mortgagees may redeem any former Mortgage. This Act shall not extend to bar any Widow of any Mortgagor of her Dower, who did not legally join with such Husband in such Mortgage, or otherwise lawfully exclude herself.)

6. If A. being about to lend Money to B. on a Mortgage, sends C. to inquire of D.

who had a prior Mortgage, whether he had any Incumbrances on *B.*'s Estate; and it is proved that *C.* went to him, and spoke to him accordingly, and that *D.* denied having any such Mortgage, *D.*'s Mortgage shall be postponed. *Thobson v. Rhodes*, 2 Vern. 554; vide 2 Vern. 370, *Draper v. Hill*. (S. C. but not S. P. ante [1 Eq. Ca. Abr.], 229.)

7. One *Goff*, being possessed of the *Thatched House* at St. James's, on a Building Lease for 60 Years, mortgages it to Dr. *Lancaster* and one *Habberfield*, for securing £600, which the Defendant afterwards paid off, and advanced to *Goff* £600 more, and took an Assignment of this Mortgage, but had not the original Lease delivered to him till some Days after the Assignment. *Goff* afterwards being in a declining Way, proposed to borrow of the Plaintiff £350 on a Mortgage of a Vault and two Rooms, Part of the Mortgaged Premises; and on a Treaty for that Purpose, one *Remington*, who acted for the Plaintiff, desired to see the original Lease. *Goff* told him that he had it not by him, but that his Lawyer kept all his Writings for him, as not thinking it safe to trust them in his own House, where all sort of Company resorted; upon which *Goff* goes to the Defendant, who was an Attorney in the City, tells him he was about agreeing with a Person for the rebuilding Part of the Premises, at so much a Foot Square, which would better his Security, and desired him to let him have the original Lease, that he may see the Dimensions of the House: the Defendant would not trust him with the Lease in his own Power, but goes along with him to the *Thatched House*; and after he had been there some Time, *Goff* sends for the Plaintiff and *Remington*, told them he had now the original Lease, which they might see; and upon their coming to his House, *Goff* goes into the Room where the Defendant was, and desires him to let him have the Lease, to shew the Person he had mentioned, for that he was now in the House; and accordingly the Defendant lets him have the Lease, which he carries to the Plaintiff and *Remington*; and they being satisfied therewith lend him the Money, and took a Mortgage of the Vault and two Rooms, insisting at the same Time to have the original Lease delivered to them; but *Goff* urging, that it concerned him much more than the Plaintiff had in Mortgage, and that he could not part with it, the Plaintiff permitted him to keep it, and he thereupon in about an Hour's Time delivered it again to the Defendant, without acquainting him with what he had done; and the Defendant swore expressly in his Answer, that he had no Notice of this Transaction, or of the Plaintiff's Mortgage. Afterwards the Plaintiff lent *Goff* a farther Sum of [322] Money, and prevailed on the Defendant to let him have the Original Lease a second Time; but there was no Proof that the Defendant knew the Occasion of it, and he by his Answer expressly denied his having Notice of it. Afterwards *Goff* failed, and thereupon the Defendant brought his Ejectment, and recovered; and this Bill was brought to have the Defendant's Mortgage postponed, upon Pretence that here was a manifest Fraud on the Plaintiff, and that the Defendant was privy to it; and at the *Holls*, the Plaintiff had a Decree accordingly, but on Appeal the Decree was reversed; but my Lord Chan. said, if a Man makes a Mortgage, and afterwards mortgages the same Estate to another, and the first Mortgagee is in Combination to induce the second Mortgagee to lend his Money, this Fraud without doubt will in Equity postpone his own Mortgage; so if such Mortgagee stands by, and sees another lending Money on the same Estate, without giving him Notice, of his first Mortgage, this is such a Misprision as shall forfeit his Priority; but here is no Manner of Proof that the Defendant knew any Thing of the Plaintiff's Lending his Money; nay if there had, yet the Plaintiff appears guilty of so much a grosser Neglect, that he ought not to prevail; for the Defendant intrusted *Goff* with his original Lease but for a very little while; the Plaintiff takes his Word that he could not part with it, and leaves it wholly in his Power, to go on in defrauding whom else he had a Mind to; besides, it appears the Defendant was imposed on by *Goff*; for he parted with the Lease only to better his own Security, and had the most specious Pretence that could be for it; and therefore it cannot, without manifest Proof, be objected to him, that he let *Goff* have his Lease to shew the Plaintiff, or with a Design to draw in the Plaintiff to lend his Money, and dismissed the Bill with costs unless the Plaintiff should within such a Time redeem the Defendant; and for Precedents were cited *Raw and Pott*, the Countess of *Bridgwater* and *Russel*, and one *Clare's Case* of *Yorkshire*. Mich. 1716, *Peter and Russel*. (2 Vern. 726, S. C.; *Gilb. Eq. Rep.* 122, S. C. *in totidem verbis*.)

(F) WHERE A MORTGAGEE MAY PROTECT HIMSELF BY BUYING IN PRECEDENT INCUMBRANCES.

1. If a Man mortgages Land to A. and afterwards makes a subsequent Mortgage to B. without Notice at the Time of making the Mortgage, and B. purchases in a precedent Mortgage, which stands out at Law, tho' nothing on it be due in Equity, or a Statute, whereon Money is due, which he extends, he shall hold the Land till he is satisfied what is due upon both Securities, though he had Notice of A.'s Mortgage before his second Purchase of the prior Security; because having at first innocently lent his Money, he may do what he can to secure that Money from being lost; and when he hath purchased in the prior Incumbrance, he hath a Title at Law, and being equally on a valuable Consideration with the mean Incumbrancer, it is but just that Equity should leave it in the same Manner that it stood at Law; for there is no Room for Equity to interpose, to take away the Security the Law had given, where the Person that has the Security comes into the Title without any Corruption at all; and it were Partiality and not Equity to interpose, where the Security gives the fair Lender a good and legal [323] Title; and it is all as one, whether such third Lender, or Purchaser, takes in a Mortgage, that is an Interest vested, or a Statute that is only a Charge; for both are real Liens, and sufficient to overthrow the Title of the mesne Incumbrancer, or whether Money be due on the first Incumbrance, or not, since that does not alter the legal Title. *Marsh and Lee, 2 Vent. 337, 338. 1 Chan. Ca. 162, 163, S. C.; [Churchill v. Grove.] 1 Chan. Ca. 36; [Hackett v. Wakefield.] Hard. 173; [Higgon v. Syddal.] 1 Chan. Ca. 149, 150; [Anon.] 2 Chan. Ca. 208; [Edmunds v. Povey.] 1 Vern. 187; 1 Chan. Ca. 20, 166; [Hitchcock v. Sedgwick.] 2 Vern. 157, 159. (Vide Post [1 Eq. Ca. Abr.], 355.)*

2. A Man mortgages the Manor and Rectory of D. to A. and afterwards mortgages the Rectory to B. without Notice of the Mortgage to A., and then B. purchases in a precedent Incumbrance on both the Manor and Rectory; and the Question was, when B. had received all the Money due on the first Security, whether he should receive any more Profits of the Manor, or only keep the Incumbrance on Foot, to protect the Rectory; which was argued before *Finch*, Lord Keep., in the Presence of *Wild* and *Twisden*; and the two Judges held, that B. should not receive the Profits of the Manor, after the first Incumbrance was satisfied, because he had taken the Rectory only for his Security of that Sum; and it would be unreasonable to give him a Security beyond what he had in his Original Intention; but the Keeper over-ruled it; for that when he had purchased the precedent Incumbrances, which comprehended both the Manor and Rectory, and were forfeited at Law, and therefore it was reasonable, that the Estate should not be taken away by the mesne Incumbrancer in a Court of Equity, which by no Method could be evicted at Law, unless such Person would do Equity, and pay the whole Money due on both Securities. [*Bovey v. Skipwith.*] 1 Chan. Ca. 201, 202.

3. If a Man lends £600 on a Mortgage, and afterwards discovering, that the Estate is pre-mortgaged to J. S. gets in an old satisfied Incumbrance, and brings his Bill against J. S. to redeem, or be foreclosed; he need not prove the actual Payment of any Money for such precedent Incumbrance; the having the Deed, or an Acquittance, being sufficient, although it is objected, that J. S. is equally a Purchaser with him. *Holt v. Mill, 2 Vern. 279. (S. C. ante [1 Eq. Ca. Abr.], 229.)*

4. If a prior Mortgage or Statute be bought in, pending a Bill brought by A. against the Mortgagor and B. who buys in such precedent Statute or Mortgage, to foreclose, though this Purchase be *pendente lite*, yet it will protect B., he being at Liberty to do what he can for his own Security. *Trin. 1687, Taylor and Leigh, 2 Vern. 29. (Called in Vern. Hawkins v. Taylor, and Leigh.)*

5. But where A. made a Mortgage to B. and afterwards a Commission of Bankruptcy was taken out against him, and the Commissioners made an Assignment of his Estate, and then C. lent the Bankrupt £2000 on a second Mortgage, having no Notice of the Bankruptcy, though he afterwards got the first Mortgage; yet it was held by two Lords Commissioners against one, that this prior Mortgage should not protect the Mortgage subsequent to the Bankruptcy; for every one is bound to take Notice of a Commission of Bankruptcy. *Hitchcock v. Sedgwick, 2 Vern. 156.*

6. And though a Purchaser or Mortgagee may buy in an Incumbrance, or lay hold on any Plank to protect himself, yet he shall not protect himself by the taking a Con-

veyance from a Trustee after he had Notice of the Trust; for by taking such Conveyance he becomes the Trustee himself. *Vide Saunders v. Dehew*, 2 Vern. 271.

[324] (G) WHERE A PERSON WHO COMES TO REDEEM MUST DO EQUITY TO THE MORTGAGEE BEFORE HE WILL BE ADMITTED.

1. If a Mortgagor borrows more Money of the Mortgagee upon Bond, where the Heir is bound, and dies, the Heir of the Mortgagor shall not redeem without paying the Bond-Debt, as well as that secured by the Mortgage; because when the Condition is broken, so that the Term or Interest becomes absolute in the Mortgagee, if the Heir of the Mortgagor will have Equity, he must do Equity, by the Payment of the whole Money due to the Mortgagee; and this is called a *Rebutter*; but if the Bill was exhibited by the Mortgagee to foreclose; there, if the Heir of the Mortgagor tender Principal and Costs, it sufficeth without Tender of the Money due on the Bond, because such Bond was not originally any *Lien* on the Land itself; and if that be tendered, for which the Land was originally pledged, there is no Reason to debar the Heir of his Right of Redemption. [Anonymous.] 2 Chan. Ca. 164; [Windhams v. Jennings.] 2 Chan. Rep. 247; [Shuttleworth v. Laycock.] 1 Vern. 245; [Taylor v. Beversham.] 2 Chan. Ca. 194, 195.

2. So where a Husband and Wife levy a Fine of the Wife's Land, to enable them to take up the sum of £400, and they make a Mortgage for it, and after the Mortgage is forfeited, the Husband pays in Part of the Mortgage-money, but afterwards borrows again the same Sum of the Mortgagee; it was decreed, that the Mortgagee having the Estate in Law in him by the Forfeiture of the Mortgage, he should hold the Land against the Heir of the Wife until the whole Money was paid; and if the Heir would not pay in the whole Principal, Interest and Costs, he should be foreclosed. *Pasch*. 1682. *Reuson and Sachererell*, 1 Vern. 41. (S. C. ante [1 Eq. Ca. Abr.], 62; 2 Chan. Rep. 98.)

3. So if a Lessee for Years mortgages his Term, and afterwards borrows Money of the Mortgagee on Bond, and dies, his Executor shall not redeem without paying the Bond as well as the Mortgage. *Anon.* 2 Vern. 177.

4. The Plaintiff pawned some Jewels to *K.* who signed a Writing that they were to be redeemed in twelve Months, otherwise for the £110 lent, they were to be as bought and sold; *K.* within a short Time after delivers over the Jewels, together with some Plate of his own, to *M.* a Bookseller, as a Pledge for £200, and *K.* afterwards borrowed £38 and £50 of *M.* on promissory Notes, to be repaid on Demand, and *M.* by Answer insisted, it was agreed, that the Pledge should be a Security, as well for the Money on the Notes as for the Money first lent, but could make no Proof of any such Promise or Agreement; and though a Redemption was decreed, yet it was on Payment of all that was due to *M.* as well upon the Notes as on the Pawns; but the Goods of *K.* which were pawned, were to be first applied as far as the Value of them would extend. *Mich.* 1715. *Demainbray and Metcalf*. (*Proc. in Chan.* 419, S. C.; *Gillb. Eq. Rep.* 104, S. C., under the Name of *Demary and Metcalf*, somewhat differently stated. 2 Vern. 691, S. C.)

5. If *A.* is bound in several Bonds with *B.* as his Surety for £4000, and *A.* conveys the Manor of *C.* to *B.* by Way of Mortgage, to counter-secure him against the Bonds for £4000, and *A.* dies, and after *D.* the Son and Heir of *A.* becomes bound with *B.* for £2000 [325] more; but there was no Agreement that the Mortgage should be a Security to *D.* against the Bonds for £2000, and after *B.* dies, his Heir shall not be permitted to redeem upon Payment of the £4000 only, but must save *D.* harmless, as well touching the £2000 as the £4000, for he that would have Equity help where the Law cannot, must do Equity to the Party against whom he seeks to be relieved. *Hil.* 19 & 20 Car. 2 [1669], *St. John and Holford*, 1 Chan. Ca. 97.

6. If *A.* acknowledges a Statute to *B.* for Payment of £800 with Interest, which being forfeited, and the Lands extended upon it, *A.* for a valuable Consideration, settles the same Lands in Tail, and after borrows Money of *B.* and by Articles it is agreed, the Statute and Extent shall stand a Security for the last Money, and after *A.* dies, and the £800 with Interest is satisfied by Reception of the Profits, yet the Issue in Tail shall not be relieved against the Penalty of the Statute; for though the Heir has an Equity, by reason of the Tail made upon a Consideration, yet the Money lent raises an Equity for *B.* so that *B.* hath both Law and Equity; whereas the Issue in Tail hath Equity only till the Penalty is satisfied. *Mich.* 14 Car. 2 [1662], *Sir John Hedworth and Primate*, *Hard.* 318.

7. If a Man makes two several Mortgages of several Lands, and dies, and one of the Mortgages is of an intailed Estate, or is deficient in Value, the Heir of the Mortgagor shall not be admitted to redeem one without the other. *Merrgrave v. Le Hooke*, 2 Vern. 297. neither shall the Mortgagor himself redeem the one, and leave the defective Mortgage; but he must take both together. [*Purefoy v. Purefoy*.] 1 Vern. 29; [*Shuttleworth v. Laycock*, *Ibid.*] 245, S. P.

8. The Plaintiff, as Assignee of a Statute of Bankruptcy, brought his Bill to redeem a Mortgage of the Manor of *Nevington* in *Kent*, made by the Bankrupt to the Defendant; the Defendant, by Answer, insisted, that he first lent the Bankrupt £200 on a Mortgage of a particular Tenement, and afterwards lent him £300 on a Mortgage of the Manor of *Nevington*, which was of better Value than the Money due; but the first Mortgage was deficient in Point of Value; and it was held, that if the Plaintiff will redeem one, he must redeem both. *Hil.* 1692, *Pope and Onslow*, 2 Vern. 286.

9. If a Man has a Debt owing to him by Mortgage, and another on Bond from the same Person, he cannot tack them together against the Mortgagor, but he shall be let into a Redemption, on Payment of the Mortgage-Money only; but the Heir in such Case shall not be let into a Redemption without Payment of both, because the Land in his Hand is chargeable with the Bond, even at Law; and since the Statute against fraudulent Devises, the Devisee of the Equity of Redemption is in the same Case with the Heir, and cannot redeem without Payment of both, because the Statute makes such Devise void as against Creditors, and then the Devisee stands in the same Place as the Heir must have done, if no Devise had been made; but before that Statute such Devisee would not be liable to the Bond-Debt. *Trin.* 1 Geo. 1 [1715], *Challis and Casborn*.

(S. C. but not S. P. *ante* 124, *Prec. in Chan.* 407, S. C., says it was so said by Mr. *Vernon*, and agreed to by the Court. *Gilb. Eq. Rep.* 96, S. C. *in totidem verbis* with *Prec. in Chan.* *Vide* 1 Vern. 244, where it is held, that the Mortgagor himself must pay both Bond and Mortgage; but *Q.* and whether there be any Difference when the Mortgagor comes to redeem, and when the Mortgagee brings a Bill to foreclose. That the Vendee or Devisee of the Equity of Redemption was not obliged to pay both before the Statute against fraudulent Devises, was resolved. *Hil.* 1698, *Baily and Robinson*.)

* 10. A. mortgaged his Estate to B. and then assigned the Equity of Redemption to C. afterwards D. obtained a judgment against A., and B. the Mortgagee assigns to D. his Mortgage, and then C. tenders the Money due on the first Mortgage to D. who had Notice of the Assignment of the Equity of Redemption, upon his purchasing in his first Mortgage; and it was here objected, that D. having the legal Estate in him by the Assignment of the forfeited Mortgage, and C. having only an equitable Interest, not supported by the legal Estate, if C. would have Equity, he ought to do Equity, by paying off both Monies to D. But it was answered and resolved by the Court, that C. should redeem, paying only the Money due on the Mortgage, and not what was due on the Judgment, because the Equity of Redemption was never bound by the Judgment, for the Judgment was not confessed, so as to become a real *Lien* upon the Estate at the Time when this Equity was assigned; and therefore the Judgment could never charge or affect it, and consequently C. purchased an Estate, not bound by the Judgment, and by consequence the Judgment-Creditor, by purchasing in the prior Mortgagor, could never defeat the Interest of C. *Trin.* 1708, *Breerton and Jones*, at the Rolls.

* 11. It was also declared, that if a Person that had a first Mortgage should, without the Consent of the Mortgagor, purchase in a subsequent Judgment, a meane Mortgagee or Assignee of the Equity of Redemption should not be obliged to pay the Money due on both Securities, in order to redeem; because such Transactions of the Mortgagee was only to load the Estate without the Consent of the Owner, when he had no Prospect of bettering his own Security. *Breerton and Jones*.

12. If the Father is Tenant for Life, Remainder to his Son in Tail, and the Father mortgages to J. S. who finding his Title defective sends £100 to the Son, and takes a Mortgage from him of the same Land, &c., the Son may redeem, paying the £100 only, for the Son is a Stranger to the Estate of his Father. *Hil.* 31 & 32 Car. 2 [1681], *Bromley and Hamond*, 2 Chan. Ca. 23.

13. So where a Lunatick, before he became such, made a Mortgage of good Part of his Estate for £50, and the Committee transferred this Mortgage, and took up 3 or £100 more upon it; my Lord Chancellor declared the Mortgage should stand a Security

for the £50 only. *Mich.* 1684, *Foster and Merchant*, 1 *Vern.* 262. (S. C. ante [1 Eq. Ca. Abr.], 277.)

(H) MORTGAGE MONEY, TO WHOM TO BE PAID.

1. Where a Mortgage was made upon Condition that the Mortgagor paid a certain Sum to the Mortgagee, his Heirs, Executors or Administrators, that then the Mortgagor should re-enter, and the Day passed without Payment, and the Mortgagee died; great Doubt was, whether the Money should be paid to the Heir or Executor of the Mortgagee; and it was formerly held, that where the Heir was named in the Condition, and no Bond or Covenant given to make it appear a Personal Matter; and there was no Deficiency of Assets to pay Creditors; that in such Case the Heir, parting with the Benefit descended to him, should have the Money on the Mortgage. [Smith v. Smoult,] 1 *Chan. Ca.* 88; [Tilly v. Egerton,] 1 *Chan. Rep.* 181, 182-3.

2. But afterwards it was truly settled in several Cases by Lord [327] Chancellor Finch, that the Money should go to the Executors or Administrators, and not to the Heir; and the Reason was, because Equity follows the Law; and at Common Law, if Conditions or Defeasances of Mortgages are so penned, as no mention is made either of Heirs or Executors, in that Case the Money ought to be paid to the Executors, because the Money came out of the Personal Estate, and therefore ought to return thither again; but if the Defeasance appoints the Money to be paid to the Heir or Executor disjunctively, if the Mortgagor pays the Money precisely at the Day, he may elect to pay it either to the Heir or the Executor; but where the precise Day is past, and the Mortgage forfeited, all Election is gone in Law, for in Law there is no Redemption; and when the Case is reduced to an Equity of Redemption, it were perfectly against Equity to revive the Election of the Mortgagor, because that would only tend to the Delay of the Payment of the Money as long as he pleased, and end in Compositions to pay the Money into that Hand which would use him best; and to say that the Election should be in the Court, would be to place an arbitrary Power in it, which would tend to the Inconvenience of the Subject, since no Man could safely pay the Money in such Cases, without applying to the Court in a Suit in Equity; and therefore since there ought to be a certain Rule, a better cannot be chose, than to come as near as can be to the Rule and Reason of the Common Law; and as the Law always gives the Money to the Executor, where no Person is named, or where the Election to pay, either to the Heir or Executor, is gone and forfeited in Law, it is all one as if neither Heir nor Executor were named in the Condition; and then Equity following the Rules of the Common Law, ought to give it to the Executor; for in natural Justice and Equity, the principal Right of the Mortgagee is to his Money, and his Right to the Land is only as a *Deposit* or Pledge for his Money; and therefore the Money ought to be paid to the proper Hand that the Mortgagee has appointed Receiver of it; and that is his Executor; and then the Heir, who is only a Trustee to keep the Pledge, ought to deliver it back to the Mortgagor; and though the Heir has the Use and Benefit of the Land till redeemed, yet he has it only as a Pledge, and therefore is a Trustee to restore it when the Money is paid to the proper hand; and the Heir himself, though he be proper to keep the Pledge, being Land, yet he is not proper to receive the Money, it being purely personal; and it is not hard that the Heir should part with the Land, without having the Money that comes in Lieu of it, because the Money was originally parted with from the personal Estate, and had immediately come into the Hands of the Executor, had it not been placed out on this real Security; and therefore it has since been decreed, whether the Executor has Assets, or not, that the Mortgage Money should be paid him. [Thornbrough v. Baker,] 1 *Chan. Ca.* 283; [Ellis v. Guavas,] 2 *Chan. Ca.* 50, [Winne v. Littleton,] 51, [Noy v. Ellis,] 220; [Turner's Case,] 2 *Vent.* 348, [Littleton's Case, *Ibid.*] 351; [Tilly v. Egerton,] 1 *Chan. Rep.* 183; [Turner v. Turner,] 2 *Chan. Rep.* 155, [Turner v. Crane, *Ibid.*] 242; [Smith v. Smoult,] 1 *Chan. Ca.* 88; [Pawlett v. Att.-Gen.] *Hard.* 467; [Turner v. Crane,] 1 *Vern.* 170, [Canning v. Hicks, *Ibid.*] 412.

3. If the Heir of the Mortgagee forecloses the Mortgagor, the Executor being no Party, upon a Bill by the Executor against the Heir of the Mortgagee and the Mortgagor, the Land will be decreed the Executor. *Gobe and the Earl of Carlisle* [Clerks n. v. Bowyer], 2 *Vern.* 67, cited to be adjudged.

[328] 4. But if the Executor of the Mortgagee, after a Foreclosure by the Heir, brings a Bill to have the Benefit of the Mortgage, the Heir, if he thinks fit, may take

the Benefit of the Foreclosure to himself, paying the Executor the Mortgage-money and Interest. [Clerkson *v.* Bowyer,] 2 Vern. 67, *per Curiam*.

5. If there be a Mortgage in Fee of a long standing, and there are two Descents cast since the Mortgage was made; and though the Mortgagor by Answer, says he will not redeem, yet the Mortgage should go to the Executor, and not the Heir, the Equity of Redemption not being foreclosed or released. *Tabor and Greaves*, 2 Vern. 367. (S. C. *ante* [1 Eq. Ca. Abr.], 273, by the name of *Tabor v. Grover*, and so called in *Vernon*.)

6. But if a Mortgagee in Fee enters for a Forfeiture, and after seven Years Enjoyment, absolutely sells the Land to *J. S.* and his Heirs; the Estate shall not be looked upon to be a Mortgage in the Hands of *J. S.* so as to make it Part of his personal Estate; but it shall be for the Benefit of his Heir. *Mich.* 1684, *Cotton and Hes*, 1 Vern. 271. (S. C. *ante* [1 Eq. Ca. Abr.], 273.)

(I) MORTGAGEE ANSWERABLE FOR THE PROFITS, AND HOW TO ACCOUNT.

1. The Mortgagee is answerable in Equity when he comes into the Possession of the Lands, for the Profits that he made of the Lands, and not for the Profits that he might have made, unless there were Fraud; for it is the Fraud and Laches of the Mortgagor, that he would let the Lands lapse into the Hands of the Mortgagee by the Non-payment of the Money; and when it doth, he is only a Bailiff for what he doth receive; but is not bound to the Trouble and Pains of making the best of what is another's. *Toth.* 133. [Fulthrope *v.* Foster] *Vide* 1 Vern. 476, 477.

2. If a Mortgagee in Possession assigns over his Mortgage, without Assent of the Mortgagor, the Mortgagee is bound to answer the Profits, both before and after the Assignment, though assigned only for his own Debt; for he is under a Trust to answer the Profits of the Pledge; and it is a Breach of Trust to assign such Pledge to a Person insolvent; but *quare*, if the Mortgagor hides, so that he cannot be served with a *Subpoena* to foreclose, whether the Mortgagee may not assign, and not be answerable for the Profits after Assignment. [Duke of Norfolk's Case,] 3 Chan. Ca. 3.

3. A Mortgagee shall not be bound by any Proof, that the Land was worth so much, unless you can likewise prove that he did actually make so much of it, or might have done so, had it not been for his wilful Default; as if he turned out a sufficient Tenant, that held it at so much Rent, or refused to accept a sufficient Tenant that would have given so much for it. *Anon.* 1 Vern. 45.

4. If a Mortgagee manages the Estate himself, there is no Allowance to be made him for his Care and Pains; but if he employs a skilful Bailiff, and gives him £20 *per Ann.* that must be allowed; for a Man is not bound to be his own Bailiff. *Bonithon v. Hockmore*, 1 Vern. 316.

5. If an Infant, by his Guardian, endeavours to overthrow the Mortgage, by supposed Intail, and after a special Verdict and great Agitation at Law, the Mortgagee prevails, and the Infant [329] brings his Bill to redeem, the Mortgagee having sworn he paid and expended above £120 in defending his Mortgage at Law, although he had but £60 Costs allowed him there, shall not be held down to the Taxation at Law, but shall on the Account, be allowed all he laid out or expended; and if the Mortgagee, in this Case, fearing that his Mortgage would be defeated at Law, gets Administration as Principal Creditor, in the Spiritual Court, he shall be allowed the Costs expended there also. *Hil.* 1705, *Ramsden and Langley*, 2 Vern. 536.

6. The Mortgagee obtained Judgment in Ejectment, and entered on the mortgaged Premises, and thereby prevented other Creditors, that had subsequent Incumbrances, from entering, and yet permitted the Mortgagor to take the Profits; and the other Incumbrancers coming to redeem him, the Court ordered the Mortgagee should be charged with all the Profits he had, or might have, received since his Entry. *Coppring v. Cooke*, 1 Vern. 270.

7. So where a Bankrupt, before he became such, having made a Mortgage of his Estate, and the Assignees of the Statute brought an Ejectment for Recovery of the Lands comprized in the Mortgage, and the Mortgagee refused to enter, but suffered the Bankrupt to take the Profits, and to fence against the Assignees with the Mortgage: it was held, that the Mortgagee should be charged with the Profits from the Time of the Ejectment delivered. *Mich.* 1684, *Chapman and Tanner*, 1 Vern. 267. (S. C. but not S. P. *ante* [1st Eq. Ca. Abr.], 56. *Vide* *Dux Bucks v. Sir Robert Gayer*, 1 Vern. 258, S. P.)

8. A. mortgaged the Manor of *T.* to *B.* to which an Advowson was appendant, *B.* brought a Bill to foreclose, the Church became void, and he likewise brought a *Quare Impedit* at Law; and on a Motion to stay the Proceedings on the *Quare Impedit*, the Court held, that though *A.* had no Bill, yet being ready, and offering to pay the Principal, Interest and Costs, if *B.* will not accept his Money, Interest shall cease; and an Injunction to stay Proceedings in the *Quare Impedit* granted; for the Mortgagee can make no Benefit by presenting to the Church, nor can account for any Value in respect thereof, to sink or lessen his Debt; and the Mortgagee therefore in that Case is but in the Nature of a Trustee for the Mortgagor. *Mich.* 1700, *Amburst and Dawling*, 2 *Vern.* 401; *Jory v. Cox*, *cit. Ibid.* S. P.

(K) HOW THE ASSIGNEE OF THE MORTGAGEE IS TO ACCOUNT.

1. If the Mortgagee assigns his Mortgage, and the Mortgagor comes to redeem against the Assignee, all Monies really paid by the Assignee, either as Principal or Interest, shall be Principal to the Assignee, and shall bear Interest: otherwise it is if the Assignee had not paid the Money; and the Assignment was only colourable, in order to load the Mortgagor with compound Interest. *Smith and Pemberton*, 1 *Chan. Ca.* 67, [Anonymous, *Ibid.*] 258. *Vide* [*Macclesfield v. Fitton*] 1 *Vern.* 169; [*Gladwyn v. Henchman*], 2 *Vern.* 135. (S. C. *ante* [1 *Eq. Ca. Abr.*], 287.)

2. If a Stranger gets an Assignment of a Mortgage for less than is due, the Mortgagor or his Heir shall not redeem, without paying all the Money due; but if a Man purchases the mortgaged Lands, without Notice of this Incumbrance; whether he has not an Equity to redeem them, for what was really paid by the Stranger. *Quare. Phillips v. Vaughan*, 1 *Vern.* 336. (S. P. *Williams v. Springfield*, 1 *Vern.* 476.)

[330] 3. But if there are subsequent Incumbrancers or Creditors in the Case, a Man who buys in a prior Incumbrance, shall against them be allowed only what he really paid, though there was in Truth a greater Sum due. *Williams v. Springfield*, 1 *Vern.* 476.

CAP. XLII.

NOTICE.

- (A) Of presumptive Notice, and where Notice to one Person shall affect another.
- (B) How far a Man is affected who acts against express Notice, or contrary to what he is obliged to take Notice of at his Peril.
- (C) Purchasers without Notice, in what Cases favoured.

(A) OF PRESUMPTIVE NOTICE, AND WHERE NOTICE TO ONE PERSON SHALL AFFECT ANOTHER.

1. If *A.* having Notice that Lands were contracted to be sold to *B.* purchases those Lands, and takes a Conveyance to the Son and his Heirs; though the Son had not Notice of *B.*'s Contract, yet Notice to his father shall affect him. *Mich.* 15 *Car.* 2 [1663], *Abney and Kendal*, 1 *Chan. Ca.* 38.

2. So if one who purchaseth for another hath Notice of a dormant Incumbrance, it shall affect the very Purchaser. [*Abney v. Kendal*], 1 *Chan. Ca.* 38, *per Curiam*.

3. If a Man lends Money on a Mortgage, and the Scrivener, who was intrusted to draw the Mortgage-Deed, had Notice of a prior Mortgage, this Notice shall affect the second Mortgagee. *Vide Brotherton v. Hall*, 2 *Vern.* 574.

4. So if *A.* having Notice of an Incumbrance, purchases in the Name of *B.* and then agrees that *B.* shall be the Purchaser, and he accordingly pays the Purchase money without Notice of the Incumbrance; though *B.* did not employ *A.* nor knew any thing of [331] the Purchase till after it was made, yet *B.* approving of it afterwards, made *A.* his Agent *ab initio*, and therefore shall be affected by the Notice to *A.* *Vide Jennings v. Moore*, 2 *Vern.* 609. (S. C. *ante*, 122.)

5. *A.* purchased Lands, having Notice of a Settlement, which was delivered to him amongst other Writings, whereby it appeared that the Vendor was but Tenant for

Life. Remainder to his first, &c., Sons in Tail Male ; upon his Purchase he took in a Mortgage Term, which was prior to the Settlement, and entred, and afterwards sold the Lands to *B.* and *C.* who had no Notice ; upon a Bill brought by the Son, after the Death of his Father, who was but Tenant for Life, against *A.* and *B.* and *C.* his two Vendees, it was decreed, that as to the two Vendees, who were Purchasers without Notice, the Bill should be dismissed, and that *A.* should account for the Purchase Money, which he received with Interest, from the Death of the Tenant for Life, there-out discounting what was due on the Mortgage Term, made prior to the Settlement. *Mich.* 1700, *Ferrars and Cherry*, 2 *Vern.* 384. (S. C. but not S. P. *ante* [1 Eq. Ca. Abr.], 3.)

6. *A.* purchased an Estate with Notice of an Incumbrance, and then sold it to *B.* who had no Notice, who afterwards sold it to *C.* who had Notice ; and it was held by the Master of the Rolls, that by this, the first Notice to *A.* the first Purchaser was revived, and that *C.* the last Purchaser should be liable to the Incumbrance, as if the Lands had never been in the Hands of one who had no Notice ; but upon a rehearing, my Lord Keep. reversed it ; for otherwise an innocent Purchaser without Notice, must be forced to keep the Estate and cannot sell it. *Hil.* 1695, *Harrison and Forth.* (*Prec. in Chan.* 51, S. C.)

7. *A.* makes a Conveyance to *B.* with power of Revocation by Will and limits other Uses ; if *A.* dispose to a Purchaser by the Will, another Purchaser subsequent is intended to have Notice of the Will, as well as of the Power to revoke ; and this is in Law Notice ; and so it is in all Cases where the Purchaser cannot make out a Title but by a Deed, which leads him to another Fact, the Purchaser shall not be a Purchaser without Notice of that Fact, but shall be presumed cognisant thereof ; for it is *crassa Negligentia*, that he sought not after it. *Mich.* 30 *Car* 2 [1678], *Moor and Bennett*, 2 *Chan. Ca.* 246 ; [*Bovey v. Smith*,] 1 *Vern.* 149, [*Anonymous*, *Ibid.*] 319, S. P. ; [*Drapers' v. Yardley*,] 2 *Vern.* 662, S. P.

(B) HOW FAR A MAN IS AFFECTED WHO ACTS AGAINST EXPRESS NOTICE, OR CONTRARY TO WHAT HE IS OBLIGED TO TAKE NOTICE OF AT HIS PERIL.

1. *A.* made *B.* and *C.* his Executors, and died ; *C.* obtained a Decree against *B.* to hinder him from receiving any more of the personal Estate, &c., and a perpetual Injunction for that Purpose was granted before any Sequestration against *B.* *J. S.* who was indebted by a Mortgage of £1000 to the Testator, paid the £1000 to *B.* and has his Mortgage delivered up to be cancelled ; but it appearing that he paid the Money after Notice of the Decree (being present at the hearing, &c.), he was ordered to pay it over again. *Trin.* 34 *Car.* 2 [1682], *Harvey and Montague*, 1 *Vern.* 57 & 122, S. C. (S. C. *ante* 146.)

[332] 2. If *A.* lends *B.* her Brother-in-Law £100 and takes Bond for it in the Name of *J. S.* and upon some Difference between *A.* and *B.*, *A.* puts the Bond in Suit, in the Name of *J. S.* her Trustee, and *B.* to avoid Expence, confesses Judgment, and afterwards pays the Money to *J. S.* the Trustee, he shall be obliged to pay it over again, having Notice of the Trust ; and it is sufficient Evidence of Fraud and Notice, that there was a new Attorney made to acknowledge Satisfaction on the Judgment, and not the Attorney on Record, who was first employed by *A.* *Mich.* 1690, *Pritchard and Langher*, 2 *Vern.* 197.

3. If a Man has a Debt due to him by Bond, and he assigns the Bond to *J. S.* and the Obligor, after Notice of the Assignment, pays the Money to the Obligee, such Payment is not good. [*Baldwin v. Billingsly*,] 2 *Vern.* 540. But if he had paid it without Notice of the Assignment, it would be otherwise. [*Ashecombe's Case*,] 1 *Chan. Ct.* 232.

4. An Administrator pays Money on Specialties, without Notice of Money decreed, and had fully administred the Assets ; and the Court nevertheless decreed, that the Administrator should pay the Money. Decreed *Hil.* 1688, *Scarle and Hale*, 2 *Vern.* 37, 88, S. P. for a Duty decreed is equal to a Judgment at Law.

5. If a Devisee obtains a Decree to hold and enjoy certain Lands against the Heir, who it was supposed had suppressed the Will, and pending this Suit, a third Person gets an Assignment of a Mortgage made by the Testator, and then purchases the Equity of Redemption of the Heir, with Notice that there was such a Will, the Court will not admit him to examine the Justice of the former Decree, nor to try at Law, whether

such Will was cancelled or destroyed by the Testator. *Hil.* 1690, *Finch* and *Newnham*, 2 *Vern.* 216.

6. A Purchaser or Mortgagee shall not protect himself, by taking a Conveyance from a Trustee, after Notice of the Trust; for by taking such a Conveyance he becomes the Trustee himself. *Saunders v. Dehew*, 2 *Vern.* 271. (S. C. *ante* [1 Eq. Ca. Abr.], 323.) So if a Man purchases from a Trustee with Notice, and levies a Fine, and five Years pass, yet it shall not avail; for by purchasing from the Trustee with Notice, he becomes the Trustee himself. [*Bovey v. Smith*,] 1 *Vern.* 149.

7. If an Executor in Trust for an Infant, Residuary Legatee, renews a Lease, Part of the Testator's Personal Estate, in his own Name, and afterwards mortgages it, and assigns the Equity of Redemption to a Trustee, to sell for Payment of his own Debts, and the Trustee sells to one who had Notice of the Infant's Title, the Purchase will be set aside. *Whalley v. Whalley*, 1 *Vern.* 484.

8. A Man who lends Money to a Bankrupt after a Commission sued out against him, but before actual Notice of it, cannot come in under the Statute as a Creditor; by two Lords Commissioners against one who doubted. *Hitchcock v. Sedgwick*, 2 *Vern.* 156. (S. C. *ante* [1 Eq. Ca. Abr.], 323.)

9. The Earl of *Newport* had two Daughters, and he devised *Newport House* to the Daughter of his eldest Daughter in Tail, which she had by the Earl of *Banbury*; provided and upon condition, that she marry with the Consent of her Mother and two other Trustees, or the major Part of them; if not, or if she should die without Issue, then he devised the said House to one *Porter* in Fee. The Lady *Anne Knowles*, the first Devisee married *Fry*, without the Consent of her Grandmother or Trustees; and it was adjudged against her, upon Point of Notice, that it was not necessary, because her [333] Grandfather had not appointed any Person to give Notice; and he might have imposed any Terms or Conditions upon his own Estate; and all Parties concerned had the same Means to inform themselves of such Conditions. *Fry and Porter* (S. C. *ante* [1 Eq. Ca. Abr.], 111), adjudged in *C. B.* 1 *Vent.* 199; 2 *Lev.* 21, S. C.; 3 *Keb.* 19, S. C. and in Chancery, 1 *Chan. Ca.* 142; 1 *Mod.* 86, 300.

10. But if Lands are conveyed or devised to an Heir at Law, upon Condition, as he has a more worthy Title which is by Descent, express Notice must be given him thereof. 8 *Co.* 9, *Frances's Case*, 3 *Mod.* 28, 29, *Mallon and Fitzgerald*.

(C) PURCHASERS WITHOUT NOTICE, IN WHAT CASES FAVOURED.

Vide Title Purchase and Purchaser [1 Eq. Ca. Abr. p. 353].

1. A Man who purchases without Notice of any prior Incumbrance, or on any prior Right to the Estate, shall not have his Title impeached in Equity; neither shall he be compelled to discover any Writings, &c., which may weaken his Title; nor shall he have any Advantage taken from him, by which he may defend himself at law. Rep. in *Chan. Temp.* *Finch*, [*Harding v. Hardrett*] 9, [*Heyman v. Gomeldon*, *Ibid.*] 34, 35; [*Snelling v. Squibb*,] 2 *Chan. Ca.* 47, 48; [*Wilkes v. Bodington*,] 2 *Vern.* 599, [*Stephens v. Gaule*, *Ibid.*] 701. He must plead himself a Purchaser without Notice [*Bodmin v. Vandenbendy*], 1 *Vern.* 179, but he need not set forth the Consideration he paid [*Moore v. Mayhow*], 1 *Chan. Ca.* 34.

2. A Bill was exhibited to prove a Will, and perpetuate the Testimony of Witnesses; the Defendant pleaded himself a Purchaser without Notice of any such Will, and insisted that unless there had been a Verdict in Affirmance of such Will (nothing hindring the Plaintiff, but that if he had a Title he might recover at Law), the Plaintiff ought not to be admitted to examine his Witnesses, thereby to hang a Cloud over a Purchaser's Estate; and upon Debate the Court allowed the Plea. *Hil.* 1 & 2 *Jac.* 2 [1686], *Beckinal* and *Arnold*, 1 *Vern.* 354. (S. C. *ante*, 234.)

3. Tenant for Life, Remainder to his first Son, mortgaged for £1500, the Deed of Settlement was then produced, and seen by the Purchaser, who notwithstanding lent the Money, being advised, that Tenant for Life not having then any Son born, could destroy the Contingent Remainders, whereas in Truth there was a Son born five Days before the lending of the Money; but the Mortgagee having no Notice thereof, and having got the Deed of Settlement, the Court would not relieve against the Purchaser, but dismissed the Bill. *Trin.* 1671, *Brampton and Barker*, 2 *Vern.* 159, cited by Lord *Rawlinson* [*Hitchcock v. Sedgwick*].

* 4. The Plaintiff's Bill was to set aside a Conveyance made to the Defendant by

A. and that the Defendant was no real Purchaser ; or if he were, yet before his Purchase he had notice, that the Estate was subject to a Trust for the Plaintiff ; and that such a Lease in the Defendant's Custody mentions it. Defendant swears himself a Purchaser without Notice of any Trust, and that the said Lease mentions no such Trust. Plaintiff replies, and the Defendant proves his Purchase, and the Plaintiff proves no Notice upon him ; but at the hearing insisted he ought to produce the Lease, to shew there was no such Mention of the Trust ; and the Defendant insisting he was not obliged to produce it, he being a Purchaser ; for the Plaintiff it was argued that he ought to produce it, because his Answer being replied to, he ought to prove it, which without shewing the Deed he cannot ; and he takes upon him to judge what Deed will amount to Notice, and what not ; which he ought not to do ; for implied Notice is as strong as express Notice ; and if the said Lease mentions only the Date, and Parties of another Deed which mentions a Trust, tis an implied Notice, which the Defendant may [334] not know, and therefore ought to produce it, that the Court may judge of it. On the other Side it was said, that by the constant Rules of this Court, a Purchaser was not obliged to shew his Title ; and this is an Attempt to alter that Rule by a side Wind ; and 'tis as easy in a Bill to say it is in some of the Deeds, as in any one in particular, and then he must expose them all, which would be of dangerous Consequence to Purchasers. 'Twas replied, if the Deed be not to be produced, then if one has a Mortgage with a Proviso of Redemption, yet if the Mortgagee will be so hardy as to swear it an absolute Purchase, and the Mortgagor has no Counterpart, he must lose his Estate. The Master of the Rolls thought, as this Case is, it ought to be produced ; but my Lord Keeper held otherwise ; and he said it was but a side Wind to make a Purchaser expose his Title, and would not do it, unless the Plaintiff had made some Proof towards satisfying his Answer, to induce him to it. *Mich. 1704, Hall and Atkinson.* (S. C. *ante* [1 Eq. Ca. Abr.], 168. 2 *Vern.* 463, *but the Reporter adds a Quære.*)

5. But where a Defendant pleaded himself a Purchaser for valuable Consideration, and denied by way of Answer, that he had Notice of the Plaintiff's Title at the Time of his Purchase or Contract, the Plea was over-ruled ; for an evasive Denial is not sufficient : and here the Word *Purchase* might be understood, when the Contract for the Purchase was made ; and it might be he had no Notice then, and might have Notice after, before or at sealing the Conveyance. *Mich. 15 Car. 2* [1663], *Moor and Mayhow*, 1 *Chan. Ca.* 634. (S. C. *ante* [1 Eq. Ca. Abr.], 38 ; 2 *Freem.* 175.)

* 6. A Purchaser for valuable Consideration shall hold, or take Place, against a prior voluntary Settlement, tho' he had express Notice thereof at the Time of his Purchase, such voluntary Settlement by 27 *Eliz.* being made void against a Purchaser with or without Notice. *Mich. 1727, Tonkins and Ennis ; per Cur'.*

[335] CAP. XLIII.

PORTIONS.

(A) Portions and Provisions for younger Children made good in Equity.

(B) At what Time Portions shall be raised, or Reversionary Estates or Terms sold for that Purpose.

(A) PORTIONS AND PROVISIONS FOR YOUNGER CHILDREN MADE GOOD IN EQUITY.

1. A. having Issue a Daughter by a former Venter, charged his Lands at B. for Payment of £3000 Portion to such Daughter, and afterwards married a second Wife, and made her a Jointure of a Moiety of these Lands at B. without taking Notice of this Charge of £3000, and afterwards by Will, thinking that this £3000, charged as aforesaid, would be good against the Jointure, and taking Notice thereof, devised to his Wife other Lands in C. in lieu of her Jointure in B. and died ; the Wife and Son and Heir agreed together, to defeat the Daughter of her £3000 Portion ; and therefore the Wife, finding that the Settlement which was made on her Marriage, tho' subsequent in Time, would yet prevail against this Charge of £3000 which was voluntary and fraudulent as to her, adhered to her Jointure, and refused to accept of the Devise ; but on a Bill brought by the Daughter, Lord Keep. decreed, that she should hold such Part of the Lands in C. as should be equal in Value to such of the Lands in B. as were comprised

within the Jointure, until her Portion was raised. *Hil.* 1683. *Reeve and Reeve*, 1 *Vern.* 219; 1 *Vent.* 363. S. C., *vide* [Shouldham v. Shouldham] 2 *Vern.* 321. (S. C. *ante* [1 Eq. Ca. Abr.], 221. *Vide* Title *Devise*, Title *Legacy*; where Portions shall sink in the Inheritance for the Benefit of the Heir, Title *Heir*.)

2. If a Man by Will gives £3000 to his younger Children, which Sum is due from *J. S.* and secured by Mortgage; and adds, that for the more sure Payment of the said Sum, in case his Son and Heir, whom he appointed his Executor, should not pay the same according to his Will, then he devised his Lands to his younger Children, for the raising and Payment thereof, *etc.*, and dies: *J. S.* prefers a Bill against the Heir, and younger Children, to redeem; and pursuant to a Decree for that Purpose, the £3000 is put out by a Master, upon a Security that proves ill; the eldest Son shall [336] not be compelled to pay it over again to the younger Children. *Mich.* 1685. *Oldfield and Oldfield*, 1 *Vern.* 336, for it was not in the Power of the Heir to compel *J. S.* to keep the Money in his Hands. (S. C. *ante* [1 Eq. Ca. Abr.], 266.)

3. But if the Lands of the Heir be charged with Portions for Infants, payable at Twenty-one, or Marriage, the Portions shall not be admitted to be paid in before they shall grow due, in Ease of the Land, nor shall the real Security be turned into a Personal one. [Oldfield v. Oldfield,] 1 *Vern.* 338, *per Curiam*.

4. If by a Marriage Settlement Portions are provided for Daughters, the Father cannot by his Will annex any Condition to the Payment of them, or devise them over in case of the Death of any of the Daughters, before their Portions become payable. *Aston v. Aston*, 2 *Vern.* 452.

5. Tenant in Tail, with Remainder in Fee to himself, levies a Fine, and settles his Estate on Trustees, in the first Place, to pay his Son and Heir £100 *per Ann.* and then to make Provision of £100 a-piece for his younger Children, to be raised and paid according to their Seniority, and a Maintenance in the mean Time. In this Case the Lord Chancellor decreed, 1st. That whereas at the Time of the Settlement, the Party that made it was a Widower, and had eight Children by his first Wife, and declared, that he intended not to marry again; yet in regard he afterwards married a second Wife, and had many Children by her, the Children by the second Wife were equally intitled with the Children of the first, to have the Benefit of this Provision for his younger Children. 2dly, That whereas the Deed directs the Provision for his younger Children should be raised, and paid according to their Seniority, yet in case there should happen a Deficiency, the Eldest should not have more, and the Younger less, but they should all be paid in Average. *Brathwaite v. Brathwaite*, 1 *Vern.* 334. (S. C. *ante* [1 Eq. Ca. Abr.], 114.)

6. If by Marriage Settlement £2500 is provided for the Issue of that Marriage, in such Proportion as the Husband shall appoint, and he dies without making any Appointment, leaving a Daughter only, the Daughter shall have the £2500. *Dary and Hooper*, 2 *Vern.* 665. (S. C. *post* [1 Eq. Ca. Abr.], 344.)

(B) AT WHAT TIME PORTIONS SHALL BE RAISED, OR REVERSIONARY ESTATES OR TERMS SOLD FOR THAT PURPOSE.

1. A. made a Settlement to the Use of himself for Life, Remainder to the Use of his first Son in Tail Male, Remainder to Trustees for forty Years, Remainder to himself in Fee; the Term was declared to be a Trust, that in case it should happen that the said A. should die without Issue Male of his Body, then the Trustees should raise £5000 for Daughters' Portions, payable at the Age of Twenty-one or Marriage, with a Provision for Maintenance in the mean Time; the Wife died, leaving two Daughters, and no Issue Male; and it was resolved, that the Right to the Portion was vested by the Mother's Death, without Issue Male in the Life of the Father; for [337] otherwise the Father might live so long, that the Portions might be of little Service. *Greaves and Mattison*, 2 *Jones*, 201. (S. C. *cit.* 2 *Vern.* 658.)

* 2. So where a Settlement was made to the Husband for Life, Remainder to the Wife for Life, Remainder to the first and other Sons in Tail Male successively, Remainder to Trustees for 200 Years; and the Term was declared to be upon trust, that the Trustees after the Death of the Husband and Wife should out of the Rents and Profits raise and pay £4000 for younger Children at their Age of Twenty-one Years, unless the Person in Remainder should raise and pay the same; the Term was decreed to be sold, and the Portions raised in the Life-time of the Father and Mother. *Mich.* 1 W. & M. [1689], *Hellier and Jones*. (S. C. but not S. P. *cit.* 2 *Vern.* 658.)

3. A Settlement on the Marriage of *A.* with *B.* was made on the Husband for Life, Remainder to the Wife for her Jointure, Remainder to the first and other Sons; and in case of Failure of Issue Male of that Marriage, if there should be Issue Female only one Daughter, then to Trustees for 500 Years in trust to raise £5000 for such Daughter, to be paid at her Age of Twenty one Years or Day of Marriage, which should first happen next after the Death of the Father and Mother, or within six Months after either of those Days or Times; and there being one Daughter only, and she having attained Twenty one, and her Father being dead, the Portion was decreed to be raised in the Life time of the Mother. *Hil.* 1703, *Gerrard and Gerrard*, 2 *Vern.* 458; *cit.* 2 *Vern.* 658. (2 *Freem.* 271, S. C. and Decree.)

By a Marriage Settlement the Freehold Estate was settled to the Husband and Wife for Life, and to the first and other Sons in Tail, and in default of Issue Male, a Term of 500 Years was limited to Trustees to raise Portions for Daughters, with Remainder over to the Defendant, the Heir Male of the Family. And this was Part of the Husband's Estate, who made the Settlement. There was a Covenant in the Deed, that for the better Stay of Livelihood for the Wife, and more ample Provision for the Issue of the Marriage, he would settle the Copyhold Estate to the same Uses, and subject to the same Trusts, as far as the Custom of the Manor would allow. There was, afterwards, a Surrender made to the Use of the Husband and Wife for Life, and first and other Sons in Tail, with Remainder over. There being no Issue Male of the Marriage, and the Freehold Estate not sufficient to raise the Daughters' Portions, they brought a Bill to have the Copyholds subjected thereunto. The Cause was first heard at the Rolls, where the Bill was dismissed, but on an Appeal to the Lord Keeper, he decreed the Copyhold Estate to stand charged, and liable to the raising of the Portions. Shouldlam v. Shouldlam, 2 Vern. 321.

4. So where by a Marriage Settlement Lands were limited to the Husband and Wife for their Lives, Remainder to the Heirs Male of their Bodies; and if there should be no Issue Male of their Bodies, and one or more Daughters, then to the Trustees for 500 Years from the Decease of the Survivor, in trust, by Sale or Mortgage, to raise £1000 for Daughters' Portions; but there was no Time appointed for the Payment of them; and the Father died leaving a Daughter only; the Portion vesting in the Daughter in the Life-time of the Mother, it was decreed to be raised by a Sale, with reasonable Maintenance in the mean Time, tho' no Maintenance was provided by the Settlement. *Hil.* 1703, *Stainforth and Stainforth* (called in *Vernon*, *Staniforth v. Staniforth*), 2 *Vern.* 460.

5. But where the Defendant, upon his Marriage, by Lease and Release settled Part of his Estate to the Use of himself for Life, Remainder to Trustees during his Life, to support Contingent Remainders, Remainder to Trustees for 500 Years upon the Trust after mentioned, Remainder to the Heirs Males of his Body on the Body of *M.* his then Wife to be begotten, Remainder to his own right Heirs, and declares the Term of 500 Years to be upon Trust, "That in case he should happen to die without Issue Male of his Body on the Body of his said Wife begotten, or that the Issue Male begotten between them should happen to die without Issue Male of their Bodies, before they or some of them respectively attain their several Ages of Twenty-one Years, and there should be Issue one or more Daughter or Daughters of his Body on her begotten, either born in or after his Life-time, who should be unmarried, or not provided for as herein after is mentioned, at the Time of his Decease, then such Daughter, if but one, to [338] have £2000 for her Portion; and if two or more such Daughters, then they to have £2000 between them, to be paid and payable at their respective Ages of Eighteen Years, or Days of Marriage, which should first happen, or as soon as they could be raised; and in case the said Portion or Portions of the said Daughter or Daughters shall not be paid according to the Purport and Intent of these Presents, then the Trustees, or the Survivor of them, their Executors, &c., shall and may, out of the Rents, Issues and Profits, or by Mortgage or Sale of the said Premises, raise, make up and pay the said Portion and Portions to the said Daughter and Daughters; and in the mean Time, and until the said Portion and Portions shall respectively become payable as aforesaid, the said Trustees, their Executors, &c., should out of the Rents, Issues and Profits of the said Premises, raise and pay the yearly Sum of £30 a piece, for the Maintenance and Education of such Daughter or Daughters; provided, that if the Defendant in his Life-time, either before or after the Death of his Wife, pay or secure to be paid to the said Daughter or Daughters (which shall be unmarried at the Time of his Death) the

" said Portion or Portions, or if he shall have Issue Male, who shall live to Twenty-one Years of Age, then, and in such case, the said Term of 500 Years to cease and be void." Afterwards the Wife died without Issue Male, leaving only one Daughter the Plaintiff's Wife, who was upwards of Twenty Years of Age; and the Defendant having married a second Wife, and refusing to give the Plaintiff one Penny Portion with his Wife, the Bill was brought to have a Decree for Sale of the Term in Remainder presently, and the Portion with Interest paid from her attaining Eighteen Years of Age; but my Lord Chancellor having taken Time to consider of it dismissed the Bill: The Difficulty, he said, in this Case, was occasioned by the Multiplicity of Words, and therefore to apprehend it the better, he had rejected the immaterial Words, and retained only those that were material: then he took Notice, that the Term was a Term vested and saleable: the only Question was, whether it was to be sold; and this depended on the Declaration of the Trust; for if the Trust had declared the Portion to be raised at Eighteen, or Marriage, she should not have staid for her Portion till the Death of her Father, but the Term in Remainder should have been sold presently, and so has been the constant Practice of this Court; nay if the Term itself had been limited on a Condition precedent, as if the Father should die without Issue Male of his Body by such a Wife, then to Trustees for 200 Years, to raise Portions for Daughters at Eighteen or Marriage; though in this Case the Condition was precedent even to the vesting of the Term; yet upon the Death of the Mother without Issue Male, the Precedents have gone, that the Term should be sold in the Life time of the Father; and this Court hath warranted the Title, though the Term itself was not vested, which is a much stronger case than this, where the Term is vested presently, and the Trust is only conditional; though he said, if this Case was *res integra*, he should not have gone so far in either of those Cases, because the plain and natural Meaning of the Deed cannot be to raise the Portions in the Life-time of the Father, when the Fund, out of which it is to be raised is not to take Effect till after his Death; but thus far the Court has gone, and the Reason that may be presumed for it was, [339] that in Equity they looked on the Death of the Wife without Issue Male an equitable Performance of the Condition, though it was not so literally at Law, till the Father's Death; because all that was contingent in the Condition by the Death of the Mother, without Issue, had happened; 'twas now impossible he should die leaving Issue Male by her; for he was now become as it were Tenant after Possibility; and it was now no more than if it had been limited if he should die, or when he should die, the Remainder to Trustees, &c., which is a Remainder vested presently, because it depends upon that which must certainly happen; so if the Condition had been annexed to the Execution of the Trust of the Term, yet upon the Death of the Mother without Issue Male, the Term should have been sold in the Life-time of the Father, for the same Reasons as in the other; and the Reason of the Court's having gone so far, was to promote suitable Matches, and that Women might have their Portions when they were likely to do them most Service; for as this Court does sometimes prolong the Time for Payment of Money, so it may sometimes shorten and abridge it; and had this Case been like the others before mentioned, he should have decreed it accordingly; but this materially varies from them; for in none of them are the Words following, *viz. unmarried, or unprovided for, as herein after mentioned, at the Time of his Decease*; which Words are a Description of, and suit only with the Person who is to have the Portion, *viz. such Daughter as is unmarried, or unprovided for, at the Death of the Father*; and though in this Case she is already married, yet she may be provided for in the Father's Life time; and so this Part of the Contingency, whether she will be unprovided for at her Father's Death is still to come; for she who will claim the Portion by this Settlement, cannot say she is unprovided for at his Death, which during his Life none can say; and this Construction is the stronger from the Clause which appoints the Maintenance, for that is only out of the Rents and Profits; whereas the Portions are to be out of the Rents and Profits, or by Mortgage or Sale; and Rents and Profits in the first Clause being put in contradistinction to Mortgage or Sale in the second, must be restrained, and cannot warrant Mortgage or Sale; and the Maintenance appointed in the mean Time, that is from Failure of Issue Male, till payable, if the Portion should be then due, the Maintenance would run on the Father's Estate for Life; which surely will not be pretended; but this is put beyond Dispute by the Proviso, if he should pay, or secure to be paid, &c. And though the Words *or unprovided for* there are left out, this is but *vitium Clerici*, and must be inserted to make it agree with the other Parts of the Deed; and then this Proviso was to give him Liberty to determine the Term.

which the Plaintiff would now have sold, for Payment of the Portion in his Life-time, to any Daughter which should be unmarried, or not provided for, at his Death ; and as to the Cases on this Head, he said that in most of them, in which the Term was decreed to be sold, there were no Conditions precedent, either to the vesting of the Term or Execution of the Trust ; and decreed accordingly. *Trin.* 1710, *Corbet and Maidwell*. (1 *Salk.* 159, S. C. ; 2 *Vern.* 640, S. C. ; 3 *Chan. Rep.* 190, S. C.).

6. A Settlement was made on the Husband for Life, Remainder to the Wife for Life, and to the first and other Sons in Tail, and in [340] default of such Issue, to Trustees for 500 Years, in trust, after the Commencement of the Term, to raise £4000 as Portions for the younger Children of the Husband and Wife, payable at Twenty-one or Marriage, by Rents, Profits, Sale or Mortgage; the Father died, leaving only a Daughter, who married the Plaintiff at Fifteen ; and it was held, that the Portion should not be raised in the Life of the Mother, nor that any Interest should accrue for it during the Mother's Life, because the Trust is to raise the Portion, after the Commencement of the Term, which must be intended when it comes into Possession. *Trin.* 1718, *Butler and Duncomb*, 2 *Vern.* 760. *Quære* of this Case, for it seems to be ill reported. (*Vide* this Case fully reported, 1 *Will. Rep.* 448.)

7. A Settlement was made in the usual Form, with a Limitation to Trustees, for want of Issue Male, to raise Portions for Daughters, to be paid at Twenty-one or Marriage, which should first happen, by and out of the Rents and Profits, or by Mortgage or Sale, as they should think fit ; and in the mean Time, and till the said Portions should become payable, the Trustees to raise £100 *per Ann.* for the Maintenance of each of them ; the Father died, and one of the Daughters having married the Plaintiff, this Bill was brought to have the Portion raised, but was dismissed, because the Portion being to be raised out of the Rents and Profits, or by Mortgage or Sale, plainly shewed that it was not to be raised till such Time as the Trustees might make Use of the Election given them by the Settlement, to raise it either out of the Rents and Profits, or by Mortgage or Sale ; but during the Life of the Mother, who had it in Jointure, they could not raise it out of the Rents and Profits ; therefore neither by Mortgage or Sale, which were all inserted in one and the same Clause, and a discretionary Power lodged in the Trustees, to use either the one Way or the other ; and till they had the Election of using either of these Ways, they had no Power at all ; besides that, the Maintenance being to proceed the raising of the Portions, if there was no Maintenance to be raised in the Mother's Life-time, the Portions were not to be raised in her Life-time, as they were not to take place till after the Maintenances ; and my Lord Chancellor and the Master of the Rolls both said, that the Cases on this Head had gone too far already, and mangled all Estates, and that they would never decree Portions to be raised in the Father's Life-time, where it could possibly bear any other Construction ; and this Decree was affirmed in the House of Lords. *Mich.* 1728, *Brome and Berkley*. (2 *Will. Rep.* 484, S. C. and Decree.)

[341] CAP. XLIV.

POWER.

(A) Power, when well created, and when determined.

(B) Of the right Execution of a Power, and where a Defect therein shall be supplied.

(A) POWER, WHEN WELL CREATED, AND WHEN DETERMINED.

1. If a Man gives Instructions to put his Will in Writing, and that his Messuages, &c., should be sold by A. and B. for the Payment of his Debts and Legacies, and dies ; and after A. dies, B. and the Heir at Law will be compelled to sell. [*Gwilliams v. Rowell.*] *Hard.* 204.

2. So if Lands are devised to be sold, and no Person is named for that Purpose, the Heir must do it. [*Pit v. Pelham.*] 1 *Chan. Ca.* 177 ; 1 *Chan. Rep.* 283, S. C.

3. If Trustees are impowered to pay Portions at prefixt Days, out of the Rents and Profits of Lands, and the Rents and Profits will not amount to the Sums to be paid, they may sell the Lands. [*Backhouse v. Middleton.*] 1 *Chan. Ca.* 175. *Vide Meynel v. Massey*, 2 *Vern.* 1, S. P.

4. If a Man has Power to charge Land with any Sum, not exceeding the Sum of

£3000 he may charge it with £3000 and Interest besides : for the Intention is to charge the Premises with £3000 Principal Money, and that of course carries Interest, and none would lend such Sum on such Security, if the Law were otherwise. *Pasch. 12 Ann. Lord Kilmurry and Geery, 2 Salk. 538, in Canc. (Vide Lord Kilmurry v. Dr. Grey, 2 Eq. Ca. Abr. 665, and Lord Kilmurry v. Dr. Geery, cit. 2 P. Wms. 671, S. C., more particularly reported.)*

5. A Man makes a Settlement on the Marriage of his Son with one *B.* and (*inter al'*) there is this *Proviso*, provided that if the said *B.* shall happen to survive her Husband, not having Issue, or without Issue of their Bodies, lawfully begotten between them, then *B.* to have Power to sell and dispose of such Lands ; the Husband dies leaving Issue : some Years after that Issue dies without Issue, and then the Wife sells those Lands ; and it was held that her Power [342] took Effect, though the Husband did not die without Issue at the Time of his Death. *Pasch. 1710, Holt and Bureigh (Called in Vernon, Burley), 2 Vern. 653.*

6. A Man makes a Settlement, wherein was a Power, that he might from Time to Time, by Deed or Writing under his Hand and Seal, revoke the Uses thereof, and by the same, or any other Deed, limit and declare new Uses. In pursuance of this Power, he revokes the old Uses, and by the same Deed limits new Uses, without annexing any new Power of Revocation to those new Uses ; afterwards thinking he had, by virtue of the first Settlement, a Power of Revocation *toties quoties*, he by another Deed revokes the last Uses, and again declares other Uses of the same Lands ; and if he had such Power, was the Question. It was agreed he might in the Deed of Revocation have annexed a Power of revoking the Uses thereby declared, and might afterwards have executed that Power accordingly ; but in this Case there being no such new Power of Revocation annexed to the new Uses, 'twas decreed that his Power of Revocation by the first Deed was executed, and at an End, and by consequence that the Revocation afterwards was without any Warrant, and so the Uses limited upon the first Revocation must stand ; and this Decree was affirmed in the House of Peers. *Trin. 1717, Heli and Bond. (Prec. in Chan. 474, S. C. and Decree ; and adds, that this Case was agreed (in Dom' Proc') to be entirely a new Case ; and that it was very elaborately argued on both Sides.)*

(B) OF THE RIGHT EXECUTION OF A POWER, AND WHERE A DEFECT THEREIN
SHALL BE SUPPLIED.

1. If one hath Power to make a Lease for ten Years, and he makes a Lease for twenty Years, yet in Equity this is good for ten Years of the twenty, and so has been settled several Times. *Trin. 15 Car. 2, Pawcy and Bowen, 1 Chan. Ca. 23 (S. C. 3 Chan. Rep. 11).*

2. One having a Power to make Leases for Twenty-one Years in Possession, made a Lease to *A.* for Twenty-one Years, in trust for the Payment of Debts ; but the Lease was made to commence from a Time to come, and so not pursuant to the Power ; yet being made for the Payment of Debts, was supported in Equity. *Pollard and Green, 1 Chan. Ca. 10 ; 1 Chan. Rep. 185, S. C.*

(Tenant for Life, with Power to make Leases for Twenty-one Years, rendering the antient Rent, makes a Lease for Twenty-one Years, to begin such a Day after ; this is not pursuant to the Power, and consequently void, because it is a future Lease which this Power does not warrant ; for if he might make it in Reversion, or *in futuro*, though but a Month after, he may as well make it to begin Twenty Years after, or after his Death, and so defeat the Intent of the Power, which being to charge the Estate of a third Person, is to be taken strictly ; and to this Purpose are several Cases, as *Palm. 468-97 ; Cro. Eliz. 5 ; 6 Co. 33 ; 1 Leon. 35 ; 3 Leon. 130 ; 4 Leon. 64 ; Moor, 199 ; Poph. 9 ; Yelv. 222 ; Cro. Car. 318 ; 2 Rol. Abr. 261 ; Raym. 247.*)

* 3. A Man made a voluntary Settlement on his Son for Life, and after to his first and other Sons in Tail, with Power for the Son to make a Lease in Possession for Ninety nine Years, determinable on three Lives, and also to make Leases for Sixty Years to commence after his Death, if he had Issue Male, to continue so long as he had Issue Male ; the Son makes a Lease to his Father in trust for one of his younger Children ; but the Lease was not pursuant to the Power ; yet it was decreed good, and taken to be as a Lease made by the Father after a voluntary Settlement. *Mich. 1698, Gooding and Gooding.*

[343] 4. But where a Reversioner upon an Estate for Life made a Settlement on herself for Life, with Power for her being Sole, to make Leases for three Lives in Possession; and she and her Husband, in the Life time of the Tenant for Life, made a Lease for Twenty one Years, *Habund.* from the Date; it was held not pursuant to her Power; for by the Marriage she put herself in the Power of her Husband; and my Lord Keeper took a Diversity between a naked Power, and a Power which flows from an Interest; for where a bare Power is given to a Feme by Will to sell Lands, although she afterwards marries, she may sell the Lands, and may sell to her Husband; but where a Feme, upon a Settlement of her own Estate, reserves a Power which flows from an Interest, that Power ought to be executed by the Feme whilst Sole; and yet he said, such Power ought to be taken liberally, though formerly they were taken strictly. *Hil.* 15 Car. 2 [1661]. *The Marquis of Antrim and the Duke of Buckingham*, 1 Chan. Ca. 17. (3 Salk. 276; 2 Freem 168, S. C.)

5. A. on the Marriage of his eldest Son B. makes a Settlement of certain Lands on B. for Life, Remainder to his first, second and third, &c., Sons in Tail, Remainder to C. a second Son for Life, and to his first, &c. Remainder to himself in Fee, with a Power to B. and C. severally as they shall come into Possession, to make Leases for three Lives, or Twenty one Years, or any Number of Years determinable in three Lives, in this Manner. First, *Of all or any of the Lands anciently and accustomedly demised, whereof Fees have been usually taken, reserving the ancient, usual and accustomed Rents or more.* Secondly, *Of all the other Lands, reserving the most improved Rents that can be got;* and that the Tenants should seal and execute Counterparts of their Leases; B. died without Issue, C. entered, and being seised with a sudden Sickness, when he had no Rent Rolls, or old Leases to guide him, taking Notice of his Power generally, executes two Leases; one of the Lands not anciently or accustomedly letten, and thereon reserved the *best improved Rent*; and on the other reserved the several *ancient and accustomed Rents*, but does not specify what those Rents are, and died; and it was held clearly by Lord Cowper, Holt, and Trevor, Ch. Justices, that the first Lease was void, and not warranted by the Power; nothing being so uncertain as what shall be said the most improved Rent; and Lord Cowper and Trevor, against Holt held, that the second Lease was void also for Uncertainty, and the Inconveniency he in Remainder or Reversion would be put to, in not being able to avow for the Rent with Exactness; by which Means he may be nonsuited, and so prevented of having any Benefit of the Lands; and though a Court of Equity may decree such a Lease good between the Lessor and Lessee, yet as there appears no Consideration in this Case, it is not proper that the Court should interpose in supplying a Defect, and thereby lay a charge on the Right of a third Person. *Hil.* 1705, *Orby and Lady Mohun*, 2 Vern. 531, 542. (*Proc. in Chan.* 257, S. C. under the Name of *Orby and Lord Mohun*, Gilb. Eq. Rep. 45, S. C.; 2 Freem. 291, S. C.; 3 Chan. Rep. 102, S. C.)

6. J. S. having four Children, viz. two Sons and two Daughters, settles his Estate on Trustees, to the Use of himself for Life, Remainder to his Wife for Life, and after their Decease to the Use and Uses of such Child and Children, and in such Shares and Proportions, as he should appoint by any Writing by him to be signed in the Presence of two Witnesses; and in default of such Appointment, to his eldest Son in Tail; he by his Will by him signed, and [344] attested by several Witnesses, devises a Rent-Charge out of those Lands to his youngest Son, and to the first and other Sons of his Body successively in Tail; and further Wills, that in case his said Son die without Issue Male, so as the Estate should come to his eldest Son, then he to pay £500 apiece to his Daughters; the Son dies without Issue; and the Bill was brought by the Daughters to have the £500 a piece, according to the Will; the eldest Son by way of Plea set forth the Deed of Settlement, and Power *prout*, and insisted, that the Power was not well pursued or executed by the Will; (to wit) that the Testator might have distributed the Land amongst his Children in such Proportions as he thought fit, but had not Power to grant or devise a Rent-Charge or Sums of Money, as he had taken upon him by his Will to do; but the Court disallowed the Plea, and ordered him to answer the Bill. *Trin.* 1688, *Thwaytes and Dye*, 2 Vern. 80.

7. If A. on his Marriage conveys Lands to a Trustee, to the Use of himself for Life, Remainder to his Wife for Life, Remainder to the Heirs of their Bodies, Remainder to A. in Fee; *Provida* that in default of Issue of the Marriage, the Trustee shall convey to such Uses as the Survivor of the Husband or Wife shall appoint; although the Husband devises the Land, and dies first without Issue, yet the Wife has a good Power

of disposing of the Estate by her Appointment. *Trin.* 1700. *Bishop of Oron and Leighton & al'*, 2 *Vern.* 376.

8. A. by a Marriage Settlement is Tenant for Life, Remainder to Trustees to raise £1000 for younger Children's Portions, as A. should appoint, Remainder to his first, &c., Sons in Tail. A. having several Children, appoints the £4000 amongst his younger Children, and particularly £2600 thereof on B. his second Son, who was then under a Treaty of Marriage; the eldest Son died six Years afterwards, whereby B. became eldest Son, and intitled to the whole Estate after his Father's Death; and thereupon A. made a new Appointment of the £2600 amongst his other younger Children; and it was held, that though B. was a Person at the Time capable of taking within the Power of appointing, yet it was upon a tacit or implied Condition, that he should not afterwards happen to become the eldest Son, and that this was a *defeasible* Appointment, not from any Power of revoking, or upon the Words of the Appointment, but from the Capacity of the Person; and decreed accordingly. *Hil.* 1705, *Chadwick and Doleman*, 2 *Vern.* 528.

9. On a Marriage-Settlement £2500 was provided for the Issue of the Marriage, in such Proportion as the Husband should appoint; he died leaving only a Daughter, and made no Appointment, and the £2500 was decreed her. *Mich.* 1710, *Dury and Hooper*, 2 *Vern.* 665. (S. C. *ante* [1 Eq. Ca. Abr.], 336.)

10. If a Man gives Legacies to his Children to be paid at Twenty-one or Marriage, and if any of them dies before Twenty one or Marriage, the Legacy of such Child to be disposed to *one* or more of the Children then living, in such Manner as his Wife, whom he made Executrix, should think fit; and one of the Children dies under Age and unmarried; the Mother may appoint such Legacy to any *one* of the other Children, and it will be good. *Mich.* 1705, *Thomas and Thomas*, 2 *Vern.* 513.

11. But if an Executor has a general Power to distribute a Sum [345] of Money amongst Children at Discretion, and he makes an unreasonable or indiscreet Disposition, it will be controlled in a Court of Equity. *Vide in Thomas v. Thomas*, 2 *Vern.* 513, *per Curiam*.

12. So where a Man having two Daughters, one by a former Wife, and another by a second Wife, devised his Estate to his Wife, to be distributed between his Daughters, as his Wife should think fit; and she having given £1000 to her own Daughter, and but £100 to the other, the Court decreed an equal Distribution. *Cragrave and Perrost, cit. in Wall v. Thurborne*, 1 *Vern.* 355, and *in Wall v. Thurborne*, 1 *Vern.* 441.

13. A. devised his Personal Estate, and £400 to be raised out of a Trust Estate, to be distributed by two of his Daughters, his Executrices, amongst themselves and their Brothers and Sisters, according to their Need and Necessity, as they in their Discretion should think fit; and my Lord Keeper decreed the Heir at Law a double Share thereof, as looking upon him as standing most in Need thereof; which Decree was affirmed in the House of Lords. *Pasch.* 1701, *Warburton and Warburton*, 2 *Vern.* 420. (S. C. *but not* S. P. 2 *Eq. Ca. Abr.* 654.)

14. If a Man makes a Settlement of his Estate on his eldest Son in Tail, with a Power by Deed or Will, under Seal to charge the Lands with any sum not exceeding £500, and he prepares a Deed, and gets it ingrossed, by which he appoints the £500 to his younger Children, and dies before it is signed or sealed; yet this shall amount to a good Execution of his Power in Equity, the Substance being performed. *Mich.* 27 *Car.* 2 [1675], *Smith and Ashton*, 1 *Chan. Ca.* 264. (*Rep. Temp. Finch*, 273, S. C. says the Person prepared Notes in Writing, which he declared should be the Effect of his last Will, and which were (as he called them) Instructions for Counsel to draw up his last Will in Form. Upon a Trial directed out of Chancery, a Verdict was found for the Will; and Lord Chan. declared there was a good Execution of the Power, and that the Notes were a clear Demonstration of his Intention. 1 *Freem.* 308, S. C. states it, that A. made a voluntary Conveyance to the Use of himself for Life, reversing a Power to make a Disposal of any Part of it by writing under his Hand and Seal, and then makes a Disposal by Will without putting to his Seal; and *Finch*, Lord Keep., gave his Opinion solemnly, that this was a good Execution of his Power. 3 *Keb.* 551, S. C.—3 *Salk.* 227, S. C. *pl.* 6, mentioned as a Will.)

15. A. by Settlement intailed his Estate, with Power of Revocation by any Writing published under his Hand and Seal, in the Presence of three Witnesses; the Land descended to his Son, who mortgaged it to J. S., who brought his Bill to foreclose; and it appearing that A. had by his Will, wherein he recited his Power, declared that

he revoked the Settlement, though but two Witnesses who signed, but another present : yet Lord Chancellor decreed, that the Mortgage Money should be paid, and said, that in Strictness here was a good Execution of the Power, a third Witness being present, though he did not sign his Name ; and if there had not, yet it was proper that such a little Circumstance should be helped in Equity. *Hil. 32 Car. 2* [1681], *Sayle and Freshland, 2 Vent. 359.*

16. Tenant in Tail with Power to make a Jointure of Lands in the Counties of A. B. and C., Remainder in Tail to J. N., marries and receives £3000 Portion with his Wife, and by Articles before his Marriage covenants to settle a Jointure, but dies before any Settlement was made ; the Wife dies, and her Executrix brings a Bill to have an Account of the Profits of the Lands, which by the Articles were covenanted to be settled in Jointure against the Remainder-man, who had upon his Marriage settled those Lands upon his Wife and her Issue, but with Notice of the Power in the first Tenant in tail to make a Jointure ; and my Lord Chancellor dismissed the Bill, there being no Equity for the Executrix of the first Jointress against the second and her Issue, who was equally a Purchaser with the first. *Mich. 1686, Elliot and Hele, 1 Vern. 406, 2 Chan. Ca. 29, 30, 87, S. C. but no Resolution.*

[346] 17. But where A. Tenant for Life, with Power to make a Jointure of £1000 *per Ann.* upon his Marriage covenanted to make a Jointure on his Wife of £1000 *per Ann.*, and pursuant thereunto a Settlement was made, and a Particular of Lands, which were mentioned to be worth £1000 *per Ann.* was set out for the Jointure, but in Truth fell short, and were not above £600 *per Ann.*, on the Jointress's Bill, the Court decreed the Jointure to be made up £1000 against the Issue in Tail, though it was urged, that he was not privy to the Marriage Treaty, nor guilty of any Fraud. *Trin. 1700, The Lady Clifford and Lord Clifford, 2 Vern. 379. (Gibb. Eq. Rep. 167, S. C.)*

* 18. Sir Edward Gold, the Plaintiff, and his Lady, intermarried in 1683, and some Years after the Marriage an Estate of Inheritance of about £100 *per Ann.* descended to the Lady ; whereupon she and her Husband, by Indenture, assigned and conveyed this Estate to Trustees and their Heirs, in trust to permit the Lady from Time to Time, notwithstanding her Coverture, without her Husband, and not to be subject to his Power or controul, to apply and dispose of the Rents, Issues and Profits thereof, as she should by any Writing under her Hand and Seal, in the Presence of two or more Witnesses, direct and appoint, with a Power likewise for the Trustees to make such Sales, Mortgages, or other Conveyances of the Lands themselves, as the Lady should in like Manner direct and appoint : The Lady, by Parsimony and Frugality had, in about twenty-two Years Time, saved about £1400 out of this her separate Estate, £790 whereof she had invested in *East-India* Bonds, £200 in twenty Lottery-Tickets, and had the Residue in Ready Money and Broad Pieces ; the Defendants were her Nieces, for whom (having no Children) she had a very great Regard and Love ; and having given them, with her Husband's Privy, four of the Bonds, she lodges the other Three in the Trustees' Hands, taking their Note for the Delivery of them, and afterwards directs the Trustees to deliver the other Three to whomsoever should bring their Note, and then gives the Note to one of the Defendants, who thereupon, by her Orders, goes to the Trustees, and gets up three Bonds from them ; and these Bonds the Lady told her Nieces, she intended should be theirs after her Death, but that she expected to have the Interest arising thereby during her Life ; she afterwards, some short Time before her Death delivers likewise to one of her Nieces a Canister, wherein were 400 *Guineas*, and several Broad Pieces of Gold, telling her she intended that to be divided between her and her Sister, after her Death ; and likewise directed the Trustees to divide the twenty Lottery-Tickets between her Nieces, after her Death. All this Transaction was only by Word of Mouth, without any Writing whatsoever, but was fully proved in the Cause. In 1712, the Lady Gold died, and Sir Edward, her Husband, having taken out Administration to his Lady, brought his Bill against the Defendants, to have an Account and Delivery up of the *East-India* Bonds, and of the Money so delivered to them, and likewise against the Trustees for the twenty Lottery-Tickets ; and the Nieces brought a Cross-Bill to establish their Title to the Money and Bonds, and to have the twenty Lottery-Tickets delivered to them, according to the Direction of my Lady Gold. It was urged for Sir Edward, that this Power to his Lady to dispose of the Profits of her Estate, was not before Marriage ; that she was not a Purchaser of it, but that being after Marriage, and voluntary, it ought to be construed strictly ; that these Powers being in derogation of the Rights of Hus-

[347] bands, were not allowed at Law ; and though Courts of Equity had supported

them, yet that was only where the Power was strictly and literally pursued : that the Defendants were neither Children nor Grandchildren, and but remotely allied to the Lady ; that though defective Executions of Powers had been sometimes supplied in this Court, for the Sake of a Wife or Children, or for the Sake of Creditors, yet it was never yet carried so far as to assist Strangers ; and that it was to be resembled to the Cases of Copyhold Lands, where the Want of a Surrender had never yet been supplied, but in the three Instances before-mentioned, or for Charitable Uses ; that Circumstances were frequently imposed on the Parties themselves to prevent Surprize ; and that if these Circumstances were not pursued, a Court of Equity would not assist, especially any Person who claims by a voluntary Disposition ; and so was the Duke of Albemarle's Case, where the Revocation was to be in the Presence of six Witnesses, where three were to be Peers ; yet that Circumstance could not be aided ; that for small trifling sums they agreed it was not necessary the Lady should make a Writing under her Hand and Seal, attested according to her Power, but for such considerable Sums as these were, the Power must be pursued, or else the Disposition would be void ; that in this Case, if the Lady had made a Will in Writing, unless attested by two Witnesses, it would not have been good, much less this Parol Disposition, and consequently the Husband intitled to them as Administrator to his Wife. On the other Side it was insisted, that it was a strange Doctrine to advance, that the Wife in this Case must be bound strictly to pursue the Power, when she had the Money in her own Hands ; that the Intent of that Power was only in case she had disposed of it to any other Person, whilst it remained in the Trustee's Hands, before ever she had received it ; that it could not be pretended but that the Trustees might pay it to herself, without any such Writing ; that they had so done in this Case, and that she was then at Liberty to have spent it, or to give it away, as she thought fit ; that it was hard to say, she had a Power over it whilst in the Trustee's Hands, and yet that, as soon as she received it herself, and consequently as soon as it became useful to her, then it should be the Husband's, unless she pursued her Power ; that if she had taken up Clothes or Goods of any Tradesman, surely it would not be pretended, but that she having the Money in her own Pocket, might pay them without any such Writing under her Hand and Seal ; that therefore the Cases cited were not to the Purpose ; for here the Money being in her own Hands, she was at Liberty to give or dispose of it as she thought fit ; that the Direction to the Trustees to deliver these Tickets to her Nieces, after her Death, was a Kind of *Donatio causa Mortis* ; and that as she, being in Possession of them herself, might have given them to her Nieces ; so she might direct her Trustees afterwards, when they had them by her Delivery. Lord Chancellor said, there was no Difference in these Cases, whether the Power were given before Marriage, or after ; for if the Disposition is to take place in virtue of this Power, it must be strictly pursued in either Case ; that he thought it should rather be taken more liberally, when given after, than when before Marriage ; for then the Husband could be supposed to be under no Temptation of giving it, as he might before Marriage, in hopes of prevailing on his Wife after, to give it up, or relinquish it ; that therefore it must be intended he fully designed she should have the Benefit of it : [348] that the Reason why the Will of a Feme Covert was not good, was not for want of Power in the Wife ; for if the Husband consented, the same Instrument which she executed as her Will would be sufficient to pass it, and it would go out of her Property ; that she having in this Case received the Money, had absolute Power to dispose of it as she thought fit ; that she might have given it away absolutely, or upon Terms ; that if, as it was agreed, she might dispose of little Sums, why not of great ones ? where was the Difference, where must the Bounds be set ? that by this Power she was made in the Nature of a Feme Sole ; and as such a Disposition in that Case would have been good, why not in this ? her Administrator in that Case could not have impeached such a Disposition ; no more can her Husband in this, who has no other right but as Administrator ; that the Disposition by her was perfect and compleat ; that the reserving the Interest to herself during Life, bound indeed the Party, but did not defeat the Gift ; that it was in her Power to give it on what Terms she pleased, and either presently, or at a future Time, and that her Death made no Difference in the Case ; and as she might have paid any Tradesman's Bill without such Writing, so she might dispose of the Whole, or of Part, in the same Manner ; and so decreed the whole £1400 to be well disposed of to the Nieces, in regard the Money being paid to her, was absolutely in her own Disposal.

Pasc. 1719, Gold and Rutland.

19. A. devised his Lands to B. his eldest Son for Life, Remainder to his first and other Sons in Tail Male, Remainder to his second and third Sons in like Manner, with Power to every Person who should, by virtue of the Will, be seised of the Lands by any Writing indented under his Hand and Seal, to settle a Jointure on his Wife of £500 *per Ann.*, provided such Wife shall have a Fortune equivalent to such Jointure, and died; B. entred, and on Treaty of Marriage with the Plaintiff, covenanted in consideration of £10,000 Marriage-Portion, that he or his Heirs would, after the Marriage, at his own Costs and Charges, according to the Power given him by his Father's Will, or *otherwise*, by good Conveyances, settle Lands of £500 *per Ann.* upon the Plaintiff, for her Jointure, to commence in Possession immediately after his Death, if she survived him; the Marriage took Effect; afterwards B. got a Settlement made and ingrossed pursuant to his Power and the Marriage Covenant, but by various Accidents was prevented from signing the Deed; and being taken ill died suddenly, not having the Deed by him, and having expressed (as was fully proved) great Uneasiness at its not being perfected, and left the Plaintiff by his Will (which he had made some Time before) a Legacy of £300 *besides what is settled on her by the Marriage Articles*; and it was decreed by my Lord Chancellor, assisted with the Master of the Rolls, and Mr. Baron Price and Mr. Baron Gilbert, that this defective Execution should be supplied in Equity, so as to bind the Estate in the Hands of the Remainder-Man; although it was objected, that she had a Remedy by the Covenant against the Heir and Executor of the Husband; and that, by the Words in the Covenant, he was at Liberty to make a different Provision for her. *Pasch. 1724, the Earl of Coventry's Case. (2 Will. Rep. 222; Lucas's Rep. 463; 9 Mod. Ca. in Lar and Eq. 12; Gilb. Eq. Rep. 160, and at the End of Max. in Eq. S. C. Str. 596, 2 Eq. Ca. Abr. 673, S. C.)*

[349] CAP. XLV.

PRIVILEGE.

(A) What Persons are intitled to Privilege.

(B) Of Proceedings by, or against a Privileged Person.

(A) WHAT PERSONS ARE INTITLED TO PRIVILEGE.

1. A Member of the Convocation is to be allowed the same Privilege with a Member of Parliament. [Parry *v.* Juxon,] 3 *Chan. Rep.* 38.

This is expressly enacted by the *Stat. 1 H. 6, cap. 1.*

2. The Widows of Peers ought to have no Privilege, because they are not to be called to Counsel, but they are to have Privilege of Peers, not to be arrested; declared by my Lord Chancellor Finch to have been so resolved in Parliament. 19 *Dec. 1676* [Anonymous], 2 *Chan. Ca.* 224.

3. Two of the Defendants, being the Officers of the *Exchequer*, plead the Privilege of the *Exchequer*; but the Plea was over-ruled; because there was a third Defendant, who had no Right of Privilege. *Fanshaw v. Fanshaw*, 1 *Vern.* 246.

(B) OF PROCEEDINGS BY, OR AGAINST A PRIVILEGED PERSON.

1. If a Member of Parliament sues at Law, and a Bill is exhibited in Chancery to be relieved against that Action, the Court will make an Order to stay Proceedings at Law till Answer, or further Order, although the Court will not proceed against a Member who has Privilege of Parliament. *Anon.* 1 *Vern.* 329.

2. The Court granted an Injunction against a Member of Parliament, but at the same Time ordered that no Attachment should be taken out. [Anonymous] 3 *Chan. Rep.* 21.

3. The Plaintiff having brought a Bill to redeem an old Mortgage against the Defendant, who was then an *Ambassador* at the Court of *Spain*; the Defendant obtained an Order, that all Proceedings should cease until his Return from his *Embassy*; the Plaintiff moved to discharge the Order; and upon Debate it was agreed a *Pro-*

lection lies for an Ambassador, *quia proferendus*, or *quia moraturus*, and may [350] at Law cast an Essoign for a Year and a Day, and may afterwards renew it, if the Occasion continues; and in this Case the Court ordered a Stay of Proceedings for a Year and a Day from this Time, unless the Defendant should sooner return into England. *Pilkington v. Stanhope*, 2 Vern. 317.

4. The Plaintiff, being protected by the *Genoese* Ambassador, was ordered, though after an Answer put in, to give Security to answer the Costs in the same Manner as if he were a Foreigner; because by the 7th of Ann. all Process against Ambassadors, and their Servants, are made void; so that if the Bill should be dismissed, no Process could issue against him; and a Precedent was produced the 25th of July 1709. *Barret and Buck*, where the like Order was made by my Lord Cowper; and that Case was likewise after Answer was put in. *Pasch.* 1729. *Goodwin and Archer*. (2 Will. Rep. 452. S. C. says, Plaintiff's Proceedings were to stay until he with a Surety gave Bond in £40 Penalty for answering Costs. And the Case likened to that of a Foreigner Plaintiff, for which were cited to this Point, *Melioruchy v. Melioruchy*, 2 Ves. 24; *Gage v. Stafford*, 2 Ves. 557.)

[350] CAP. XLVI.

PROCESS.

(A) Of issuing, serving and returning a Process, by, and against whom, at what Time; and here of Contempts.

(B) Of Sequestrations.

Of Injunctions, *vide* Title *Injunction*.

(A) OF ISSUING, SERVING AND RETURNING A PROCESS, BY, AND AGAINST WHOM, AT WHAT TIME; AND HERE OF CONTEMPTS.

1. If a Cause has slept twelve Months in Court, there shall be no Proceedings had upon it, without first serving a *Subpœna ad faciendum Attornat'*. *Anon.* 1 Vern. 172.

2. If a Man is arrested upon an Attachment, the Contempt shall hold good, though no Affidavit be filed at the Time of taking forth the Attachment, if it be filed before the Return of it. *Anon.* 1 Vern. 172.

[351] 3. If one be taken up on an Attachment, either in Process or in Execution after a Decree, yet in both Cases, on his appearing before the Register, he is to be discharged, and to answer the Interrogatories at large, not in Custody; and if he be continued in Custody, the Court on Motion, and appearing before the Register, will discharge him. *Hil.* 1700. *Danby and Lawson*. (*Prec. in Chan.* 110, S. C. and S. P.)

4. So if the Sheriff take one up on Attachment in Process, he is to give a Bond of £40 Penalty to the Sheriff, to appear and answer; but for one taken up in Execution after a Decree, the Sheriff may insist on Security proportionable to his Duty; but in both Cases, on the Register's Certificate that the Party has appeared, the Sheriff is to deliver up the Bond; agreed to by the Registers, and ruled by the Master of the Rolls. *Hil.* 1700. *Danby and Lawson*. (*Prec. in Chan.* 110, S. C. and S. P.)

5. The Plaintiff obtained an Order, that Service of Process to appear at the Defendant's last Place of Abode, should be deemed good Service, and left the same at the House where he lodged, and carried on the Process to a Sequestration, and then brought on the Cause against the other Defendant; who insisted that if the Plaintiff ought to be relieved against him, he ought to have a Decree over, against the other Defendant; and therefore he was concerned to see that the Proceeding was regular, and insisted, that it being above twelve Months since the other Defendant had left that Lodging, the Service was not good; and of that Opinion was the Court. *Parker v. Blackb.* 1771. 2 Vern. 369. (S. C. but not S. P. *ante*, 73; S. C. and S. P. 2 Eq. Ca. Abr. 490. *Prec. in Chan.* 99.)

6. If after Process of Contempt, the Defendant put in an insufficient Answer, and so reported, the Plaintiff shall not, as formerly, begin the Process at the *Subpœna*,

but shall go on to the Attachment with Proclamation, and other Process, as if the Answer had not been put in. [Anonymous.] 1 *Chan. Ca.* 238.

* 7. A Distinction was taken by the *Solicitor General*, and agreed to by the Court as reasonable and agreeable to the Meaning of the printed Orders of the Court, that if Process to a Messenger, or any other Process of Contempt, has gone out against a Defendant for Want of his Answer, on Tender of the Costs of those Contempts, if the Plaintiff accepts them, and the Answer on looking into it, appears to be insufficient, so that the Plaintiff takes Exceptions, and the Defendant is obliged to put in a further Answer; in order to compel the Defendant to put in such further Answer, if not put in in Time, the Plaintiff must begin all Process *de novo*, and go on with it regularly, because his Acceptance of the Costs was a Remission of all former Contempts, and purged them; but as an insufficient Answer is really no Answer at all in the Judgment of the Court, if he refuses to accept the Costs, and the Answer being put in, on Exceptions taken to it, is reported insufficient, he may go on with the Process where he left off, to compel putting in a further Answer, without beginning *de novo*, as in the other Case. *Trin.* 1728, *Haistwell and Grainger*.

8. Process issued against the Defendant till Proclamation returned, then came a general Pardon; and the Defendant appeared and demurred to the Bill, which the Plaintiff moved to set aside, because though the Contempt was pardoned, yet the Delay was a Loss to him; but the Court ordered them to proceed on the Demurrer for by the Pardon the Defendant stands *rectus in Curia*. *Anon. Mich.* 26 *Car.* 2 [1674], 1 *Chan. Ca.* 238.

9. Upon a Motion for a *Serjeant at Arms*, on a Commission of Rebellion returned, it was held that by the King's Demise every Process of Contempt not executed is determined, so that the Party [352] must begin again at an Attachment; but where any Process is executed, and a *Capi Corpus* returned, there the Process stands good. *Anon.* 1 *Vern.* 300. (By 1 *Ann. st.* 1, *cap.* 8, *sec.* 5, no original Writ, Writ of Nisi prius, Commission, Process or Proceedings whatever in or issuing out of any Court of Equity nor any Process or Proceeding upon any Office or Inquisition, nor any Writ of Certiorari or Habeas Corpus in any Matter or Cause, either Criminal or Civil, nor any Writ of Attachment or Process for Contempt, nor any Commission of Delegacy or Review, for any Matters Ecclesiastical, Testamentary, or Maritime, or any Process thereupon shall be determined, abated or discontinued by the Demise of any King or Queen of this Realm, but every such Writ, Commission, Process and Proceeding, shall remain in full Force and Virtue to be proceeded upon as if such King or Queen had lived, notwithstanding any such Death or Demise.)

10. But when an Attachment was sued out in the Time of King Charles the Second, and executed three Days after his Demise, but before Notice of his Death; it was adjudged to be well executed, and the Proceedings thereon regular. *Burch v. Maypowder*, 1 *Vern.* 400, *Q.* (See the Book; 2 *Show.* 467, *S. C.*)

(B) OF SEQUESTRATIONS.

1. If a Defendant is in Contempt, and in Prison for not performing a Decree, the Court will order a Sequestration against his Real and Personal Estate. [Elvard *v.* Warren.] 2 *Chan. Rep.* 151. Of the Antiquity of Sequestrations, and that they are proper and necessary Processes. *Vide* [Hide *v.* Petit] 1 *Chan. Ca.* 92; [Kildare *v.* Eustace.] 1 *Vern.* 421.

2. Upon an Affidavit that the Defendant was gone into *Holland* to avoid the Plaintiff's Demand against him; and he having been arrested on an Attachment, and a *Capi Corpus* returned by the Sheriff, the Court, upon Motion, granted a *Serjeant at Arms* against him; and upon the Return thereof granted a Sequestration. *Frederick v. David*, 1 *Vern.* 344.

3. A Sequestration, that issues as a mesne Process of the Court, will be discontinued and determined by the Death of the Party; but where a Sequestration issues in pursuance of a Decree, and to compel the Execution of it, there, tho' the same be for a personal Duty, it shall not be determined by the Death of the Party. *Burdett v. Rockey*, 1 *Vern.* 58, *Q.* *Vide Anon.* 1 *Vern.* 116. *University College v. Foxcroft*, 1 *Vern.* 166.

4. A Sequestration binds from the very Time of awarding the Commission, and not only from the Time of executing it, and its being laid on by the Commissioners; for if that should be admitted, then the inferior Officer would have *ligandi & non ligandi potestatem*. *Burdett v. Rockey*, 1 *Vern.* 58.

5. The Party who takes out a Sequestration, shall not be answerable for the Acts of the Sequestrators, for they are the Officers of the Court; as if they have Power to fell Timber, and they fell to the Value of £7000 and bring only £2000 into the Account. *Dacres v. Chute*, 1 *Vern.* 160. (2 *Chan. Ca.* 104; 2 *Ch. Rep.* 245, S. C.)

6. Sequestrators on a mesne Process are accountable for all the Profits, and can retain only so far as to satisfy for the Contempts. *Vide* [*Gibson v. Seevengton*] 1 *Vern.* 248.

[353] CAP. XLVII.

PURCHASE AND PURCHASER.

(A) Who is deemed a Purchaser in Equity.

(B) Purchasers, in what Cases favoured in Equity.

(C) Where a Purchaser, who purchases from a Person who has only a Power to sell, must see that the Purchase Money is rightly applied.

Of Purchasers without Notice, and of Presumptive Notice, *vide* Title Notice.

(A) WHO IS DEEMED A PURCHASER IN EQUITY.

1. Lessee at a Rack Rent, though he paid no Fine, is a Purchaser, and shall avoid a voluntary Conveyance. *Vide* [*Shaw v. Standish*] 2 *Vern.* 327.

(Though the Word *Purchase* in Law is of a very extensive Signification, and comprehends every Species of Acquisition in Contradiction to hereditary Descent and Escheat. *Lit. sect.* 12. Yet in Equity a Purchaser is considered as a Person who innocently, without Fraud or Surprize, for valuable Consideration, acquires a Right or Interest, and is therefore so far favoured and protected, that his Title shall not be impeached in Equity; no Planks that he can lay hold on, and by which he can secure himself at Law, shall be taken from him, neither shall he be compelled to discover any Thing that will weaken his Title, &c. *Vide* Title Notice and Bills of Discovery, Title Bill; and 1 *Chan. Ca.* 36; 2 *Chan. Ca.* 48, 161, 252; 1 *Vern.* 27; 2 *Vent.* 339; 2 *Vern.* 158, 159, 161.)

2. A. entered into Partnership in Fifths, and three others, for twenty-one Years, in digging for Mines in A.'s Lands, A. to have two Fifths, and in consideration of his Ownership of the Land, to have a Tenth out of the Share of the other Partners, and they covenanted to bear Profits and Loss in proportion: provided, if any one of the Partners should be minded to desist, and signify such his Intention, and pay his Share of the Charges and Expenses to that Time, the Agreement as to him, on his releasing his Interest to the rest, to be void: pursuant to the Articles they searched for Mines, and after two Years Time, and the Expence of about £120 they discovered a valuable Mine, and worked for about the Space of three Months, and then A. died, and his Widow set up a voluntary Settle[354]-ment made after Marriage; and the Court inclined, that the Partners were as Purchasers, and that the voluntary Settlement should not stand against them. *Mich.* 1695, *Shaw and Lady Standish*, 2 *Vern.* 326.

3. If a Man, in consideration of a Marriage-Portion, settles a Jointure on his Wife, and makes a Provision for the Issue of that Marriage, the Wife and Children are to be considered as Purchasers for valuable Consideration; and though the Settlement was made after Marriage, yet if it was made pursuant to Articles entred into for that Purpose previous to the Marriage, it is the same Thing; and the Jointress, in such Case, shall avoid a prior voluntary Conveyance, and shall not be obliged to discover Writings, nor any Thing else that may prejudice her, unless she has her Jointure confirmed to her. 1 *Chan. Ca.* 99, *vide* *Carpenter v. Carpenter*, *Wasborne v. Downes*, 1 *Vern.* 440; *Towers v. Davys*, 1 *Vern.* 479, *vide* *Stephens v. Gaulle*, 2 *Vern.* 701.

4. But if the Settlement was made after Marriage, and not pursuant to Marriage Articles, it will be fraudulent against Creditors, but it will be good against a subsequent Purchaser with Notice, tho' not against one without; for the Wife and Children are to be considered more than mere Volunteers; but if the Matter rests barely in Covenant or Agreement, it will never be carried into Execution against a subsequent Purchaser

without Notice, who has got a legal Title, nor against a second Jointress without Notice, who brought in a Marriage-Portion. *Vide Title Dower and Jointure*, Letter (C) [1 Eq. Ca. Abr. 220]. *Vide* [Jason v. Jervis] 1 Vern. 286; and for more on the Subject of Jointure, *vide* [Benson v. Bellasis] 1 Vern. 17, [Speake v. Speake, *Ibid.*] 217.

5. If a Wife joins with her Husband in letting in an Incumbrance on her Jointure, and barring an Estate in Tail Male, and they limit the Uses to the Husband for Life, Remainder to the Wife for Life, Remainder to their two Daughters; this does not make the Daughters Purchasers, so as to shut out a Judgment-Creditor of the Husband's antecedent to the barring the Estate tail, for it is a voluntary Gift from the Wife to the Husband. *Trin.* 1700, *Ball and Burnford*. (*Prec. in Chan.* 113, S. C. and Decree; 2 Eq. Ca. Abr. 677, S. C.)

(B) PURCHASERS, IN WHAT CASES FAVOURED IN EQUITY.

1. A Purchaser came into a Man's Study, and there laid Hands on a Statute that would have fallen on his Estate, and put it up in his Pocket, and he having thereby obtained an Advantage in Law, tho' so unfairly, and by so ill a Practice, yet the Court would not take that Advantage from him. Sir *John Fagg's* Case, cited 1 Vern. 52, 53. (2 Vern. 159, S. C. cited.)

2. If a Release be obtained from a Grantee of a Rent-Charge, without any Consideration, and by Fraud, yet a Purchaser will be admitted to take Advantage of it. *Harcourt and Knowel*, 2 Vern. 159, cited to be adjudged by *Rawlinson*, Lord Commissioner.

3. The Plaintiff and Defendant had each of them purchased a Reversion expectant on the Death of Tenant for Life; the Plaintiff brought his Bill, that he might preserve their Testimony, and be admitted to try his Title in the Life-time of Tenant for Life; but for as much as the Purchaser was a Defendant, the Court would do nothing in it, and he lost the Land for want of examining his Witnesses. [355] *Seybourne and Clifton*, 2 Vern. 159, cited by Lord Commissioner *Rawlinson*. *Vide* *Bechinall v. Arnold*, 1 Vern. 354, ante [1 Eq. Ca. Abr.], 234.

4. If a Purchaser buys in an old Statute or Mortgage, tho' nothing be due upon it, yet he shall be admitted to defend himself by it at Law; but for this *vide* how far a subsequent Mortgagee shall defend himself by buying in a precedent Incumbrance, Title, *Mortgage*, and [Huntington v. Greenville] 1 Vern. 50, [Edmunds v. Povey, *Ibid.*] 187; [Hawkins v. Taylor,] 2 Vern. 29, [Stanton v. Sadler, *Ibid.*] 30, [Turner v. Richmond, *Ibid.*] 81, [Saunders v. Dehew, *Ibid.*] 271.

* 5. A. purchased the Manor of *D.* in which were certain Lands called *B.* and *P.*, the Manor, at the Time of the purchase, was in Mortgage for a Term of Years, and the Mortgage was paid off, and the Term assigned in Trust to attend the Inheritance; afterwards A., upon the Marriage of his Son, settles Part of these Lands, and amongst them the Lands called *B.* and *P.*, but no care was taken of the Mortgage-Term, that stool out; afterwards A. being in Possession contracts with the Defendant to sell him all the said Manor, except the Lands called *B.* and *P.*, but shews Part of the Lands of *B.* and *P.* as Part that he would sell, but the Defendant did not know that any Part of the Lands were called by that Name; and in the Conveyance to the Defendant there is an Exception of Lands called *B.* and *P.* After the Purchase-Money paid, the Defendant was evicted of Part of the Lands called *B.* and *P.* (which he did not know by that Name, for they had been shewn to him as Part of his Purchase, and he had paid for them) by the Plaintiff, who claimed under A.'s Son; upon which the Defendant having found the old Term that was on Foot at the Time of A.'s Purchase, got an Assignment of it, upon which the Plaintiff brought his Bill to be relieved, and to have an Assignment of the Term; and that as to the Lands called *B.* and *P.*, he was no Purchaser of them, for they were expressly excepted in his Conveyance. But my Lord Chancellor was of Opinion, that these Lands being shewn to the Defendant as Part of his Purchase, and he not knowing them to be excepted by the Name of *B.* and *P.*, was in Equity a Purchaser of them; and the Court ought not to assist in defeating of them, and therefore dismissed the Bill as to all the Lands purchased by him. *Mich.* 1698, *Ozwick and Brockett*.

6. A. on his Marriage settled Lands, which were entailed on his Wife for a Jointure; his Brother was privy to the Marriage, and ingrossed the Jointure-Deed, and concealed the Intail; A. died without Issue, having devised the Lands to *J. S.* the Brother re-

covered in Ejectment ; on a Bill brought by the Jointress and *J. S.* for Relief, the Brother confessed that he was Privy to the Marriage-Treaty, and ingrossed the Jointure-Deed, and that he had then the Deed of Intail in his Hands, but did not mention his Title, nor discover the antient Deed of Intail, because he apprehended his Brother would dock the Intail ; and the Court decreed the Jointress to hold and enjoy her Jointure against the Brother and all claiming under him, and a perpetual Injunction against the Judgment in Ejectment ; but as to *J. S.*, who claimed the Reversion and Inheritance by a voluntary Devise, the Bill was dismissed ; and this Decree was affirmed in the House of Lords. *Mich.* 1691, *Raw and Pole*, 2 *Vern.* 239. (S. C. *ante* [1 Eq. Ca. Abr.], 169 ; *Raw v. Potes*, *Prec. in Chan.* 35, S. C.)

7. So where a Mother, who was absolute Owner of a Term, was present at a Treaty for her son's Marriage, and heard her Son declare, that the Term was to come to him at his Mother's Death, and was a Witness to the Deed, by which the Reversion of the Term [356] was settled on the Issue of that Marriage ; on a Bill brought by the Issue of that Marriage, she was compelled to make good the Settlement, and to settle the Reversion of the Term accordingly. *Trin.* 1690, *Hunsden and Cheyney*, 2 *Vern.* 150.

* 8. So where a younger Brother, having an Annuity of £100 *per Ann.*, charged on Lands by his Father's Will, contracted with *A.* to sell him this Annuity ; *A.* goes to *B.* the elder Brother, and tells him he was about to buy this Annuity of his younger Brother, and desired to know if his younger Brother had a good Title to it, and whether his Father was seised in Fee at the Time of making the Will, and whether the Will was ever revoked ; *B.* told him he believed his Brother had a good Title to it, and that he had paid him his Annuity these twenty Years ; but withal, told him, that he heard there was a Settlement made of his Father's Lands before the Will, and that the said Settlement was in the Hands of *J. S.*, and that he had never seen it, and therefore could not tell him what the Contents of it were, but encouraged him to proceed in his Purchase, telling him, he had not only paid his Brother his Annuity to that Time, but had paid his Sisters £3000 under the same Will ; afterwards *B.* gets a Settlement in his Hands, by which the Land out of which the Annuity issued was intailed, and would thereby avoid this Annuity : But on a Bill by *A.* to have the Annuity paid, or the Purchase-Money back again, the Court decreed Payment of the Annuity, purely on the Incouragement given by the elder Brother. *Hil.* 1682, *Hobbs and Norton*. (S. C. 1 *Vern.* 136, 2 *Chan. Ca.* 128.)

9. *A.* possessed of a Term for 100 Years, in 1638 made his Will, and *B.* who married his Daughter, Executor, and devised the Term to his own Wife ; the Executor assented, she entred, and after three Years died : after her Death the Executor entred and enjoyed the Term till 1650, and then sold it to one, who surrendered, and then took a new Lease for 200 Years, and laid out £250 in building on the Premises ; *B.* died, and his Wife survived him till the Year 1669. *J. S.*, who married the Daughter of *B.*, being beyond Seas twenty Years, and not knowing of his Title, came into England in 1670, and being informed of this whole Matter, and of his Title in Right of his Wife, took Administration to the Wife of *A.*, and Recovered by virtue of the Term for 100 Years in an Ejectment ; the Purchaser and Builder exhibited a Bill to be relieved against this dormant Title : And *Grimston*, Master of the Rolls, the Possession going so long, and divers Purchasers, and the last Purchaser under the new Term having no Notice of the old, or of the dormant Title to the Residue of the Term of 100 Years, adjudged the Purchaser should be relieved, and hold the Land till he was repaid his Charges in building, discounting the Profits received after the Purchase, which *J. S.* perceiving, and that the Value would not exceed £22 *per Ann.*, and that the Residue of the old Term was only for thirty-two Years, he agreed (by Advice of the Master of the Rolls) to take £80 of the Purchaser, and to release his Title to the old Term. *Mich.* 27 *Car.* 2 [1675], *Edlin and Battaly*, 2 *Lev.* 152, *in Canc.*

10. The Plaintiff having a Lease of certain Mills for twelve Years, which were near expired ; the Lessor, on his Marriage, makes a Settlement of these Mills to the Use of himself for Life, then to the first and other Sons of that Marriage in Tail Male, Remainder to his [357] own right Heirs : afterwards the Plaintiff takes a new Lease of these Mills from the Father for Thirty Years, and lays out £2800 in new Building and Improving them : the Defendant was the eldest Issue Male of the Lessor, and during the Time the Plaintiff was making these Improvements, went to his Father, and told him, he had no Power to make any such Lease : that after his Death the

Estate would be his, but never acquainted the Plaintiff with this, or of the Settlement made on his Father's Marriage; but on the contrary, writ to the Plaintiff to take Care to keep one of the Mills in particular in repair; then the Father dies, and the Son recovers in an Ejectment against the Lessee, who thereupon brought his Bill to be quieted in the Possession of the Mills during the Residue of his Lease, for that the Defendant was fully acquainted with the Circumstances of this Lease, knew his Father had no Power to make it, and yet never forbid or cautioned the Plaintiff from going on with his Repairs, but on the contrary stood by and saw them, and encouraged him in the proceeding therein; and therefore the Plaintiff had a Decree to hold during the Residue of his Term; for though the Defendant was not privy to the making of this Lease, but that was only the Fraud of the Father; yet he being to have the Estate after his Father's death, and taking Notice thereof to his Father, and that he had no Power to make any such Lease, and yet suffering the Plaintiff to go on in his Repairs thereof, with a Design to reap the whole Benefit thereof when his Father was dead, was such a Fraud and Practice in him as ought to be discountenanced in this Court, for *Qui tacet consentire videtur*; and *Qui potest & debet retare jubet*. And it was decreed that the Plaintiff should enjoy for the Residue of his Lease. *Pasch. 1712, Hanning and Ferrers. (Gilb. Eq. Rep. 85, Hil. 9 Ann. S. C. in totidem verbis.—Vide the last Case.)*

* 11. The Plaintiff's Wife before her Intermarriage with the Plaintiff, being possessed of a Term for Years as Executrix to her first Husband, and which was liable as Assets to the Payment of his Debts, in order thereto, and to raise Money for that Purpose, the Plaintiffs, after their Marriage, entered into an Agreement with the Defendant, for Sale of the House in question for the Residue of the Term, for £450, whereof £210 was to be applied in discharge of a Mortgage thereon, to one J. S., and the remaining £240 was to be paid to the Plaintiffs; accordingly the Plaintiffs executed an Assignment of the House to the Defendant, with a Receipt indorsed thereon for the whole Purchase Money; but the Defendant did not then pay the Purchase-Money, but gave a Note for the Payment of £210, Part thereof to J. S. the Mortgagee, and of the remaining £240 to the Plaintiffs; and for the Non-payment thereof the Plaintiffs brought their Bill to have a specific Performance, and Payment of the Money accordingly. The Defendant, by his Answer, admitted the whole Case to be as above set forth, but insisted, that he ought not to be bound thereby, for that the Plaintiffs could not make him a good Title, they having, by Articles before Marriage, agreed to settle this House for the Benefit of themselves and their Issue, of which he had no Notice at the Time of his Purchase; and for Discovery of these Articles, and to have up his Note on a Re-assignment of the House, the Defendant brought his Cross Bill; the Plaintiffs, by their Answer, admitted there were such Articles, but insisted, that the House lying in *Middlesex*, those Articles were never registered in the *Middlesex* Office, and therefore void, as against the Plaintiff; but on a Hearing [358]ing at the Rolls, the Master of the Rolls decreed the original Bill to stand dismissed, with Costs; and on the Cross Bill decreed the Note given for the Purchase-Money to be delivered up on a Re-assignment of the House; and the Plaintiff in that Cause likewise to have his Costs, by Reason of the Plaintiff's Fraud in concealing the Articles; and this Decree was affirmed by my Lord Chancellor. *Mich. 1727, Beatniff and Smith.*

* 12. So in a Case between two Purchasers of Lands in *Yorkshire*, where the second Purchaser having Notice of the first Purchase, but that it was not registered, went on and purchased the same Estate, and got his Purchase registered; yet it was decreed, that having Notice of the first Purchase, though it was not registered, bound him, and that his getting his own Purchase first registered was a Fraud, the Design of those Acts being only to give Parties Notice, who might otherwise, without such Registry, be in Danger of being imposed on by a prior Purchase or Mortgage, which they are in no danger of when they have Notice thereof in any Manner, though not by the Registry. *Blades and Blades*, by Lord Chancellor King decreed. (*Vide 1 Ves. 68, this Case cited in Le Neve v. Le Neve by Lord Hardwicke, who said it did not appear by the Bill or Answers, that there was any Charge of Actual Fraud, the only Charge being Notice.*

[*Mews' Dig. Mortgage, G. 5. Approved. Agra Bank v. Barry, 1874, L. R. 7 H. L. 148.*]

(C) WHERE A PURCHASER, WHO PURCHASES FROM A PERSON WHO HAS ONLY A POWER TO SELL, MUST SEE THAT THE PURCHASE MONEY IS RIGHTLY APPLIED.

1. If Lands are appointed for Payment of Debts, the Purchaser, though there results a Trust to the Heir, is not concerned whether the Personal Estate was sufficient to pay the same, or whether too much was sold, or the Creditors paid : for he having paid the Purchase-Money shall hold against the Heir and Creditors, and their Remedy must be against the Trustee or Person impowered to sell. [*Culpepper v. Aston*.] 2 *Chan. Ca.* 115.

* 2. But if Lands are devised to be sold for Payment of Debts in a Schedule, in that Case the Purchaser is bound to see the Purchase-Money applied to the Payment of those Debts ; but if the Trust be general, to pay Debts, though he has Notice of them, yet the Purchaser is not obliged to see the Money applied. *Mich.* 1692, *Abbot and Gibbs*. (S. P. *Spalding v. Shalmer*, 1 *Vern.* 301.)

3. If Lands are vested in Trustees by Act of Parliament, to be mortgaged for a particular Purpose, it is incumbent on the Mortgagee to see the Money applied accordingly. *Trin.* 1686, *Cotterel and Hampson*, 2 *Vern.* 5.

4. A. had an Interest for a Term for Years in a Printing-Office, and made his Will, and devised his Term in the Printing-Office to his Executors, in Trust, by Profits, &c., to raise £2000 for the Portion of his Daughter, and then for other Trusts, and died ; the Executors mortgage this Term for £1000 to J. S. on Pretence of want of Assets to pay the Testator's Debts ; and the Plaintiff, the Assignee of the Mortgagee, brings his Bill to foreclose the Equity of the Redemption ; the Daughter opposed it, and insisted this Mortgage ought not to take Place till her Portion was raised, for that the said Term was devised to the Executors in Trust for that Purpose in the first Place, and the Mortgagee could not but have Notice of it ; and that there were no Debts of the Testator ; or if any, the Mortgagee at his Peril ought to see the Money applied to discharge them, and to be allowed no more than he could make out to be so applied. Lord Keep. Where a Trust is to sell for Payment of Debts in a Schedule, the Purchaser at his Peril is to see the Money applied to the Payment of those Debts ; but here the Question is, how far an Executor's Power does extend over a Chattel which has a Trust annexed to it : the Law has intrusted the Executor with the Personal Estate to pay Debts ; and unless he has a general Power, he has none at all ; for if he cannot sell, none can buy, and the general Trust must take Place ; and a Purchaser is not bound to prove the Debts, or the Number of them, or the Application of the Purchase-Money ; therefore the Sale is good ; but after, on Appeal to the House of Lords, they altered this Decree ; and preferred the Portion. *Quære Causam inde.* *Mich.* 1703, *Humble and Bill* (2 *Vern.* 444, S. C.). It is now settled, and with great Reason, that an Executor, where there are Debts, may sell a Term, and the Devisee of the Term has no other Remedy but against the Executor to recover the Value thereof, if there be sufficient Assets for the Payment of Debts. *Per the Master of the Rolls, in the Case of Ewer and Corbet*, *Trin.* 1723, 2 *Will. Rep.* 148.

[359] CAP. XLVIII.

REMAINDER.

(A) OF WHAT THINGS A REMAINDER MAY BE MADE.

1. If one hath the Office of Park-keeper, Forester, Gaoler, Sheriff, &c., to him and his Heirs, he may grant these Offices to one for Life, Remainder to another for Life, &c., for *Omne majus continet in se minus* ; and as they are grantable over in Fee, so may they be granted in Succession to one for Life, with Remainders over, &c. So of Lands, Houses, Rents, Commons, Estovers, or any other Interest or Profit in *Esse*, wherein the Grantor hath the absolute Property to him and his Heirs for ever. [Sir H. Nevil's Case.] *Plow.* 379 b, 381 a. [Archbishop of Canterbury's Case.] 2 *Co.* 48, [Bingham's Case, *Ibid.*] 97.

2. But where a Man seized of Lands in Fee granted thereout a Rent-charge to one for Life, or Years, Remainder over to another in Fee, or in Tail, &c., it was doubted if this Remainder were good, because this Rent had no Existence at all before the Grant, and the Grantor cannot be said to have any Part of the Rent left in him, as he would have of Land, because he first gave Being to the [360] Rent, and bounded the Time of its Existence; which being run out, nothing therefore remains to grant over to another, and a Remainder is to be granted out of that which would otherwise be a Reversion in the Grantor; which here this Rent cannot be, being newly created: but yet in this Case, by the better Opinion of the Books, and a Judgment (2 *Salk.* 577; 2 *Lutw.* 1225) directly in Point, such Remainders of a Rent newly created have been held good: for as the Grantor might at first have granted it in Fee, or for ever, having such perpetual and durable Interest in the Fund, out of which it was to arise; so he may share and divide his Grant, and give Part thereof to one, and Part to another, in Succession; and the rather, because the particular Estate and Remainders are but one Estate as to the Grantor, divided in Limitation only, being limited to pass out of him all at the same Time: and as to him make no Difference, whether the one or more take Benefit jointly, or in Succession one after another; but if he grant such Rent for Life, or Years, to one, without going farther, he cannot after grant the Reversion thereof to another, because he has no Reversion in him, for the Reason before given; and the Reasons of this Case will go likewise to Commons, Estovers, &c., newly created. 2 *Roll. Abr.* 415; 2 *Co.* 70, 76, 78; 1 *Lev.* 144; 1 *Sid.* 285; 2 *Keb.* 29.

3. If one be created Baron, Viscount, &c., by Patent, and after, in the same Patent, the same Honour is granted to another in Remainder; yet this operates as a new Grant, and not as a Remainder, for the King had no Reversion of that Honour in him, though he had still the same Power of appointing one in Succession to take it, as he had of granting it to the first. [*Rex v. Viscount Purbeck*], *Show. P. C.* 5. 11.

4. But what seems most proper to be inquired into under this Head, is the Reason and Practice of limiting Remainders in Personal Goods, or Chattels, for they in their own Nature seem incapable of such a Limitation, because being Things transitory, and by many Accidents subject to be lost, destroyed, or otherwise impaired; and also the Exigencies of Trade and Commerce requiring a frequent Circulation thereof, it would put a Stop to all Trading, and occasion perpetual Suits and Quarrels, if such Limitations were generally tolerated and allowed; but yet in Last Wills and Testaments such Limitations over of Personal Goods or Chattels have sometimes prevailed, especially where the first Devisee had only the Use or Occupation thereof devised to him: for then they held the Property to continue in the Executors of the Testator, and that the first Devisee had no Power to alter or take it from them; yet in either Case, if the first Devisee did actually give, grant or sell such Personal Goods or Chattels, the Judges would very rarely allow of Actions to be brought by those in Remainder, for Recovery thereof; hence it came to pass, that it was a long While ere the Judges of the Common Law could be prevailed on to have any Regard for a Devise over, even of a Chattel Real, or a Term for Years after an Estate for Life limited thereon; because the Estate for Life being in the Eye of the Law of greater Regard and Consideration than an Estate for Years they thought he, who had it devised to him for Life, had therein included all that the Devisor had a Power to dispose of; and though they have now gained that Point upon the Ancient Common Law, by establishing such Remainders, and have thereby brought that Branch out of the Chancery (where they frequently helped the Remainder-man, by allowing of Bills to compel the first Devisee to give Security); yet it was at first introduced into the [361] Common Law, under the new Name of *Executory Devise*, and took all the Sanction it has since received from thence, and not as a Remainder (for which *vide* Title *Devise*): but as to personal Goods and Chattels, the Common Law has provided no sufficient Remedy for the Devisee in Remainder of them, either during the Life of the first Devisee, or after his Death; therefore the Chancery seems to have taken that Branch to themselves in lieu of the other which they lost, and to allow of the same Remedy for such Devisee in Remainder of personal Goods and Chattels, as they before did to the Devisee in Remainder of Chattels Real, or Terms for Years. *Dyer*, 7; *Cro. Car.* 347; *Plow.* 521 a; *Godolph.* 356; *Swinb.* 137.

5. Therefore where a Man devised £600 a-piece to two Daughters, and the Residue of his Personal Estate to his Son, and if either of his Children died during their Minority, the Survivors to be Heirs to the Deceased by equal Portions; the Son died,

and the Sister brought a Bill against the Executors and the other Sister, to have her own £600 and the Half of the Brother's personal Estate, and had a Decree accordingly, but was forced to give Security to pay back her own £600 in case she died during her Minority; though it was said, if she died during Minority, leaving Issue, it would be a hard Case. [*Pate v. Hatton*.] 1 *Chan. Ca.* 199.

6. A Devise was made of the Use of Goods, Plate and Household Stuff, to one for eleven Years, and after to another, and held a good Devise; and a Decree to deliver them accordingly after the eleven Years. *Jolly and Wills*. 2 *Chan. Rep.* 137.

7. So upon a Devise of certain Books, Jewels and Rarities to one for Life, and after of the Things themselves to another; he in the Remainder brought a Bill in the Lifetime of the first Devisee to have Security for their forth-coming after the Death of the first Devisee; and the Court being assisted by two Judges held the Remainder good, but ordered them to move for the Security another Time. *Vachell and Lennox* (1 *Chan. Ca.* 129, S. C. *Vide* [1] *Bro. Chan. Ca.* 279, *without special Damper, the Court will order only an Inventory and not Security*).

* 8. A Farmer devised his Stock (which consisted of Corn, Hay, Cattle, &c.) to his Wife for Life, and after her Death to the Plaintiff; it was objected, that no Remainder can be limited over of such Chattels as these, because the Use of them is to spend and consume them; but the Master of the Rolls said, the Devise over was good; but said, if any of the Cattle were worn out in using, the Defendant was not to be answerable for them; and if any were sold as useless, the Defendant was only to answer the Value of them at the Time of the Sale; and an Account was decreed to be taken accordingly. *Mich.* 1702, *Hayle and Burrodale*.

9. The Distinction which has been taken between the Devise of a personal Thing to one for Life, Remainder to another, and the Use thereof to one for Life, with a Remainder over, seems now exploded in conformity to the Civil Law; and likewise as the Testator's Intention appears the same in both Cases. 37 *H.* 6 [1458-59], 1 *Brok.* 254 (57), Title *Devise*; 13 *Co.* 5, 16; *Owen*, 33; 2 *Vern.* 245.

10. Therefore if a Man devises Household-Goods to his Wife for Life, and afterwards to his Son; this is a good Devise over, and the same as if the Devise had been only of the Use of the Goods to the Wife for Life. *Mich.* 1696, *Hide and Parrot*. (a) 2 *Vern.* 331, decreed. *Gibbs and Barnardiston* (S. C. *Proc. in Chan.* 323; *Gilb. Rep. Eq.* 79; 2 *Eq. Ca. Abr.* 357), S. P. *Hil.* 1711, decreed.

(a) *Will. Rep.* 1. 6. S. C., where it is said, that Lord Keep. took Time to consider of this Point; and afterwards on the Strength and Authority of the Precedents, which had followed the Civil and Canon Laws in construing the Use of the Thing, and not the Thing itself to pass, where the first Devise is for a limited Time, in order the better to comply with the Intention of Testator, allowed the Devise over to be good. And the Reporter adds, and thus it is now settled; and refers to the Cases *Tissen and Tissen*, 1 *P. Wms.* 500, and *Upwall v. Halsey*, 1 *P. Wms.* 651.

[362] 11. But if Money, Goods, or other Personal Chattels are devised to one and the Heirs of his Body, or to one, and if he dies without Heirs of his Body, the Remainder; this Remainder is totally void, and the Courts of Equity will not allow of a Bill by the Remainder-man to compel Security, &c., or to have the Money, &c., after the Death of the first Devisee; but it shall go to his Executors or Administrators; for the first Devise gives the absolute Property of a personal Estate, as a like Devise of a real Estate before the Statute *de donis* gave a Fee; upon which no Limitation could be made further; and as the Heirs are the Representatives to take a real Estate, so are the Executors to a personal Estate; and this is not within the Statute *de donis*, but remains as at Common Law. 2 *Vent.* 319; 2 *Chan. Ca.* 94; 2 *Chan. Rep.* 66, 153; 1 *Chan. Rep.* 122, 260; 1 *Salk.* 156; 2 *Vern.* 324, 325, 600, 601. (S. P. *Gibbs v. Barnardiston*, 2 *Eq. Ca. Abr.* 357; *Proc. in Chan.* 323; *Gilb. Eq. Rep.* 79; 1 *Ves.* 133, 154; 1 *P. Wms.* 290; 2 *Ves.* 646. *Vide* 1 *Bro. Chan. Cas.* 170, 187, 188; 2 *Bro. Chan. Cas.* 33.)

12. And yet where a Devise was of Money and Goods to one for Life, and if the Devisee died without Issue, then to go over to another, this was held a good Devise over; for the first Limitation being expressly for Life, the Words after could not enlarge it by Implication, as they could a Real Estate, and then it falls within the common Rule of other Cases, where the Limitation is held good, the Contingency being to happen within the Compass of a Life or Lives *in esse*. 1 *Chan. Rep.* 111. But for this *vide* of executory Devises of Terms for Years, Title *Devises* [1 *Eq. Ca. Abr.* 191].

13. So where A. devised in the Words following, *viz. And the Rest and Residue of my Estate unbequeathed shall be put forth to Interest by my Executors, and the one Half of the Interest shall be paid to my Sister A. C. during her Life, and the other Half of the Interest unto her Daughter A. S., and she to have one Half of my Household Goods, and after her Mother's Decease to have all the Interest during her Life; and my Will is, that if the said A. S. die without Issue of her Body, the Principal of the Residue shall be divided equally between M. and F. and such Children as are or shall be born of their Bodies then living*; it was held, that the Remainder to M. and F. was good. *Pasch. 1688. Smith and Clever, 2 Vern. 38, 59. (Vide Love v. Windham, ante [1 Eq. Ca. Abr.], 191.)*

14. A Term for 900 Years was assigned to Trustees, in trust to permit the Husband and Wife, and the Survivor of them, to receive the Profits for so many Years of the Term as they, or the Survivor of them should happen to live; and after their Deaths to the Use of the Heirs of the Body of the Wife, by the Husband to be begotten; and it was held, that the Heir of the Body took by Purchase, and that it did not vest absolutely in the Mother, who survived, so as to go to her Administrator. *Mich. 1690, Peacock and Spooner, 2 Vern. 43, 195*, decreed, and affirmed in the House of Lords. (2 *Freem.* 114. S. C. states it thus: The Trust of a Term for Years upon a Marriage, was limited to A. the Husband for Life, then to B. the Wife for Life, and then to the Heirs of the Body of the Wife by the Husband to be begotten. A. dies, leaving Issue, B. married a second Husband, and dies, the Husband takes Administration; and the Question was, whether the Husband should have the Term, as Administrator to the Wife, or the Issue; and it was resolved by three Lords Commissioners, that the Issue should have it; for to support the Intent of the Settlement, they would take the Words *Heirs of the Body* to be *Descriptio Personarum*, and not Words of Limitation. Affirmed in *Dom' Proce.* This Reporter in a Note says: That this seems to carry the Trust of a Term farther than any other Judgment, and contrary to the former Resolutions. Note in 1 *Ves.* 135. Lord Hardwicke says, he knows not what to make of this Case of *Peacock v. Spooner. Et vide P. Wms. 135; 2 Ves. 237, 660.*)

15. But afterwards a Decree at the Rolls, grounded upon the Case of *Peacock and Spooner*, was reversed, and decreed the Limitation to the Heir Male void; and that the Whole vested in the Father by the Limitation to him for Life, Remainder to the Heirs of his Body. *Hil. 1710, Webb and Webb, 2 Vern. 668. (Vide P. Wms. 132, S. C.) Vide [Peacock v. Spooner] 2 Vern. 196.*

[363] 16. A. being possessed of an Annuity of £14 *per Ann.* for ninety-nine Years, out of the Exchequer, on his Marriage covenants with B. and C. to pay this £14 *per Ann.* to his Wife for her separate Use, and after the Death of either of them, then to the Survivor for Life; and after the Death of both, then to the Child or Children to be begotten between them; and in default of such Child or Children, then to his own Executors and Administrators for the Residue of the Term; A. and his Wife had Issue only one Son (Note: the Son seems to have survived A. and his Wife), who lived to the Age of five Years, and then died; and after the Death of A. and his Wife, the Plaintiff took out Administration to the Son, and brought his Bill against the Executors of A. and his Wife for this Annuity; and it was insisted upon, that the Limitation to the Executors and Administrators of A. was void, being after a Limitation to the Child or Children, which was the same as if it had been limited to the Issue; and a Settlement of a Term on Trustees, in trust to permit the Father to receive the Profits for so many Years of the Term as he should live, and after to permit the Mother to receive the Profits for so many Years of the Term as she should live, and then in trust to permit their Child or Children, or Issue, to receive the Profits for the Residue of the Term, will bear no Limitation over in default of Issue or Children, in case there be any one in Being, no more than such a Limitation of the Term itself would be good; for this would be to introduce and revive all the Inconveniences of a Perpetuity, which have been so long since exploded, and the Trust of a Term must be limited in the same manner as the Term itself will bear a Limitation. But the Lord Chancellor said, this being by way of Covenant, no more passed out of him than to serve the Uses expressed; and it was not a Disposition of the Annuity itself, but only a Covenant to pay the £14 *per Ann.* in such Manner; and since it was never divested out of A. he would not, on this Bill, on any Pretence of Equity, tear it out of him or his Executors; and so dismissed the Bill, though he did not at all dispute the Case, if it had been of a Term, or the Trust of a Term, settled in such Manner, that the Remainder would not have been good;

but here there was only a Covenant to pay the £14 and not the Annuity itself, which was thought, at the Bar, to be an over nice Distinction. *Trin.* 1715, *Lasse and Grey*. (*Gilb. Rep.* 97, S. C. *in totidem verbis*. 2 *Vern.* 692, S. C. *somewhat differently reported*. And note, That at the End of the Case the Reporter adds, *Quære tamen; If this Distinction be allowed, Settlements of Terms hereafter will be done by Way of Covenant, with such Remainders over as cannot be done by Way of Limitation of an Estate or of a Trust.*)

(But this Decree seems to be reasonable, because the Administrator comes for a specifick Performance of the Covenant, and that he cannot do, who was not originally in Contemplation, or intended to be provided for by the Covenant, but that the Term had actually been vested to these Uses; then the Interest of the Term being vested in the Child and the Heirs of his Body, as it must be if the Settlement had been drawn according to the Covenant, then it must have gone to his Administrator. *Gilb. Eq. Rep.* 98, in S. C.)

The Testator devised Plate, Pictures, &c., to be enjoyed as Heir Looms by the Person who should be entitled to the Use and Possession of his House at Stoke. J. S. Tenant for Life, under the Will, of the House at Stoke, has a Son born, who, under the Will, was Tenant in Tail thereof, subject to his Father's Life Estate, which Son died in fourteen Days. It was decreed by Lord Thurlow, C. (which Decree was affirmed by Lord Loughborough, Ashhurst, and Hotham, Lords Commissioners, and afterwards in the House of Lords) that the Plate and other Chattels so devised, vested absolutely in the Son of J. S. and, on his Death, vested in his Father, as Administrator to him. Foley v. Burnell, [1] Bro. Chan. Cas. 274.

[364] CAP. XLIX.

RENT.

- (A) In what Cases there may be Remedy for Rent in Equity, when none at Law.
(B) In what Cases the Lessee may be relieved against the Payment of Rent in Equity.

(A) IN WHAT CASES THERE MAY BE REMEDY FOR RENT IN EQUITY, WHEN NONE AT LAW.

1. If a Rent be devised by Will in Writing, a Court of Equity may compel the Tenant of the Land to give Seisin, because by Intendment the Tenant of the Land was *Inops Consilii* at the Time of the Devise. *Moor*, 805; *Lat.* 147.

2. So if a Man grants a Rent-sock, Equity will decree Seisin to be given, and the Rent to be paid to the Grantee. 1 *Roll. Abr.* 378; [*Davy v. Davy*.] 1 *Chan. Ca.* 147.

3. A Bill was exhibited for the Payment of £3 for a Rent of £5 *per Ann.* Arrear, for twelve Years, suggesting that the Deed by which it was created was lost; and there being Proof that it was constantly paid before the twelve last Years, the Master of the Rolls decreed that the Arrears and growing Rent should be paid, because it did not appear what Kind of Rent it was, and so no Remedy at Law. *Hil.* 20 & 21 *Car.* 2 [1670]. *Collet and Jaques*, 1 *Chan. Ca.* 120. (*Vide S. C. ante* [1 *Eq. Ca. Abr.*], 32.)

4. So where a Bill was brought, suggesting, that the Plaintiff did not know the Nature of the Rent, nor the Boundaries of the Land, so as to be able to declare with Exactness; the Court said, that it ought to be decreed; but at the Importunity of the Defendant directed a Trial, whether there was any such Grant or not. *Cox v. Foley*, 1 *Vern.* 359.

The Bill stated Plaintiff's title to a Fee Farm Rent issuing out of certain Estates of Defendant; that such Fee Farm Rent had been regularly paid to Plaintiff, and to those under whom he claimed until, &c., since which time the Sum of, &c., had accrued and was due to Plaintiff for Arrears; that he could not distrain on the Lands, they having undergone various Alterations and that great part of Defendant's Revenues arising from the said Estates consisted of Tolls and other incorporeal Matters by Reason of which Plaintiff was deprived of his Remedy at Law. The Answer admitted Plaintiff's Title to the Rent and Arrears due, but denied that the Lands had undergone Alteration, and alleged that the Estates were not able to pay the Rent to Plaintiff, and that for that

Reason the Rent had not been paid; and insisted that the Plaintiff's Remedy was at Law. See Lloyd Kenyon, Master of the Rolls, *This Demand is for one certain Rent payable out of a certain Portion of Property. The Plaintiff has a Remedy at Law, but will lose. But it is argued that Execution at Law will not be so fruitful a Remedy as Sequestration in Equity. But the Plaintiff may have an Elegit, and it is no Reason for coming here, that he can have it only for a Moiety of the Land. Let the Bill be reversed for a Year to let the Plaintiff proceed at Law, and after that, if it be necessary, to may proceed in Equity if a Court of Equity can aid him.* *Leeds v. Radnor*, 2 Bro. Chan. Ca. 338.

5. A Rent of £1. 14s. was granted by King H. 6, to *Eaton College*, issuing out of certain Lands; the Bill suggested, that the College did not know where the Lands lay, so as to enable them to distrain, and therefore pray that the Executor of the Tertenant may be answerable for the Arrears; which the Master of the Rolls thought reasonable, in respect that the personal Estate was increased thereby; and decreed it accordingly. 1 *Chan. Ca.* 121. (*Eaton College v. Beauchamp*, ante [1 Eq. Ca. Abr.], 32 S. C.)

[365] 6. So where the Plaintiff by his Bill suggested, that he having the Grant of a Rent charge issuing out of certain Lands, the Defendant, to hinder him from a Distress, converted the Premises into Tillage; my Lord Chancellor directed to have it tried, whether there was any Fraud used to prevent the Plaintiff from distraining, and declared, that if there was, he would grant Relief. [*Davy v. Davy*.] 1 *Chan. Ca.* 144.

7. A. seised of an Estate, devised it to B., and thereout devised £100 *per Ann.* to his Father, payable Half-yearly, and in default of Payment, to enter and distrain, and the Distress to detain until the Arrears paid; the Father dying, his Widow and Executrix brought her Bill for Satisfaction of her Arrears; and the Master of the Rolls decreed the Arrears with Costs and Charges, and she to enter and enjoy until satisfied. *Mich.* 1700, *Foster and Foster*, 2 *Vern.* 386 (*Prec. in Chan.* 122, S. C.); but *vide Champernoon v. Gubbs*, 2 *Vern.* 382 (S. C. *Prec. in Chan.* 126), where on a like Bill my Lord Keeper refused to relieve the Plaintiff; the Party having provided a Remedy by Distress, must be satisfied with it, unless some particular Fraud is proved, as letting the Land lie fresh, or depasturing it in the Night-time, to prevent a Distress; and 1 *Chan. Ca.* 185, that Equity will not grant a Remedy for Rent, when there is one at Law, nor change the Nature of the Rent, so as to make the Person liable, unless there was Fraud, &c., in preventing a Distress.

(B) IN WHAT CASES THE LESSEE MAY BE RELIEVED AGAINST THE PAYMENT OF RENT IN EQUITY.

1. The Plaintiff was Tenant to the Lady M. of a House in *London* at a certain Rent; he left the House and went to *Oron* to King *Charles I.*, and then sent his Servant with the Key of the House to the Lady, and desired her to re-enter and accept the Surrender; she said she would advise with the Defendant, her Son in Law (who then sat in the House of Commons, and was on the Side of the Parliament); afterwards she refused to accept of a Surrender; the House was made an Hospital by the Parliament for maimed Soldiers; the Defendant, as Executor to the Lady, brought Debt at Law against the Plaintiff for Rent incurred whilst the House was so used; and on a Bill to be relieved against the Action, my Lord Chancellor took Time to advise; but declared, that if he could, he would relieve the Plaintiff. *Pasch.* 19 *Car.* 2 [1667]. *Harrison and Lord North*, 1 *Chan. Ca.* 83.

2. A Lessee for Years under a certain Rent, and Covenants to repair, makes 100 Under-Leases; the Premises not being repaired, nor the Rent paid, a Re-entry is made, and the original Lease avoided. See of the Under-Lessee's having brought a Bill against the Head Landlord and first Lessee & al': the Court held, that there could be no Decree to apportion the Head Landlord's Rents, nor any Relief for the Plaintiffs, but on their Payment of the whole Rent in Arrear, and repairing all the Premises; but having so done, they might compel the Rest of the Under-tenants to contribute. *Webber v. Smith*, 2 *Vern.* 103. (S. C. ante [1 Eq. Ca. Abr.], 115.)

[366] CAP. L.

TITHES.

- (A) Tithes, of what Things due, and by whom to be paid.
 (B) Of a Modus.

(A) TITHES, OF WHAT THINGS DUE, AND BY WHOM TO BE PAID.

1. Though Beasts of the Plough are exempt from paying Tithes, because by the Labour of such Cattle Tithes of another Kind arise ; yet if Oxen are turned to Grass, and fattened for Sale, they shall from such Time pay Tithe for the Herbage they eat, being no Way beneficial to the Parson in any other Tithes. *Edmond and Sandys, Show. P. C.* 192.

2. A Bill was exhibited to be relieved for Tithe Oar in *B.* a Township within the Rectory of *C.* and the Court held, that Tithe Oar was not due of common Right, but by particular Custom only, and therefore directed a Trial to be had at Law, whether there was any, and what Custom, within the said Township for the Payment of Tithe Oar, with Direction to the Judge to indorse the *Postea*, how the Custom was found upon the Trial. *Pasch.* 1688, *Niccol and Wiseman*, 2 *Vern.* 46.

(*Qu. If this Case be not mis-named and should not rather be called Buxton v. Hutchinson, Vide 2 Vern.* 46 ; *vide ante*, 43, pl. 1.)

* 3. It was decreed in the House of Peers, on Appeal from the Court of Exchequer, that the Tithes of a Mill are personal Tithes, against several seeming Authorities or Doubts in the Books ; and that in consequence of their being personal Tithes, not the tenth Toll or tenth Dish of the Corn ground belongs to the Parson, but the tenth Part of the clear Profits, after the Charges of erecting the Mill, and the other Charges of Servants, Horses and other Expences deducted. *Newt and Chamberlain*, 1706. (*S. C.* 2 *Eq. Ca. Abr.* 731 ; 8 *Vin.* 39 ; 1 *Bro. P. C.* 157. *Vide S. C. cit.* 2 *P. Wms.* 463.)

4. If a Man hath a Nursery of Trees, and he sells them and pulls them up himself, he shall pay the Tithe ; but if he sells them particularly to another, the Vendee shall pay the Tithes, as in case of Tithe of Corn, if sold standing, the Vendee shall pay the Tithes ; but [367] if sold after a Severance, the Vendor must. *Mich.* 16 *Car.* 2, *Grant and Hedding, Hard.* 380, 381.

5. Tithes for the Agistment of Cattle are payable by the Owner of the Cattle, for the Cattle take the Profits and Herbage of the Soil ; so in Case of Commoners. *Hard.* 184, *per Curiam* ; and the Chief Baron said, the Owner of the Soil might pay them ; but clearly, the Agistor is compellable to pay them.

(B) OF A MODUS.

1. A Bill was exhibited to examine Witnesses *in perpetuum rei Memoriam*, to prove a *Modus Decimandi* ; the Defendant demurred, for that the Bill was to establish a Custom against the Church, and in Prejudice of Tithes that are due *Communi Jure* ; and several Precedents were cited, where Bills to have a *Modus* decreed, were, upon Demurrer, dismissed ; but this Bill being only to preserve Testimony, the Lord Keeper thought it reasonable the Defendant should answer, and over-ruled the Demurrer. *Trin.* 1683, *Somerset and Fotherby*, 1 *Vern.* 185.

(It was formerly doubted, whether a Bill in Equity would lie to establish a *Modus*, or customary Manner of paying Tithes, especially if the Custom had not been found good at Law ; and sometimes on a Demurrer to such Bills they have been dismissed ; but the constant Practise now is, to retain such Bills, and to decree on the Pleadings, or to direct a particular Point to be tried at Law ; concerning the Reality of such a Custom, or the Legality of it. 1 *Chan. Rep.* 27 ; 1 *Chan. Ca.* 187.)

* 2. A Bill was brought to establish a *Modus*, or customary Manner of Payment of Tithes, which was thus, that every Person not inhabiting or residing within the Parish, having Lands, Meadow, or Pasture Grounds, have used to pay for every Acre, Time out of Mind, on *Good Friday*, 4*d.* per Acre, and so in proportion for a greater or lesser Quantity than an Acre, to the Parson in lieu of Tithes of those Lands ; but when the Owner lived or inhabited within the Parish, then to pay Tithes in Kind of those Lands ; and the only Question was, whether this was a good *Modus*, or not.

It was insisted upon for the Parson, that it was not a good *Modus*, for the Uncertainty of it ; and for that was cited and relied on a Case in 1 *Lev.* 116, and the same Case 1 *Keb.* 602, where it is called a Leaping or a Dancing *Modus*, and there held not to be good for that Reason, for he may live in the Parish To-day, and remove out of it To-morrow ; and how can the Rector, in a Case of such Uncertainty, know how to make his Demands, when it is in the Power of the Parishioner to defraud him thereof, by going out, or coming into the Parish at his Pleasure ; and it is the Property of a *Modus*, that the Parson may as well know how to demand it, as the Tenant to pay it ; but here it is wholly in the Power of the Tenant to make it either a *Modus*, or payable in Kind, just as he pleases ; and if Two should agree thus ; you shall live in my House within the Parish, and I in your's out of the Parish, this will alter the Tithes for the Time ; or if there should be two joint Lessees, and one should live in the Parish, and the other out of the Parish, what is to be done in this Case ?

That Tithes are of the Revenue of the Church, and any Thing done in Derogation thereof is to be taken strictly.

[368] That this *Modus* is to arise by the Act of the Party, and no *Modus* can arise by the Act of the Party, but what is for the Benefit of the Parson ; but here it is to arise by the Act of the Party, and yet is to the Prejudice of the Parson ; for the Difference between Tithes in Kind and this *Modus* are 10*d. per Ann.* 1 *Roll. Abr.* 649.

This *Modus* tends to depopulate the Parish, so as there may be none to preach to ; and all Customs founded in Fraud, are to be disallowed, as 1 *Leon.* 99 ; *Cro. Eliz.* 446.

But on the other Side it was argued, that this was a good *Modus*, that as on the one Hand the Parson is not to be defrauded of his Dues, so on the other Hand a *Modus* is not to be overturned on slight Grounds ; that if they should, Purchasers might be affected, who come in under a Persuasion, that such *Moduses* are all they are to pay ; that it is not necessary to shew upon what particular Reason every *Modus* began, if it may be supposed to have a reasonable Beginning ; that this might begin when there were more Lands in the Parish than the Inhabitants could manure, and yet the Owners of those Lands who lived elsewhere should be obliged to pay 4*d.* an Acre for them, though it is not necessary to shew the Reasons on which they began.

That all *Moduses* may be said to be an Invention to cheat the Parson ; and so in some Books they are called, as they are less than Tithes in Kind.

That as to its being a Leaping or Dancing *Modus* ; so was that of the *Cisterians* and other Religious Orders, who paid Tithes of Lands *quandiu in propriis Manibus ex-cultantur* ; so Tithes are payable of Hay whilst it continues Meadow ; but if broken up, the Tithes thereof cease till laid down again ; and by *Godb.* 194, it appears there to be in the Power of the Occupier to chuse, whether to pay his Tithes to the Parson or Vicar, and yet held good.

That this is not such a new Case as the other Side would have it imagined ; for *Cro. Eliz.* 136, is a Case to this Purpose, though perhaps it might not occur at the Time the Case in 1 *Lev.* and 1 *Keb.* came in Question ; and that it is not so easy a Matter to remove out of a Parish at Pleasure ; nor is it to be supposed any one would do it merely to cheat the Parson ; and it was said in general, that this *Modus* was as certain and permanent as most *Moduses*, or even as Tithes in Kind, which depend on the Choice of the Owner, whether he will plough his Land for Corn, or mow it for Hay ; and here it is so far certain, that the Parson is every Year secure of having either Tithes in Kind, or 4*d. per Acre* ; and if there is any Fraud proved, the Parson will, notwithstanding, recover Tithes in Kind ; as 1 *Leon.* 99, and the Case afore cited in 1 *Lev.* and 1 *Keb.* was exploded, and denied to be Law ; and the following Cases in the Exchequer were quoted as Authorities in Point. *Ashly and Pattison, Trin.* 12 *Car.* 1 [1636] ; *Ashford and Newcomen, Trin.* 12 *Car.* 2 [1660] ; *Plaxton and Langston, Mich.* 2 *W. & M.* [1690] ; *Reynolds and Appland* about two Years ago, and also *Moor* 909, *Hob. Cowper* and *Andrews*, and 2 *Brown Ent.* 595, 6.

The Court held it a good *Modus*, and said, that all *Moduses* were at first upon an Agreement between the Parson, Patron and Ordinary, by some Deed or Instrument in Writing, in the Nature of a Contract [369] or Agreement ; which, tho' now lost, yet being run out into a Prescription continues good ; that here is no Uncertainty in the *Modus*, for the Parson is always sure to have the 4*d. per Acre*, or else the Tithes in Kind ; nor is there any Burden on the Rest of the Parishioners, by one or two going out of the Parish ; and a Leaping or Dancing *Modus* is where the *Modus* itself varies, and is sometimes more and sometimes less, which is not the present Case ; and decreed accord-

ingly by the Lord Chancellor, assisted by Mr. Justice *Reynolds* and Justice *Fortescue*. My Lord Chancellor said, the Case in *Kibbe* might perhaps be the Occasion of this Suit. *Trin.* 1730, *Chapman* versus *Bishop of Lincoln*. (*Chapman v. Monson*, 2 P. Wms. 565, S. C. *Mosel*. 266, 279; *Fitzgib.* 119; *Barnard*. B. R. 292; 2 *Eq. Ca. Abr.* 735, S. C.).

CAP. LI.

TRADE AND MERCHANTIZE.

- (A) Of Principals and Factors.
- (B) Of Partners in Trade.
- (C) Of Policies of Insurance, and Bottomry-Bonds.
- (D) Of Part-Owners, Masters, and Freighters of Ships.
- (E) Of Customs amongst Merchants relating to Accounts, and Notes given by them for Money.

(A) OF PRINCIPALS AND FACTORS.

1. If a Factor save the Customs of Goods due to a Foreign Prince, and such Saving, by the Laws of that Country, is Felony in the Factor, and a Forfeiture of all the Freight, the Factor shall have the Benefit of the Customs saved, and not the Employer, for he runs the Hazard wholly, and has the Possession, which is a Right against all, except him that hath the very Right. *Trin.* 15 *Car.* 2 [1663], *Smith* and *Oxenden*, 1 *Chan. Ca.* 25. Two Merchants having certified, that the Benefit of the Non-payment of the Customs belonged to the Factor; and two others, that it belonged to the Employer. [*Knipe v. Jesson*,] 1 *Chan. Ca.* 76, S. P.

[370] 2. But if the Duties or Customs are due to our King, and the Factor saves them, and a Bill is brought by the Merchant against him, he shall be obliged to discover them; for this Custom being founded in Fraud, is void. *Mich.* 15 *Car.* 2 [1663], *Borr* and *Vandal*, 1 *Chan. Ca.* 30. (*Nels. Chan. Rep.* 87, *Borre* and *Vande*, S. C. and P.)

3. If A. employs B. as his Factor to sell Cloth, and B. sells the Cloth on Credit, and before the Money is paid, B. dies indebted by Specialty more than his Assets will pay; this Money shall be paid to A. and not to the Administrator of B. as Part of his Assets, but thereout must be deducted what was due to B. for Commission; for a Factor is in Nature only of a Trustee for his Principal. *Hil.* 1708, *Burdet* and *Willet*, 2 *Vern.* 638.

4. The Plaintiff being a Factor in *Blackwell-Hall*, advanced Money for his Principal, relying, as was surmised, on the Credit of Cloths resting in his Hands, to re-imburse himself; the Clothier died, his Administrator sued at Law for the Cloth; and the Factor prayed, that he might be allowed, on Account, the Monies he advanced, but was dismissed; for if there are Debts of a higher Nature, it would be a *Decastavit* in the Administrator, to pay or discount the Plaintiff's Debt. *Mich.* 1689, *Chapman* and *Derby*, 2 *Vern.* 117. Vide [*Peters v. Soame*] 2 *Vern.* 428.

(B) OF PARTNERS IN TRADE.

1. If two Persons ingage in a joint Undertaking in the Way of Trade, or enter into Copartnership, it is not necessary to provide against Survivorship. [*Jeffereys v. Small*,] 1 *Vern.* 217.

2. The Plaintiff's Husband (to whom she is Administratrix) and the Defendant were Copartners for many Years in the Trade of a Druggist: the Plaintiff brought her Bill for a Discovery of the Estate, and her Proportion and Dividend thereof, &c., the Defendant answered; and it appearing that many Debts owing to the joint Trade stood out, it was moved, on Behalf of the Plaintiff, that an able Attorney might be appointed to sue for and recover those Debts, it being alledged in the Bill, that the Defendant carrying on a distinct Trade for himself with the Persons that were Debtors to the joint Trade, to oblige them, he forbore to call in their Debts; and it was ordered accordingly, unless the Defendant, within a Week, would give Security to the Plaintiff to answer her Moiety of the Debts that were standing out. *Hil.* 1682, *Estwick* and *Conningsby*, 1 *Vern.* 118.

3. *A.* and *B.* were Partners, as Woollen Drapers, *A.* received Money in the Shop of *J. S.* and gave a Note for it, signed by himself and Partner : *A.* and *B.* being both dead, and *A.* not leaving sufficient Assets, it was held on a Bill brought by *J. S.* against the Executors of both the Partners, that this Note being given by one of the Partners should bind both ; and that tho' at Law it binds only the Executor of the surviving Partner, yet in Equity the Creditor may follow the Estate of the other, though no Proof was made that this Money was brought into the Stock, or used in Trade. *Trin.* 1693, *Jane and Williams*, 2 *Vern.* 277, 392.

4. *A. B.* and *C.* were Partners together in the Trade of a *Dry Salter*, *C.* imbezils and wastes the Joint Stock, contracts private Debts, and becomes a Bankrupt ; the Commissioners assign the [371] Goods in Partnership ; *A.* and *B.* brought a Bill for an Account, and to have the Goods sold to the best Advantage ; and insisted, that out of the Produce of the Goods the Debts owing to the Joint Trade ought to be paid in the first place, and that out of *C.*'s Share Satisfaction ought to be made for what *C.* had wasted or imbeziled, and that the Assignees could be in no better Case than the Bankrupt himself, and were intitled only to what his third Part would amount unto clear, after Debts paid, and Deductions for his Imbezilments ; and the Court seemed to be of that Opinion, but sent it to a Master to take the Account and state the Case. *Trin.* 1693, *Richardson and Goodwin*, 2 *Vern.* 293 ; *vide* Title *Bankrupt* [1 Eq. Ca. Abr.], *P.* 55, *Ca.* 5, *S. C.*

(C) OF POLICIES OF INSURANCE AND BOTTOMRY-BONDS.

1. Where a Policy of Insurance is against Restraint of Princes, that extends not where the insured shall navigate against the Law of Countries, or where there shall be a Seizure for not paying Custom or the like. 2 *Vern.* 176, *per Hutchins*, Lord Commissioner.

2. The Defendant had lent £300 on a Bottomry-Bond, and afterwards insured £450 on that Ship with the Plaintiff, for six *Guineas per Cent.* Premium, as interested for Money lent, &c., the Ship outlived the Time at which the Money was payable, and afterwards was lost in the *East-Indies* ; the Defendant recovered the Money on the Bottomry-Bond, and afterwards sued the Insurers upon their Policy, who brought their Bill to be relieved, for that the Money insured by the Policy, was the Money lent upon the Bottomry, and that the Defendant was no otherwise interested in the Ship ; and that the Money being paid, no Use ought to be made of the Policy ; and the Court decreed the Policy to be delivered up. *Trin.* 1692, *Goddart and Garret*. (2 *Vern.* 269, *S. C.* where it is held, that a Person having no Interest but his Bottomry-Bond cannot insure ; and that a Person who has no Interest in the Ship or Cargo cannot insure ; though the Policy was interested, or not ; but Insurances are for the Benefit of Traders and Merchants only ; not that others unconcerned should make unreasonable Gain. But *Q.*)

3. But where the Defendant lent the Plaintiff £250 on a Bottomry-Bond, and afterwards insured on the same Ship, but the Insurance was larger as to the Voyage, there being Liberty to go to other Ports and Places than what were contained in the Condition of the Bottomry-Bond ; the Ship being lost, the Defendant recovered the Money on the policy of Insurance, and also put the Bottomry-Bond in Suit ; the Ship, though lost, having deviated from the Voyage mentioned in the Bond ; the Plaintiff brought his Bill pretending the Defendant ought not to have a double Satisfaction, to recover both on the Insurance and also on the Bond, he having insured only in Respect of the Money he had lent on the Bottomry, and had no other Interest in the Ship or Cargo, and therefore the Plaintiff would have had the Benefit of the Insurance, paying the Premium ; but the Court held, that the Defendant having paid the Premium, was intitled to the Benefit of the Policy, and run the Risque, whether the Ship was lost, or not ; and the Insurers might as well pretend to have Aid of the Bottomry-Bond, and to discount the Money recovered thereon, [372] as the Plaintiff to have the Money recovered on the Policy to ease the Bottomry-Bond. *Mich.* 1716, *Harman and Vanhatton*, 2 *Vern.* 717.

4. On a Policy of Insurance on Goods by Agreement valued at £600 and the Insured not to be obliged to prove any Interest ; the Lord Chancellor ordered the Defendant to discover what Goods he put on board ; for although the Defendant offered to renounce all Interest to the Insurers, yet he referred it to a Master, to examine the

Value of the Goods saved, and to deduct it out of the Value or Sum of £600, at which the Goods were valued by the Agreement. *Mich.* 1716, *Le Pypre and Farr*, 2 *Vern.* 716.

5. The Plaintiff entered into a Penal Bond of Bottomry, to pay £40 *per Month*, for £50, the Ship was to go from *Holland* to the *Spanish Islands*, and so to return for *England*; but if she perished, the Defendant was to lose his £50, she went accordingly to the *Spanish Islands*, took in *Moor*s at *Africk*, and upon that Occasion went to *Barbadoes*, and then perished at Sea; the Plaintiff being sued on the Bond and Penalty sought Relief, pretending that the Deviation was on Necessity; but his Bill was dismissed, saving as to the Penalty. [*Vachel v. Vachel*.] 2 *Chan. Ca.* 130; *vide* [*Green v. Young*] 2 *Salk.* 444.

6. But where *J. S.* entered into a Bottomry-Bond, whereby he bound himself, in consideration of £400, as well to perform the Voyage within six Months, as at the six Months End to pay the £400 and £40 Premium, in case the Vessel arrived safe, and was not lost in the Voyage; and it fell out that *J. S.* never went the Voyage, whereby his Bond became forfeited; and he preferred a Bill to be relieved; and in regard the Ship lay all along in the Port of *London*, and so the Defendant run no Hazard of losing his Principal, the Lord Keeper thought fit to decree, that the Defendant should lose the Premium of £40 and be contented with his ordinary Interest. *Mich.* 1684, *Dequilder and Depeister*, 1 *Vern.* 263.

* 7. A Part-Owner of a Ship borrowed Money of the Plaintiff upon a Bottomry-Bond, payable on the Return of the Ship from the Voyage she was then going in the Service of the *East-India Company*, and the *East-India Company* broke up the Ship in the *Indies*; and the Owners brought their Action against the Company, and recovered Damages, but they did not amount to a full Satisfaction; and the Obligee brought his Bill to have his proportionable Satisfaction out of the Money recovered, but his Bill was dismissed, and he left to recover as well as he could at Law; for a Court of Equity will never assist a Bottomry-Bond which carries an unreasonable Interest. *Mich.* 1701, *Dandy and Turner*.

(D) OF PART-OWNERS, MASTERS AND FREIGHTERS OF SHIPS.

1. If there are three Part-owners of a Ship, and one of them refuses to fit out the Ship, and the others do it without his Consent, and this Ship is lost in the Voyage; yet he who refused to join shall bear his Proportion of the Loss, for he would have been intitled to a Share of the Profits, if there had been any; but in case the other two Part-owners had applied to the Court of *Admiralty* (as regularly they ought to have done) that Court would have made an Order, that upon one Part-owner's refusing to navigate the Ship, the other [373] Two should have Liberty to do it alone, and should not have been accountable to the Part-owner, that refused to join for any Part of the Profits; and then, in case the Ship had been lost, the whole Loss must have rested on those Two who set out the Ship. *Hil.* 1684, *Strelly and Winson*, 1 *Vern.* 297. (*S. C. ante* [1 *Eq. Ca. Abr.*], 7.)

2. Where the major Part of the Part-owners of a Ship settle and agree an Account of the Profits of a Voyage, it shall conclude the Rest. *Trin.* 1687, *Robinson and Thompson*, 1 *Vern.* 465, *per Curiam*.

3. A Master of a Ship, without the Owner, treated with the Plaintiff, a Merchant, for the Freight of the Ship at eighty Tuns, and accordingly entered into a Charter-party with him, to sail from *London* to *Falmouth*, and from thence to *Barcelona*, without altering the Voyage, and there to unlade at a certain Rate *per Tun*; and for Performance the Master binds the Ship, Tackle, &c., valued at £300, the Master deviates and commits Barratry, by which the Merchant, in effect, loseth his Voyage and Goods; the Merchant had a Sentence against the Master and Ship in *Barcelona*, which was confirmed in a higher Court in *Spain*; and the Owner having brought Trover for the Ship, the Merchant exhibited his Bill to be relieved against this Action, and likewise another Action brought for Freight; and it was held by my Lord Chancellor, that the Charter-party having valued the Ship at a certain Rate, the Owner is not liable further; and the Master is liable for Deviation and Barratry; for should it be otherwise, Masters would be Owners of all Men's Ships and Estates. 2 *Chan. Ca.* 238.

4. But where *A.*, a Master of a Ship, of which the Defendants were Part owners,

brought several Goods of the Plaintiffs, as Beef, Biscuit, Sails, Cordage; the Master failed, and a Bill was exhibited to compel the Defendants, the Part-owners, to pay; who insisted, that A. only was liable; and besides, that he had Money from the Owners to pay the Plaintiff; and the Court held, that A. was but a Servant to the Owners, and where a Servant buys, the Master is liable; and if the Owners paid their Servant, yet if he paid not the Creditors, they must stand liable, and therefore decreed the Owners to pay the Plaintiffs their Debts in proportion to their respective Shares and Interests in the Ship. *Hil. 1709, Speering and Degrave, 2 Vern. 643. (S. C. ante, 308.)*

5. The Plaintiff, a Merchant in London, hired the Defendant's Ship to freight for a Voyage to *Bourdeaux*, at £3. 10s. *per Tun*; it happened that an Imbargo was laid on all Merchant Ships for six Weeks; the Ship afterwards proceeds on her Voyage to *Bourdeaux*, and the Defendant not discovering what Agreement he had made with the Plaintiff in *England*, the Plaintiff's Factors and Correspondents there agree to allow the Defendant £6. 10s. *per Tun*, upon which latter Agreement the Defendant recovered at Law; a Bill being exhibited for Relief against this second and underhand Agreement, obtained, as was alledged, by Fraud, was dismissed; for the Defendant was at Liberty to make a new Agreement, by Reason that the Performance of the first was obstructed by the Embargo after laid on all Merchant Ships. *Mich. 1691, Draddy and Deacon, 2 Vern. 242.*

[374] 6. A. and B. Part-owners of the Ship *Falcon*, and C. the Master, by Charter-party agree with the *East India Company*, that the Ship should be ready to sail the 10th of *March* 1683, and should go from Port to Port, and to any Port or Place within the Limits of the *East-India Company's* Charter, as they should direct, but was to be dispatched back for *England*, on or before the 24th of *Jan.* 1684, or so soon after as to save her *Monsoon* for *England* that Year, or in default of her being dispatched within the Time aforesaid, the Owners were to pay four Months Demurrage, at £7. 10s. *per Diem* for her *Monsoon* so lost, and her Stay in *India* after the 20th of *Jan.* 1684, with this further Clause, that the Company might detain the Ship in their Employment in Trade or Warfare for any longer Time, not exceeding twelve Months after the 20th of *Jan.* 1684, after the Rate of £7. 10s. and 6d. *per Diem* Demurrage, until the Ship be dispatched from the last lading Port, or Expiration of the twelve Months, which shall first happen; but after the twelve Months expired, the Ship to return to *England*, and the Company not to be liable for any further Demurrage, or any Damage that may accrue by her Detention after that Time; and the Company covenant, on the Ship's Arrival in *England*, to pay Freight for 300 Tun, and Demurrage from the 20th of *Jan.* 1684, until the Ship should be dispatched, for the Space of twelve Months after the said 20th of *Jan.* 1684. And it was thereby provided, that until six Days after the Ship shall have returned to the Port of *London*, and made a right and full Discharge of all her Lading, the Company are not to pay, nor to be liable to pay any of the Sums of Money agreed on for Freight or Demurrage, or for detaining the Ship in *India*; it being the Intent of the Parties, that if the Ship should be lost either in her outward or homeward bound Voyage, nothing should be paid by the Company for Freight or Demurrage; the Ship set Sail according to the Charter-party, arrived in *India*, and was employed by the Company in Trading from Port to Port for one Year and upwards; and arrived in *India*, *Nov. 23.* 1684, and was to enter into Demurrage in four Months afterwards, which was the 23d of *March.* 1684, and the twelve Months after (during which Time the Company by their Charter-party might detain her) ended *March 23.* 1685, but the Ship was employed in the Company's Service, so that she arrived not at *Surat* until 1686, and from thence was ordered to *Bombay*, where the Ship having been so long detained in those Seas was surveyed, and found not sufficient for a Voyage to *England*; and on *Sept. 24.* 1686, the Seamen were discharged, and the Ship left there, the Company refusing to pay any Thing for Freight or Demurrage, because by the express Provision of the Charter-party, they were not to pay until six Days after the Ship's Arrival in *England*, and discharged of her Lading; and if they were to pay any Thing, yet they were to be charged with Demurrage until *March 23.* 1685, only, as is provided by the Charter-party, and refused likewise to account for the Value of the Ship, or shew how that they had disposed of her. The Part owners brought a Bill for Relief; and the Court held, that though the Charter party was so penned, that nothing could be recovered at Law, yet the Plaintiffs having a just Demand ought to be relieved in Equity; and therefore [375] decreed, that the Company should account for what they made of the Ship, that they should

pay Demurrage according to the Rate mentioned in the Charter-party, and that they should also be charged in Respect to Freight. *Hil. 1690, Edwin & al' and the East-India Company*, 2 Vern. 210.

* 7. So in a Case, where by the Agreement there was no Freight to be paid for the outward-bound Cargo, but only a certain Rate *per Tun* for the Homeward-bound Cargo; and when the Ship arrived beyond Sea, the Factor had no Goods at all to load the Ship with: the Court decreed Payment of the Freight. *Westland and Robinson* (2 Vern. 212, S. C. cited *per Cur'*).

8. So where the *East-India Company* took Bonds from the Mariners and Officers of a Ship, not to demand their Wages, unless the Ship returned to the Port of *London*: and the Ship arrived at a delivering Port, and was afterwards taken by the *French*: it was held by my Lord Chief Just. *Holt*, in an Action tried by him, and likewise in Chancery, that the Seamen and Officers should have their Wages to the Time of the Arrival of the Ship at the delivering Port. *Vide Edwards v. Child*, 2 Vern. 727. (*Vide Lord Raym.* 739, S. C.)

(E) OF CUSTOMS AMONGST MERCHANTS RELATING TO ACCOUNTS AND NOTES GIVEN BY THEM FOR MONEY.

1. If one Merchant sends another an Account stated, and he desires him to write to him speedily, and send his Exceptions, and the Account is rested upon fourteen Years, it shall not afterwards be unravelled. 1 *Chan. Ca.* 127, *per Curiam*.

2. So where the Plaintiff's late Husband and the Defendant had Dealings together as Merchants, and she exhibited a Bill for an Account: although it was agreed that the Length of Time was no Bar, yet the Plaintiff's Husband living many Years after the Trade and Dealings between them ceased, and after some Differences and Disputes had arisen between them, and acquiescing to the Time of his Death, the Court dismissed the Bill, and left the Plaintiff to recover at Law, if she could. *Mich. 1692, Sherman and Sherman*, 2 Vern. 276 (S. C. *ante* [1 Eq. Ca. Abr.] 12, 13), and *per Hutchins*, Lord Commissioner, amongst Merchants it is looked upon as an Allowance of an Account current, if the Merchant that receives it does not object against it in a second or third Post.

3. One *Agris*, a Goldsmith, having £150 of *Berkley's Money* in his Hands, gives him a Note, whereby he promises to pay to him, or Order, on Demand, the Sum of £150. *Berkley* being indebted in the same Sum to the Plaintiff, delivers over that Note to the Plaintiff, but without making any Indorsement: Plaintiff presently carries this Note, and likewise another Bill for £80, which he had upon one *Jackson*, to Sir *Stephen Evans* and *Hales*, Goldsmiths in *Lombard street*, who were his Bankers or Cashiers, and they gave him a Note to this Effect, *viz. Received of Mr. Trowell (the Plaintiff)* £230 upon Account: and on the Margin it was written thus, *Berkley* £150, *Jackson* £80, and this Note was signed by Sir *Stephen* and *Hales*: they presently sent their Dunner to *Agris* to demand the [376] Money, but he put them off from Time to Time for about thirteen or fourteen Days, though the Dunner had been several Times with him for the Money; and afterwards *Agris* fails: it was proved in the Cause, that *Agris* was solvent after the Note given by Sir *Stephen Evans*, and had paid above £800 to several People: upon *Agris's* failing, the Plaintiff applies to the Defendants, Sir *Stephen Evans* and *Hales*, for Payment of the £150. Sir *Stephen* not thinking himself obliged to pay it, sends the Plaintiff to *Berkley*, to whom the Note was first given, and he likewise refusing Payment, the Plaintiff brought his Bill against them for a Satisfaction, and had a Decree at the Rolls, to charge Sir *Stephen Evans* and *Hales*: from which Decree they appealed to my Lord Keeper: and insisted they were not chargeable with this Money: that they took *Agris's* Note only as Servants to the Plaintiff, and had several Times sent their Dunner to demand the Money: that his promising them Payment was the Reason they did not give Notice, nor return the Note to the Plaintiff: that their Manner of giving Notes in *Lombard street* was different from those given by Goldsmiths at *Temple Bar*, yet in Substance they were the same, and amounted to no more than a Receipt for the two Notes from such Persons for so much Money, which, when they received, they promise to be accountable for: that this Bill was but in Nature of an Action of Account against them as Bailiffs or Receivers of so much Money: and at Common Law, if such Action had been brought, and upon the Trial it appeared they had received no Money, the Jury would have found against

the Plaintiff; that the Reason that led Sir *Stephen* to give a Note in such a Form, was a Case *Mich. 2 Ann.* between *Ward* and him, where the Case was, that the Plaintiff *Ward* being indebted to one *Fellows* in the Sum of £60, and having a Note from Sir *Stephen Evans* for £100, when *Fellows* came for his Money, *Ward* sends a Servant with him to Sir *Stephen* with a Bill of £100, and ordered him to pay *Fellows* the £60, and indorse it off the £100 Note; but Sir *Stephen* having a Note on one *Wallis* for £60, 10s. gives that Note to *Fellows*, who pays him the 10s. Overplus, and goes away with the Note; the next Day *Wallis* fails; and upon an Action brought by *Ward* for the £100 the Court of *B. R.* was of Opinion, that the Delivery of the Note upon *Wallis* for £60, 10s. was no Payment, and therefore *Ward* recovered the whole £100, and therefore Sir *Stephen* now only gave a Note for so much received on Account; and the Note in the Margin, shewing from whom it was due, made it plain, he only acknowledged the Receipt of such Notes, but had no Design to charge himself with the Money till it was received. But my Lord Keeper was clear of Opinion, that the Note imported an Acknowledgment of so much Money received on the Plaintiff's Account; that the Entry on the Margin could at most only shew how it was received; and that the Note spoke itself, whatever the Forms and Meaning of such Notes were, and therefore affirmed the Decree. *Mich. 1710, Trowel and Sir Stephen Evans & al'.*

[377] CAP. LII.

TRIAL

(A) IN WHAT CASES A NEW TRIAL MAY BE GRANTED, OR THE VENUE CHANGED BY A COURT OF EQUITY.

1. The Defendant's Wife had pawned her Husband's Plate to the Plaintiff for £110, for which the Defendant in Trover had recovered £115 Damages against the Plaintiff, and Judgment for it; the Plaintiff exhibited his Bill to be relieved against the Judgment, and to have a new Trial, suggesting that the Defendant was privy to the Pawning, and received the £110, and the Proofs being read, it appeared that the Defendant had confessed so much; which, if it had been proved at the Trial, it was agreed the Defendant could not have recovered on the Trover; but there being no Proof now, that the Plaintiff at Law could not, by reason of any Accident, have his Witnesses at the Trial, the Court would not, on any Neglect of his, grant a new Trial. *Hil. 15 & 16 Car. 2 [1664], Curtess and Smalbridge, 1 Chan. Ca. 23. (2 Freem. Rep. 178, S. G. and P.)*

(Bills for changing the Venue or for granting a new Trial, are not reduced to any great Certainty; the Grounds for Relief, in the first Case, is Partiality in the Jurors; for though, by the Law, the Trial is to be by a Jury *de Vicineto*, yet if it appears that one of the Parties is so powerful in Interest in the County, that by that Means the other is in Danger of not having equal Justice done him, the Court will order the Trial in an indifferent County. 1 *Vern.* 439, 267. Grounds for a new Trial are, new Evidence discovered, which could not possibly be made Use of in the first; Perjury in the Witnesses, Partiality in the Jurors, &c., (a) all which must be made out to the Satisfaction of the Court. *Vide 1 Chan. Ca. 65.*)

(a) It is a Rule, that the Court will not set aside a Trial at Law for any Matter which might be made Use of at the Trial. 2 *Freem. Rep.* 178.

* 2. But where an Action was brought against an Administrator, who pleaded *Plene administravit*, and the Trial was brought down by *Proviso*; and at the Trial, the Defendant being put to prove a Sum of £50, paid before the Plaintiff's Original, which not being provided to do, a Verdict was against him; yet after finding the Note, whereby his Witness was enabled to swear that Matter, on a Bill brought in Chancery, a new Trial was granted. *Hil. 28 Car. 2 [1677], Hennell and Kelland.*

3. So where a Bill was exhibited for a new Trial, suggesting the Plaintiff's Mark

to the Bond was forged by one *Webb*, and on that Surprise the Defendant had recovered against him at Law, all the pretended Witnesses to the Bond being dead, a new Trial was granted. *Mich.* 1691, *Coddrington and Webb*, 2 *Vern.* 240.

4. The Plaintiff's Wife had a Bond of £100 entered into, to her, by her Uncle, as a free Gift (as she pretended), to be paid after his [378] Death; and this Bill was brought to discover the Obligor's Assets, and to have a Satisfaction out of the real and equitable Assets. The Defendant insisted the Bond was forged, and therefore ought to have no Countenance or Assistance of a Court of Equity; and there were considerable Proofs of its being so; so it went to Law to try *factum vel non*, and found for the Bond; and then the Plaintiff came back to the Court, and had a Decree for a Satisfaction out of the Assets; for it was said, that the Validity of the Bond having been so solemnly determined at Law, where it was only triable, the Plaintiff ought to have the common Justice and Assistance of this Court. The Defendant being dissatisfied with this Decree, petitioned for a Rehearing; and the Cause coming to be reheard, the former Decree was affirmed. The Defendant pressed much for another Trial, but that was denied; for it was said if it were granted, and a Verdict against the Bond, the Plaintiff might, with as much Reason, ask another Trial, and so Matters would be made endless; besides it would be much more unreasonable to grant a new Trial in this Case, because several of the Plaintiff's Witnesses, who gave Evidence at the former Trial, were since dead; but the Defendant being still more dissatisfied, appealed to the House of Lords, who granted a new Trial, and it was found against the Bond. *Hil.* 1700, *Wharton and Tilley*. (2 *Vern.* 378, 419, S. C., somewhat differently reported.)

5. An Issue was directed to be tried touching the Custom of the Manor of —, which was found against the Plaintiff; and the Cause being heard on the Equity reserved, it being alledged to be a Cause of Value, and concerning all the Copyholds in the Manor, a new Trial was directed upon Payment of Costs. *Trin.* 1688, *Edwin and Thomas*, 2 *Vern.* 75; 1 *Vern.* 489, S. C. *Vide* [*Fitton v. Macclesfield*] 1 *Vern.* 293, where it is said, that upon one Trial it was not proper to make a Decree to bind the Inheritance.

6. But where the Plaintiff, being a Purchaser, came into Equity for Writings, and a Partition of Lands; and the Defendant insisted there was an Intail, and the Plaintiff's Purchase not good; the Court, on the first Hearing, gave the Plaintiff a Year's Time to try his Title: an Ejectment was brought, and a Copy of the Deed of Intail was produced, but the Original lost, and not proved to be executed: Verdict against the Intail; the Cause being set down on the Equity reserved, the Defendant insisted, he ought not to be bound by one Trial, in a Matter of Right of Inheritance, but the Court refused him any Relief, being only a Decree for a Partition; but the Reporter adds a *Quare tamen*. *Trin.* 1691, *Bliman and Brown*, 2 *Vern.* 232.

7. A Factor buys Cheese for his Principal, and then breaks: and an Action is brought against the Principal, and a Recovery at Law: the Plaintiff here endeavoured in the Court of Law, to have got a new Trial, but was denied it: then he brought his Bill, and suggested for Equity, that before the Cheese bought, he had countermanded the Authority of the Factor, and that the Defendant had Notice of it: and that since the Trial the Plaintiff found that the Principal Witness, on whose Testimony the Recovery was had, was a Partner with the insolvent Factor (but that was not proved); another Suggestion was, that there could not be an indifferent Trial in *Suffolk*, for that almost all the Freeholders there were concerned in Interest, and had declared they would never find against their Country-men: but the Court refused to grant a new Trial. *Pasch.* 1702, *Tovey and Young*, 2 *Vern.* 437. (S. C. *Proc. in Chan.* 193.)

[379] CAP. LIII.

TRUST AND TRUSTEES.

- (A) When a Trust shall be said to be raised.
- (B) Of resulting Trusts, or Trusts by Implication.
- (C) What shall be a Trust, and not an Use executed by the Statute.
- (D) What Act of the Trustee shall defeat the Trust, or be a Breach of the Trust in him.
- (E) What Acts of the Trustee jointly with *Cestui que* Trust, or by *Cestui que* Trust only, shall defeat the Trust, or destroy contingent Remainders.
- (F) When a Trust is to be executed, what Estate or Interest is to be conveyed, and to whom.
- (G) Trustees how to account, and what Allowances to have.
- (H) How far Trustees are answerable for each other.

(A) WHEN A TRUST SHALL BE SAID TO BE RAISED.

1. If a Man devises £1500 to A. and B. for such Uses as the Testator had declared to them, and by them not to be disclosed, and he discloses the Trust to A., who by Letter discloses it to B., this shall be a Trust, and the Letter is a good Declaration thereof, though either, or both the Trustees be dead. *Trin.* 1689, *Crooke* and *Brooking*, 2 *Vern.* 50, 106.

(When a Trust is well raised for Payment of Debts, *vide* Devise for Payment of Debts, Title *Devise*; Resulting Trusts for the Benefit of an Heir, Title *Heir* [1 Eq. Ca. Abr. 264]; where Executors shall be Trustees for the next of Kin, Title *Executors and Administrators* [1 Eq. Ca. Abr. 235]).

2. But if a Man devises £40 to be paid to his Cousin J. S., and by him to be disposed of in such Manner as the Testator should by a private Note acquaint him with, and dies without having made [380] any such Appointment; this shall be a good Bequest to J. S., and shall not go to the Executors, from whom it was intended to have been given away. [*Lambert v. Bainton*,] 1 *Chan. Ca.* 198.

3. If an Improprator devises to one that served the Cure, and to all that should serve the Cure after him, all the Tithes and other Profits, &c., tho' the Curate is incapable of taking by this devise in such Manner, for want of being incorporate, and having Succession, yet the Heir of the Devisee shall be seised in Trust for the Curate for the Time being. 2 *Vent.* 349, by *Finch*, Lord Chancellor.

4. A. lent B. £100, and in the Note which was given for it, Mention was made that it should be disposed of as A. should direct; on a Bill exhibited for it, the Court declared it was a *Depositum* or Trust, and decreed Payment of it, tho' it was barred by the Statute of Limitations. 2 *Vent.* 345.

5. A. in consideration of £80 conveys an Estate absolutely to B., and afterwards A. brings a Bill to redeem, and B. by Answer insists that the Conveyance was absolute, but confesses, that after the £80 paid, with Interest, it was to be in trust for the Wife and Children of A., and A. replies to the Answer; though there be no other Proof of the Trust, yet it will be decreed for the Wife and Children. *Pasch.* 1693, *Hampton* and *Spencer*, 2 *Vern.* 288-9. (S. C. *ante* [1 Eq. Ca. Abr.], 36.)

6. So if J. S. makes his Will, and his Wife Executrix, and the Son afterwards prevails on his Mother (by telling her that the Executorship would be troublesome to her, &c.) to get J. S. to make a new Will, and name him Executor therein, he promising to be a Trustee for the Mother, which is done accordingly, and in that Will there is but a small Legacy given the Wife; this will be decreed a Trust for the Wife on the Point of Fraud, notwithstanding the Statute of *Frauds* and *Perjuries*. *Hil.* 1684, *Thyn* and *Thyn*, 1 *Vern.* 296.

(B) OF RESULTING TRUSTS, OR TRUSTS BY IMPLICATION.

1. If a Man purchases Lands in another's Name, and pays the Money, it will be a Trust for him that paid the Money, tho' there be no Deed made, declaring the Trust thereof; for the Statute of *Frauds* and *Perjuries* extends not to Trusts raised by operation of Law. 2 *Vent.* 361 *Vide* [*Gascoine v. Thwing*] 1 *Vern.* 366, 367. S. P.,

admitted; but there said, *that the Proof must be very clear, that he paid the Purchase-Money.*

(By the 29 *Car.* 2, All Declarations and Creations or Trusts of Lands or Hereditaments must be in Writing, signed by the Party, or by his last Will in Writing, or else void: except Trusts arising by Implication of Law, and transferred or extinguished by Act of Law, which shall be of the same effect as if this Act had not been made. ⁶)

2. If there are three Lessees of a Church-Lease, and one of them surrenders the old Lease, and takes a new Lease in his own Name, it shall be a Trust for all. *Mich.* 1684, *Palmer and Young*, 1 *Vern.* 276, *per Curiam*.

[381] 3. A. and B. agreed together to take a Lease of a *Colliery* for less than three Years, for which they contracted at a certain Rent, but by the Agreement the Lease was taken in A.'s Name only; tho' at the Time of the executing thereof, the Lessor insisted, that B. should be a joint Lessee with A., and should receive a Moiety of the Profits, and be answerable for a Moiety of the Rent, and refused to let it on any other Terms, and accordingly demanded and received a Moiety of the Rent from B. On a Bill brought by B., A. pleaded the Statute of Frauds and Perjuries, and that there was no Declaration of a Trust in Writing; B. insisted that it was good, being a Lease for less than three Years; or if his Title was not good on that Account, yet it was good as a resulting Trust; as to the first, the Court held, that tho' a Lease for three Years may be good by Parol, yet when such a Lease is made in Writing, the Trust of that Lease cannot be declared by Parol; and as to the second, ordered the Plea to stand for an Answer (the Judge, who sat in my Lord Chancellor's Absence, being in doubt about it, tho' he inclined to over-rule the Plea). *Mich.* 1682, *Riddle and Emerson*, 1 *Vern.* 108.

4. A.'s Father had executed a Grant of the next Avoidance of a Church to B. the Defendant's Father, who was a Clergyman, and a Person much intrusted and employed by him; and the Grantee knew nothing of the making of this Grant; and being examined in a Cause had deposed, that he did not purchase it; and it was held, that this was a resulting Trust to the Grantor, there being no other Trust declared. *Hil.* 1697, *The Duke of Norfolk and Brown*. (*Prec. in Chan.* 80, S. C., *in totidem verbis*.)

5. But if the Mortgagee assigns over his Mortgage to J. S. and declares a Trust thereof by Parol for A. and B., there being in this Case an express Trust declared, though by Parol only, it shall prevent a resulting Trust to the Assignor; for the Statute of Frauds, which saves resulting Trusts, extends only to such as were resulting Trusts before the Statute; and a bare Declaration by Parol before the Act would prevent any resulting Trust. *Trin.* 1693, *Lady Bellasis and Compton*, 2 *Vern.* 294, but no Decree.

6. If a Father purchases Lands in the Name of his eldest Son, this shall be an Advancement for the Son, and not a Trust for the Father, though the Father has been in possession of it, and has received the Rents and Profits thereof. *Hil.* 28 *Car.* 2 [1677], *Lord Gray and Lady Gray*, 1 *Chan. Ca.* 296. [*Scroope v. Scroope*,] 1 *Chan. Ca.* 27, S. P. [*Elliott v. Elliott*,] 2 *Chan. Ca.* 231 (a), S. P., and there said to be the constant Rule. (S. C. but not S. P. *ante* [1 *Eq. Ca. Abr.*], 270.)

(a) *Note*: In 2 *Chan. Ca.* 231, Lord Chan. *Nottingham* took a Distinction where a Parent made a Purchase in the Name of an unadvanced Child, and where in the Name of a Child already advanced. In the former Case it was only an Advancement for the Child, in the latter a Trust for the Parent.

7. So where the Lord of a West-Country Manor (his Tenants refusing to renew) made a Lease to his Daughter for ninety-nine Years, and afterwards sold the Estate to J. S., who had Notice of the Lease, and took a collateral Security, that the Daughter should release within four Years after she attained her Age of Twenty-one Years; and though it was insisted, that this was a Trust for the Father, and that it was the usual Method, that Lords of West-Country Manors took, when the Tenant in Possession refused to renew; yet my Lord Chancellor held it no Trust for the Father; but an Advancement for his Child; and that the Purchaser having purchased with Notice of it, and taken a collateral Security, he must make the best of his Security. *Trin.* 1687, *Jennings and Selleck*, 1 *Vern.* 467, decreed.

[382] 8. So if a Father purchases a Copyhold Tenement in the Name of his eldest

* *Note*: This relates to Trusts and equitable Interests, but not to an Use, which is a legal Estate. *Per Lord Chan.* 1 *Will. Rep.* 112.

Son, an Infant of about eleven Years old, and lays out £400 in Improvements, pays the Purchase money, and all the Fines, and enjoys it during his Life (but having surrendered it to the Use of his Will), devises it to his Wife for Life, and after to his younger Children, who were otherwise unprovided for; and the eldest Son recovers in Ejectment: the Wife and Children cannot be relieved against it, for the Purchase shall be considered as an Advancement for the Son, and not a Trust for the Father, though he enjoyed it during his Life: for the Son was but an Infant at the Time of the Purchase. *Pasch. 1687, Mumma and Mumma, 2 Vern. 19. Vide Baylis v. Newton, 2 Vern. 28.*

9. A Man bought Copyhold Lands of the Nature of Borough English, in the Name of his eldest Son, but there was no Declaration of Trust in Writing; but the Plaintiff would have had it as a Trust for the Father, who, as well as the eldest Son, were both dead: it was agreed the Father paid the Purchase-Money, and many Witnesses were examined on both Sides, and Acts of Ownership, as Receipts of Rents, Repairs, &c., proved in both Father and Son; so that the Proofs as to that Matter seemed to be pretty equal; but there being no Declaration in Writing, that it was a Trust for the Father, the Court decreed it an Advancement for the Son; which was affirmed in the House of Lords. *Trin. 1701, Shales and Shales. (2 Freem. 252, S. C. and Decree. It is a settled Rule, that whenever a Father purchases in the Name of a Child unprovided for, it is intended a Provision and not a Trust, unless it be otherwise proved, and the proof lies on the Plaintiff: this was held so before the Statute of Frauds, &c., and is stronger since, because Declarations of Trusts ought to be in Writing, tho' in other Cases a Trust will result where it appears that another paid the Money. Per Cur'. Ibid. 252, 253.)*

10. So if a Father purchases Lands in his eldest Son's Name, and the Son is put into Possession, who afterwards falls sick, and in his Sickness the Father gets him to execute a Deed, declaring his Name was made use of only in trust for him; and the Son recovers, and continues in Possession and marries; after his Death his Wife shall be endowed, notwithstanding this Declaration of Trust; and tho' the Father had got a Conveyance of the Legal Estate from the younger Son: for this is a secret and fraudulent Deed of Trust to deceive Creditors and Purchasers. *Pasch. 1702, Bateman and Bateman, 2 Vern. 436. (S. C. but not S. P. ante [1 Eq. Ca. Abr.], 149, 315; S. C. and P. ante, 218.)*

11. If the Grandfather takes Bonds in the Name of his Grandchildren, the Father being dead, this shall be an Advancement for the Grandchildren, and not a Trust for the Grandfather: for the Father being dead, the Children are under the immediate Care of the Grandfather. *Pasch. 32 Car. 2 [1689], Ebrand and Dancer, 2 Chan. Ca. 26.*

The Testator by his Will devised to Trustees for Terms of 99 and 101 Years, Remittender to his Sons T. F. and E. F. for Life. The Trusts of the Term were to pay off certain Debts of T. F. and E. F. scheduled by the Testator, and to make to said T. F. and E. F. a discretionary Allowance not exceeding, &c., until such the Debts of said T. F. and E. F. were first paid, but so as his said two Sons, or either of them, should have no Estate, Right, Title, Claim, or Interest in the Rents or Profits of the Lands, &c., comprised in the said Terms, during their Lives, and the Life of the Survivor of them, other than the Trustees, in their absolute and uncontrolled Power, should think expedient. After the Death of his said two Sons and Payment of the Debts, &c., the Terms were to attend the Inheritance. By Lord Thurlow, Chancellor, the Nature of a resulting Trust is that it is such as escaped the Intention of the Testator, and here the Intention of raising a Trust beyond the Payment of the scheduled Debts, is so totally unexpressed, that no Trust can be raised upon the Terms used. The Rule of Law is, that where the Trusts of a Term are exhausted, a Trust results for want of a farther Disposition to the legal Tenants. These must now be resulting Trusts, and therefore go to the Tenants for Life. Davidson v. Foley, 2 Bro. Chan. Ca. 203.

(C) WHAT SHALL BE A TRUST, AND NOT AN USE EXECUTED BY THE STATUTE.

1. If Lands are devised to Trustees and their Heirs, in Trust for a Feme Covert, and that the Trustees shall from Time to Time pay and dispose of the Rents and Profits to the said Feme Covert, or to such Persons as she, whether Sole or Covert, shall appoint, and that her Husband shall have no Benefit thereof: and as to the Inheritance, in trust to such Persons as she by Will, or other [383] Writing under her Hand, should

appoint : and for want of such Appointment, to her and her Heirs, this shall be a Trust, and not an Use executed by the Statute. *Mich.* 1685, *Neill and Saunders*, 1 *Vern.* 415.

(By the 27 *H. 8. c.* 10, it is provided that the Use and Possession shall be always united, by declaring, that where any are or shall be seised of any Lands, &c., to the Use or Trust of any other, by reason of any Bargain or Sale, Feoffment, Fine, Recovery, Contract, Agreement, Will, or otherwise, by any Means whatsoever, *Cestui que Use*, or he to whose Use the Lands are settled in Fee-simple, Fee-tail, for Life, Years, or otherwise, or he who hath any Use in Reversion or Remainder, &c., shall be deemed to be in Possession of the Land to all Intents and Purposes : and where one is seised of Lands to the Use or Intent that another shall have an yearly Rent out of the same Lands, *Cestui que Use*, or he to whose Use the Rent is granted, shall be deemed in Possession thereof, &c. of the Rent, and of like Estate, as he that had the Use. But notwithstanding this Statute, there are three Ways of creating an Use or a Trust, which still remains as at Common Law, and is a Creature of the Court of Equity, and subject only to their Controul and Direction : 1st, Where a Man seised in Fee raises a Term for Years, and limits it in Trust for A., &c., for this the Statute cannot execute, the Termor not being seised. 2^{dly}, Where Lands are limited to the Use of A. in Trust to permit B. to receive the Rents and Profits : for the Statute can only execute the first Use. 3^{dly}, Where Lands are limited to Trustees to receive and pay over the Rents and Profits to such and such Persons : for here the Lands must remain in them to answer these Purposes : and these Points were agreed to. 1700, *Synson and Turner, per Curiam, ante*, 220.)

2. But where a Man devised the Rents and Profits of certain Lands to T. B. the Wife of W. B. during her natural Life, to be paid by his Executors, into her own Hands, without the intermeddling of her Husband, and after her Decease he devised them to others : and it was held by *Rokeby* and *Eyre*, Justices, that the Lands themselves belonged to the Wife, against *Holt*, Ch. Just., who held strongly, that the Executors were only Trustees for the Wife. *Trin.* 7 W. & M. [1695], *South and Allen in B. R.* 1 *Salk.* 228. (*Comb.* 375, and 5 *Mod.* 63 ; *Ibid.* 98, 103, S. C. adjudged by two J. against the Opinion of *Holt*, Ch. J.)

3. If Lands are devised to Trustees and their Heirs, on Trust to permit A. to take the Profits for his Life, and after the Trustees to stand seised to the Use of the Heirs of the Body of A. A. has an Estate-tail executed in him : for this being a plain Trust at Common Law, what is so, must be executed by the Statute, which mentions the Word *Trust* as well as Use. *Broughton and Langley*, 2 *Salk.* 679. 1 *Lut.* 823, S. C. and *per Holt*, Ch. Just., the same Point *cont.* in the Case of *Burchett and Durlant*, 2 *Vent.* 312, is not Law. (*Vide Lord Raym.* 873.)

* 4. But where Lands were devised to Trustees and their Heirs, in trust to pay several Legacies and Annuities, and to pay the Surplus of the Rents and Profits to a married Woman, during her Life, for her separate Use, or as she should direct : and after her Death the Trustees to stand seised to the Use of the Heirs of her Body, with Remainders over : and the Question was, whether this Devise to pay the Surplus of the Rents and Profits to the Wife, was such a Use or Trust as was executed by the 27 *H. 8.* for if it was, then it was urged, that she being Tenant for Life, the Limitation after to the Heirs of her Body being coupled with it, gave her an Estate-tail, according to *Shelley's Case*, 1 *Co.*, but if it did not, then the eldest Son was to take as a Purchaser : and it was held by the Court, that she had only a Trust for Life, and consequently the Heirs of her Body must take by Purchase : and the rather in this Case, because it was limited to the Heirs of her Body severally and successively, as they should be in Seniority of Age and Priority of Birth, and the Heirs of their respective Bodies issuing : and a Difference was taken between this Case and that of *Broughton and Langley*, 2 *Salk.*, for there it was to permit A. to receive the Rents and Profits for Life : but here it is a Trust in the Trustees, to pay over the Rents and Profits to such and such Persons : and therefore the Estate must remain in them to answer these Trusts : otherwise she must be the Trustee, contrary to [384] the express Words of the Will. *Mich.* 1728, *Jones and the Lord Say and Seal* decreed, and affirmed in the House of Lords, (S. C. 3 *Bro. P. C.* 458.)

(D) WHAT ACT OF THE TRUSTEE SHALL DEFEAT THE TRUST, OR BE A BREACH OF THE TRUST IN HIM.

1. If A. seised in Fee, in trust for B. for full Consideration conveys to C. who has Notice of the Trust ; and afterwards C. to strengthen his own Estate, levies a Fine to B., the *Cestui que Trust* is not bound to enter within five Years ; for C. having purchased with Notice, notwithstanding any Consideration paid by him, is but a Trustee for B., and so the Estate not being displaced, the Fine cannot bar. [Bovey v. Smith,] 1 Vern. 149, agreed *per Curiam*.

(Trusts are so far regarded and supported in Equity, that regularly no Act of the Trustee shall prejudice the *Cestui que Trust* ; for though a Purchaser for valuable Consideration, without Notice, shall in no Case have his Title impeached in Equity ; yet the Trustee must, especially in Equity, make good the Trust ; and my Lord Hobart is of Opinion, that an Action lies against him at Common Law ; but if he purchases, with Notice, then he becomes the Trustee himself, and shall be accountable for every Act of his, as the Trustee was, and if either becomes insolvent, the *Cestui que Trust* has his Remedy against the other. The Trustee of a Legacy dying before the Legacy is paid, shall not prejudice the Legatee ; so if a Trustee of Land die without Heir, though the Lord by Escheat will have the Land at Law, yet it will be subject to the Trust in Equity. *Trin.* 1702, *Eales and England* ; so if A. puts out £100 at Interest in the Name of B., who after becomes a *Felo de se*, A. may be relieved against the King upon his Trust, in Equity, upon the Statute of 33 H. 8, cap. 39 ; *vide Hard.* 176, 466, 395, 468 ; *Lane.* 54.)

2. So if an Executor, in Trust for an Infant Residuary Legatee, renews a Lease, Part of the Testator's Personal Estate, in his own Name, and first mortgages it, and then assigns the Equity of Redemption to a Trustee, to sell for Payment of his own Debts, and his Trustee sells to one who had Notice of the Infant's Title, the Purchase will be set aside. *Mich.* 1687, *Walley and Walley*, 1 Vern. 484, decreed.

3. If a Trustee sells the Land to a Stranger, who has no Notice of the Trust, and a Fine and Proclamation, and five Years pass, and the Trustee afterwards, for valuable Consideration really paid, purchases these Lands again from the Vendee, the Vendee, notwithstanding the Fine, &c., shall stand seised, as at first, and as if the Land had never been sold. *Mich.* 34 Car. 2 [1682], *Bovey and Smith*, 1 Vern. 60, 84, 144 ; 2 Chan. Ca. 124, S. C. (S. C. ante [1 Eq. Ca. Abr.], 256.)

(E) WHAT ACTS OF THE TRUSTEE, JOINTLY WITH *Cestui que Trust*, OR BY *Cestui que Trust* ONLY, SHALL DEFEAT THE TRUST, OR DESTROY CONTINGENT REMAINDERS.

1. If Trustees in a Settlement, to support contingent Remainders, join with the Tenant for Life in any Conveyance, to destroy the contingent Remainders before they come *in esse* ; this is a plain Breach of Trust ; and whoever claims under such Conveyance, [385] having Notice of the Trust, or by a voluntary Settlement, shall be liable to make good the Estates. *Mich.* 9 Ann. [1710], *Pye and Georges*, 2 Salk. 680 (1 Will. Rep. 128, S. C., said to be so declared by Lord Keeper Harcourt). *Vide* the Cases *infra*.

(But if a Trustee joins with a *Cestui que Trust*, in any Conveyance to bar the Intail, this is no Breach of Trust : for it is no more than what he may be compelled to, though the Trustee himself might have barred such Intail without his joining ; and that not only by Fine or Recovery, but likewise by Feoffment, Bargain or Sale, Devise or Surrender (if the Intail be of a Copyhold, and there is no particular Custom which requires a Common Recovery) ; for such Intail is not within the Statute *de donis*, but remains as at Common Law ; and being a Trust is governable only by the Rules of Equity, and not by the Niceties of the Law ; and this seems to be supported not only by the latter, but by the far greater Number of Authorities, and in Cases wherein the very Point itself was debated, though there are *obiter* Sayings and Opinions, which have made some Distinctions, and others which have flatly contradicted it. *Vide* 1 Chan. Ca. 49, 213 ; 1 Chan. Rep. 68 ; 2 Chan. Ca. 78, 64 ; 1 Vern. 13, 440 ; 2 Vent. 350 ; 2 Vern. 133, 552, 583, 702, 703, 704, 705.)

2. But where a Settlement was made in consideration of a Marriage, and £3000 Fortune, and for settling the Lands in question in the Name and Blood of the Husband ; and the Lands were limited to Trustees, in trust for the intended Husband for 99 Years,

if he should so long live, Remainder to Trustees during his Life, to support contingent Remainders; Remainder to the first and other Sons of that Marriage, Remainder to the Heir of the Body of the Husband, Remainder to the first and other Sons of that Marriage, Remainder to the right Heirs of the Body of the Husband, Remainder to the right Heirs of the Husband; the Marriage took Effect, and the Husband and Wife and Trustees to support, &c., by Fine and other Conveyance settle these Lands on the Husband for ninety-nine Years, if he should so long live; Remainder to Trustees during his Life to support contingent Remainders; Remainder to the Wife for her Life, for her Jointure, Remainder to the first and other Sons of that Marriage, Remainder over to several others; and then the Husband and Wife died without Issue; and the Plaintiff being Heir at Law to the Husband, brought his Bill to set aside this second Conveyance by the Trustees, as being made in Breach of their Trust; and insisted, that they were Trustees, as well for the Support of this Remainder as of the Remainder to the first and other Sons all being contingent Remainders; and that such Conveyances ought to be set aside, as has been the Practice of this Court, at least the Opinion of the Court these twenty Years past. Lord Chancellor held it to be so as to the first and other Sons, who came in, and were to be considered as Purchasers under the Marriage-Settlement and Portion; and said it would be dangerous for any Trustees to make the Experiment, for that it was most certainly a Breach of Trust; and if it should ever come in question, he thought this Court would set aside such a Conveyance, not but that he said the Case might possibly be so circumstanced, as that this Court would not relieve against it; but where Relief is to be given, in such Case, it is only to those who come in and claim as Purchasers, as the first and other Sons, but all the Remainders after to the Heirs of the Body of the Husband, Remainder to his right Heirs, are merely voluntary, and not to be aided (a) in this Court; and therefore dismissed the Bill. *Mich. 1713, Tipping and Piggot. (Gilb. Eq. Rep. 34, S. C. in totidem verbis. See Trevor and Trevor, P. 387, pl. 7.)*

(a) *Vide 1 Lev. 237, Jenkins and Keymis, which seems cont'.*

3. So if a Settlement on a Marriage-Treaty be made on the Husband for ninety-nine Years, if he live so long, Remainder to Trustees to preserve contingent Remainders; Remainder to the Heirs of the Body of the Husband by the Wife, Remainder to the Heirs of the Husband; and there is Issue two Sons and a Daughter; and the Wife being dead, the Husband and Trustees join with the eldest Son in a Fine of Feoffment to *J. S.*, this is a good Bar of the Trust-Estate, and the Trustees joining is no Breach of Trust, for they were Trustees purely for the Tenant in Tail, and to preserve his Estate, and not to stand in Opposition to him for the sake of those who were to come after him. *Mich. 1717, Elice (called in Vern., Elie, and in Peere Wms. and 2 Eq. Ca. Abr., Else) and Osborne, 2 Vern. 754. (Vide S. C. 1 Will. Rep. 387, somewhat differently reported 2 Eq. Ca. Abr. 702, S. C.)*

[386] * 4. *J. S.* by a Marriage Settlement was Tenant for ninety-nine Years, if he should so long live, with Remainder to Trustees and their Heirs during his Life to support contingent Remainders, with Remainder to his first and every other Son successively in Tail Male, Remainder to Trustees for 500 Years, in trust to raise Portions for Daughters, if there were no Issue Male, or that such Issue Male died without Issue before Twenty-one; *J. S.* had Issue a Son, and being of Age and about to marry, he and his Father bring a Bill to have the Trustees join in making an Estate, in order to suffer a Common Recovery, that he might be enabled to make a Settlement on his Marriage. And it was urged, that the Trustees were only Trustees for the Son, and ought to execute Estates as he should direct, he having the Inheritance in him; and that the End of the Trust was to hinder the Father from defeating the Son of the Estate. On the other Side it was urged, that these Trustees were not only Trustees for the eldest Son, but were designed as a Guard to the whole Settlement; that the Mother being living, there might be other Children, and for the Trustees to join, would be a Breach of Trust; and if there should be Daughters, they would by this Means be entirely stript of their Portions: and tho' the Term for raising them was unskilfully drawn in putting it behind the Estate-Tail to the Sons, yet this Court had set it sometimes before those Estates. There being a Daughter, in this Case, my Lord Harcourt directed, upon giving Security for the Daughter's Portion, that the Trustees should join in the Recovery. *Trin. 11 Ann. [1712], Frewin and Charleton.*

5. By a Marriage Settlement Lands were settled on the Husband and Wife for Life, Remainder to Trustees to preserve contingent Remainders, Remainder to their first

and every other Son in Tail Male ; and the Husband and Wife being married twelve Years, and having no Issue, and having contracted Debts, they bring a Bill, and pray that they may be enabled to sell Part of the Lands for Payment of the Debts ; and the Trustee consented, provided he might be indemnified ; and though it was urged, that there were Precedents of like Cases : yet the Lord Keeper refused to make any such Decree, saving, he had known People married near twenty Years without Issue, and after had Children ; but at the Importunity of Counsel, gave them Time to attend him with Precedents. *Trin.* 1683, *Daries and Weld*, 1 Vern. 181. (S. C. 2 Chan. Cas. 144.)

6. But where A. having mortgaged his Lands, and also confessed a Judgment, and he afterwards, on a Marriage Treaty, settled the Lands thus incumbered to the Use of himself for Life, Remainder to Trustees, to support contingent Remainders, Remainder to his Wife for Life, Remainder to his first and other Sons in Tail, Remainder to his own right Heirs, and having no Issue, article to sell the Lands to J. S., who brought a Bill for a specific Performance of the Agreement, and suggested that the Trustees refused to join, and that the Mortgagee threatened to enter ; it was decreed, that the Trustees should join and be indemnified, the Estate being of an Equity of Redemption only ; and there being no Issue, (tho' the Husband and Wife were married six Years) and the Wife on her Examination in Court consenting freely thereunto. *Mich.* 1693, *Platt and Sprigg*, 2 Vern. 303. But note : those Settlements can rarely be broke through but by an Act of Parliament.

[387] 7. Sir John Trevor, late Master of the Rolls, being seised of the Estate in question, which was the antient Estate of the Family, and of the Value of £239 *per Ann.* or thereabouts, on his Marriage with Jane Puleston, Widow, enters into Articles on the 23d of October 1669, with the said Jane, and with William Salisbury and Sir Richard Loyd, as her Trustees, whereby, in consideration of the intended Marriage, and of the Love and Affection he had and bore to the said Jane, and the Heirs Males of their two Bodies, he doth for himself, his Heirs, Executors and Assigns, covenant, promise and grant, with the said Trustees, their Heirs and Assigns, that he would, at his own Costs and Charges, before the End of two Years next after the Date thereof, at the Request of the said Trustees, their Heirs and Assigns, settle, convey, and assure to the said Trustees and their Heirs, as they or their Heirs, or their Counsel, should direct and appoint, the Lands in question, to the several Limitations and Uses in these Presents mentioned and expressed, and also in the said Settlement and Conveyance, as shall be agreed on by the said Sir John Trevor, William Salisbury, and Sir Richard Loyd, and to no other Use or Uses whatsoever, *viz.* To the Use of Sir John Trevor for Life, without Impeachment of Waste, and after his Decease, to the Use of the said Jane Puleston for her Life, and after her Decease to the Use of the Heirs Males of the Body of the said Sir John Trevor, upon the Body of the said Jane Puleston to be begotten, and the Heirs Males of such Heirs Males issuing ; and for default of such Issue, to the Use of the right Heirs of Sir John Trevor for ever, with a Covenant from Sir John Trevor with the Trustees and their Heirs, that the said Premises shall remain to the said Jane Puleston, during her natural Life, after the Death of the said Sir John Trevor, free from all Incumbrances, and a Covenant in the Words following : And the said Sir John Trevor doth further, for him and his Heirs, grant and agree to and with the said William Salisbury and Sir Richard Loyd, their Heirs and Assigns, that in case the Uses and Limitations in these Presents are not hereafter well and truly raised, according to the true Intent and Meaning of these Presents, that then the said Sir John Trevor, and his Heirs, shall stand and be seised of all and singular the said Premises, until such Time that a further Assurance of the said Premises be made, to such Use and Uses, Intents and Purposes, as herein before-mentioned, expressed and declared ; and soon after the Marriage took Effect, and Sir John had Issue by the said Jane, the Plaintiff, his eldest Son, the Defendants three younger Sons, and two Daughters. These Articles were laid by for several Years, and nothing farther done upon them ; but in 1692, Sir John Trevor levies a Fine of those Lands ; and the two Trustees being dead, without having ever requested a Settlement, the Plaintiff, some Time after this Fine, marries against his Father's Consent, and by several other Acts of Weakness and Disobedience, became so obnoxious to his Father, that 29th Septemb. 1699, Sir John Trevor makes a Deed, wherein he recites these Articles, that he had thereby agreed to settle and convey these Lands to the Use of himself for Life, Remainder to the said Dame Jane his Wife for Life, Remainder to the Heirs Males of his Body on the Body of the said Dame Jane to be begotten ; and reciting that his Son Edward (the Plaintiff) was very weak and

disordered in his Understanding, and that all Methods to improve him had been ineffectual ; and also reciting, that he had married with a strange Woman, and thereby [388] brought Disgrace on his Family, to the Ruin thereof ; and that he was of a furious Spirit towards his Brothers and Sisters ; therefore, and for several other Causes and Considerations, Sir *John* declares, that it was the Intent and Meaning of the said Parties, at the Time of levying the said Fine, that the same should be and enure to the Use of himself for Life, without Impeachment of Waste, then to the Use of the said Dame *Jane* for Life, Remainder to the Defendant *John Trevor*, his second Son, and the Heirs Males of his Body, with like Remainders to *Arthur* and *Tudor Trevor*, his two youngest Sons, with a Remainder to his own right Heirs ; and a *Proviso*, that if any of his three younger Sons should marry without his Consent, that then he should have Power to demise or lease the said Premises for the Term of 500 Years, reserving Rent, or no Rent, as he thought fit, to any Person or Persons he should think fit ; and the 16th of *October* next following, he makes a like Settlement of other Lands, of the Value of £630 *per Ann.* and upwards, and the 20th of *May* 1717, dies intestate, leaving a Personal Estate to the Value of about £40,000, and also a Real Estate in *Ireland*, of the Value of £750 or thereabouts, being let out on Leases for Lives, and worth to be sold, about £24,000, and also some new purchased Lands in *England*, of the Value of £300 *per Ann.* or thereabouts ; and by his Death the now purchased Lands, and the Estate in *Ireland*, descended to the Plaintiff, his eldest Son, who also became intitled to his Share of the Personal Estate, which amounted to upwards of £9000. After his Death *John Trevor* entered on the Lands settled on him as aforesaid, for which he being provided for beyond his Share of the Personal Estate, could have no Part thereof, by reason of the Statute of Distributions ; and this considerably augmented the Shares of *Edward* the eldest Son, and the other Brothers and Sisters ; notwithstanding which the Plaintiff, the eldest Son, brought his Bill to have the Trust performed, and a specifick Execution of these Articles, and that the Lands comprised in the Articles may be conveyed to him, and the Heirs Males of his Body, according to the Purport of the said Articles, and to have a Discovery of the Deeds and Writings, and an Account of the Rents and Profits from the Time of his Father's Death. It appeared that these Articles had been thrown by for several Years as useless, and were, after Sir *John Trevor's* Death, found at the Bottom of an old Trunk ; but the Plaintiff having gotten the same into his Custody brought this Bill for a specifick Performance thereof.

For the Defendants it was insisted, that though by the first Part of the Articles they seemed to be only executory, yet by the last Part, by the Covenant to stand seised, they were actually and immediately executed ; that he thereby covenanted to stand seised to the before-mentioned Uses, till a Settlement was made thereof accordingly ; that no such Settlement having ever been made, the Uses continued to be executed by virtue of that Covenant ; that by these Uses he was plainly Tenant in Tail, then by the Fine had bound his Issue, and made himself Master of this Estate, which he might settle and dispose of as he thought fit ; that he was Tenant in Tail, appeared from this, that if a Settlement had been made pursuant to the very Words of the Articles, he had an Estate-tail in himself ; that wherever the Ancestor takes an Estate for Life, and afterwards in [389] the same Deed, a Limitation is made to the Heirs Males or Heirs Females of his Body to be begotten ; in such Case the Heirs Males, or his Heirs Females, take by Descent, and not by Purchase ; that this is a known and standing Rule of Law which has never yet been shaken ; that the Limitation after to the Heirs Males of such Heirs Males was Tautology, and of no Use ; that it was saying no more than what the Law would have said without these Words ; and therefore, if there were two such Limitations one after another, they would not impeach or controul the first Limitation ; and this appears clearly by *Shelley's Case*, 1 *Co.* and in a Case of *Legut* and *Shewell* (*vide* this Case, *infra*, Letter (F), Case 7, p. 394, reported *cont.*) in this Court, where the Judges of *C. B.*, by Certificate under their Hands, gave their Opinions accordingly, that the Settlement being actually executed, the Law was open, and the Plaintiff had no Occasion to come into this Court for a specifick Execution of what was already executed ; that this was plain from the Covenant, that the Wife should enjoy during her Life, free from Incumbrances, and this Covenant does not go to the whole Estate agreed to be settled, but only to the Estate for Life of the Wife ; that if the Issue were intended to take as Purchasers, this Covenant would have been extended to the whole Estate, as the Issue under this Marriage Contract were Purchasers of it, as well as the Wife ; but the Heirs Males of the Body of Sir *John Trevor* coming in only by virtue of the Intail, it

would have been vain and idle to have carried that Covenant beyond the Estate for Life of the Wife because it would only be a Covenant for himself, that the Clause without Impeachment of Waste did not necessarily argue an Estate for Life in Sir *John Trevor*; that it was for the Sake of the intervening Jointure to his Wife, which would have obstructed that Power without express Words; and he might have been enjoined from Waste in this Court, for the Preservation of her Jointure, if he had not reserved to himself an express Liberty of committing Waste; that this Court was not bound in all Cases to carry Articles executory (admitting these were so) into Execution; that if the Nature and Circumstances of the Case were such as to make it unequitable and unconscionable, this Court would never decree a specifick Execution of Articles; that in this Case it was unreasonable to ask Assistance of this Court, when so much greater Compensation was to come to the Plaintiff; that by the Descent of so great a real Estate, and the Accession of so great a Share of the personal Estate, the Plaintiff was abundantly recompensed for the Value of the Estate in question; that it was in Sir *John Trevor*'s Power to have prevented him of either, and his not doing it was equivalent to an express Devise thereof to him, and therefore ought to be looked on as a Satisfaction; that in the Case of *Blandy Wigmore* in this Court, where the husband, before Marriage, gave a Bond to leave his Wife worth £500 if she survived him, and he afterwards died intestate, and her distributive Share came to above £500, this was adjudged as Satisfaction of the Bond; that Sir *John Trevor* plainly took it he had a Power over his Estate; that his Judgment was so well known, that he never would have attempted it, if he had not thought it clear; that the Disobedience and Behaviour of his Son, the Plaintiff, were such, as put him under a Necessity of considering the Nature and Extent of his Power over this Estate; and since he who was so good a Judge in Cases of this Nature, had dis[390]posed of the Estate, this Court would presume he had Power so to do, and that the Motives of his Proceeding herein were just and warrantable.

But notwithstanding these Reasons it was decreed for the Plaintiff. Lord Chancellor said, this Case ought to be considered now as if this Bill had been brought within two Years after the making of the Articles; that if a Bill had been then brought, there could have been no Doubt but that a Settlement must have been decreed pursuant to the Intention of the Articles; that upon Articles the Case was stronger than on a Will; that Articles were only Minutes or Heads of the Agreement of the Parties, and ought to be so modelled when they come to be carried into Execution, as to make them effectual; that the Intention of the Parties was only to give Sir *John Trevor* an Estate for Life; that if it were otherwise, it would have been vain and ineffectual; and it would have been in his Power, as soon as the Articles were made, to have destroyed them; that then the Consideration of Love and Affection which he had to *Jane* and the Heirs Males of their two Bodies, would have run thus, that he did, in consideration thereof, settle an Estate on himself, which he might give away from his Heirs Males whenever he thought fit; that this was much stronger, by reason of the Limitation, and to the Heirs Males of such Heirs Males issuing; that the Construction contended for by the Defendant, would make these Words perfectly useless and idle; that he did indeed admit it to be so reported in *Shelly's Case*, 1 Co., but he said, 1st, That was not at all material to the Principal Point in question there. 2dly, That in *Anderson's* Report of that Case, nothing like it was taken Notice of; and he said, that few or none of the Points reported by my Lord *Coke*, were the Resolutions of the Court. 3dly, That the Reason of that Case was, for that if it had vested in the eldest Son by Purchase, and that Heirs Males of the Body should have only been a Description of a Person, that then, if he had died without Issue, there had been (as was then held) an End of the Estate-tail, and none of the younger Sons could have succeeded to it; but this has been held otherwise since that Time, and a Judgment in Point, in *Carter's Reports* (as he remembered), that the Estate-tail should go to all the Sons successively, notwithstanding its vesting in the eldest Son by Purchase; that he did not know how the Case of *Legatt and Shewell* was; but if it were as cited, he thought it not Law; that the Intention of the Articles was plain, to make the Issue of that Marriage Purchasers; that they were wholly relative to a subsequent Settlement to be made; that the Agreement to settle to the Uses therein, and also in the said Settlement to be agreed upon, could only be intended such other Uses as were necessary to make the Settlement effectual; and that it could never be intended other Uses inconsistent with, and repugnant to those Articles; that if that had been their Intent, it had been in Effect but an Agreement with the Trustees to settle those Lands as he thought fit;

that the other Uses to be agreed upon, must not be such as would overthrow the present Uses, but such as would establish and support them; that this could only be by a Limitation to Trustees to support the contingent Remainders; that this Limitation to the Heirs Male of his Body was [391] in effect but a Limitation to his first and other Sons; and if the Articles had been so penned, would not this Court have decreed a Limitation to Trustees to preserve them; or if by Fine, or otherwise, they had been destroyed before they took Place, would not this Court have set them up again? that the Limitation to the Heirs Males of his Body, upon these Articles, was but a contingent Remainder, and yet such as within the Intent of the Parties ought to be preserved: that the Covenant to stand seised was until such Time as the Uses therein were well and truly raised, according to the true Intent and Meaning of the Articles: that if a Settlement had been made defective in any Particular, that would not have been final or conclusive; that a second Settlement must have been made till the Uses therein were well and truly raised; that this Covenant for ever subsisted till such Settlement were made; that he did not believe that it was Sir *John Trevor's* Opinion, that he was absolute Master of this Estate, and might dispose of it as he thought fit; that if that had been his Opinion, he would have thought it sufficient to have levied a Fine thereof, without transmitting down his Son to Posterity with such a Blemish; that the Reason of that could only be to discourage his Son from attempting to break into the Settlements he had made of this Estate; that if it were otherwise, he thought it no Imputation on Sir *John Trevor's* Judgment: that the Provocations he might be under from his Son's Disobedience and Misbehaviour might so far bias his Judgment, as to incline him to think he had Power over this Estate; that he would not look on these Settlements in 1699, as made by Sir *John Trevor*, Master of the Rolls, but as made by a Father provoked by the undutiful Behaviour of an eldest Son; that he hoped never to see the Time when this Court should so far have Power as to judge what Behaviour of a Son should amount to a Forfeiture of his Estate, and therefore thought, if the Settlement had been made, no Misbehaviour of the Son could amount to a Forfeiture of it; that as to the Estate descended on the eldest Son, this came to him by Accident; it was not given to him by his Father in Satisfaction of the Articles; and there may happen a Case where no Estate at all may descend to an eldest Son; and if a Father, upon such Articles, should have Power to defeat an eldest Son, and leave him no other Provision, it would be of dangerous Consequence to establish a Precedent of such a Power; that though the eldest Son in this Case happened to be well provided for, so were the younger Sons too; and as they were sufficiently provided for, there was the less Reason to take away this from the Eldest; that this Estate being specifically agreed to be settled, it was a Trust for the eldest Son, which he came here to have an Execution of, and not to have a Recompence or Satisfaction for it; that this Trust passed with the Lands into whose Hands soever they came, and could not be defeated by any Act of the Father or the Trustees; and therefore decreed a Conveyance to the Plaintiff and the Heirs Males of his Body, and an Account of the Profits from the Father's Death, and the Deeds and Writings to be delivered up. *Trin. 1719, Trevor and Trevor*. This Decree was affirmed in the House of Lords. (1 *Will. Rep.* 622, S. C.; 9 *Mod.* 161, S. C.; 10 *Mod.* 436, S. C.; 2 *Eq. Ca. Abr.* 475, 505, S. C.; 14 *Vin.* 572, S. C.)

(1 *Will. Rep.* 622, S. C., says, it was decreed that the second Son and his younger Brothers and Sisters should join in a Fine to Plaintiff, the eldest Son, to hold to him in Tail, with Remainders to the other Sons in Tail successively, according to the Marriage Articles. *In Dom' Proc'* this Matter was greatly debated by Lord Chan. and Lord *Nottingham* for the Decree, and Lords *Trevor* and *Harcourt* against it; but it was affirmed without any Division. *Ibid.* 634. 2 *Mod. Ca. in Law and Eq.* 161, S. C., says, after a long Debate the Decree was affirmed *in Dom' Proc'*. *Ibid.* 166.)

[392] (F) WHEN A TRUST IS TO BE EXECUTED, WHAT ESTATE OR INTEREST IS TO BE CONVEYED, AND TO WHOM.

* 1. A Husband, as Administrator to his Wife, obtained a Decree against the Trustees to raise her Portion; but he being a younger Brother, having made no Settlement on her, and having a Son by her, the Money was decreed to be raised, and put out for his Benefit for Life, then to the Son for Life, and if he leave Issue, then

for such Issue ; but if he dies without Issue, and the Father survive, he to have it, *Patch. 1700, Wytham and Cawthorn.*

* 2. Upon a Marriage, Articles were entered into, whereby it was agreed, that the Wife's Portion should be laid out in the purchasing of Lands, which should be settled on the Husband and Wife for their Lives, and the Life of the longer Liver of them, and after to the Heirs of the Body of the Wife, by the Husband to be begotten ; yet the Master of the Rolls decreed the Settlement to be to the first and other Sons, &c., so as the Husband and Wife might not have Power to bar the Issue. *Mich. 1698, Jones and Langhton.*

3. So where an Estate was limited to A. and B. in trust for C. and the Heirs of his Body ; *Proviso*, that if he die without Issue, then in trust for D. for Life, with Remainders over ; and C. brought his Bill to have the Trustees make a Conveyance of the legal Estate to him, and that it might be to him in Fee, to prevent his suffering a Recovery ; the Trustees by Answer submitted to the Court ; but the other Remaindermen, who were Defendants, opposed the executing any legal Estate to C., because he would then suffer a Recovery, and defeat the Intent of the Donor, which was, that it should be preserved for them, in case C. had no Issue ; they alledged, that C. had married improvidently, and was extravagant, and would spend the Estate, and cited the Case at the End of *Twine's Case, 3 Co.*, where, if an improvident Man makes a voluntary Settlement, to put it out of his Power to spend his Estate, this Settlement shall be supported even at Law ; and therefore a Court of Equity will never help an extravagant Man to destroy such a Settlement as this ; and that in the Case of Sir *Fra. Gerrard*, the Lord Chancellor *Jefferies* had refused to decree the Trustees for Sir *Fra. Gerrard* and the Heirs of his Body, with a Remainder to a Charity, to convey the legal Estate, so as to enable him to suffer a Recovery. On the other Side it was said, there was no Reason my Trustee should hold my Estate, whether I will, or no ; and that if a Court of Equity did not decree a Conveyance in such Case, it would be establishing a Perpetuity ; and that the constant Course of this Court is, that when Money is given to be laid out in a Purchase to be settled in Tail, with Remainders over, the Court will decree the Money to him that was to be Tenant in Tail, if he desire it, to prevent Circuity ; but the Master of the Rolls decreed the Trustees to execute a Conveyance to C. in Tail, but would not decree the Conveyance to be in Fee, though pressed to it ; and he said there may be many Reasons why a Court of Equity would not decree a Conveyance at all, in such a [393] Case, sometimes for a Politick Reason, as if it were to enable a Nobleman to suffer a Recovery, and leave the Honour bare, without Estate ; or if the Party were a notorious Spendthrift, or when the Estate-tail was only by Implication, as he said he took it in Sir *Fra. Gerrard's Case* ; and he thought it would be an ungodly Thing in the Trustees to execute a Conveyance of the legal Estate in such a Case as this at the Bar, without a Decree of the Court. *Hil. 1701, Saunders and Neril. (2 Vern. 428, S. C.) Note* : Though the Court would not decree a Conveyance in Sir *Fra. Gerrard's Case*, yet he suffered a Recovery as *Cestui que Trust* in Tail, which was held good, and the Estate enjoyed under it discharged of the Charity. *Vide 2 Vern. 702, White v. Thornburgh.*

4. But where on a Treaty of Marriage, Articles were entered into for settling Lands on the Husband for Life, Remainder to the Wife for Life, Remainder to Trustees to preserve contingent Remainders, with Remainder to the Heirs of the Body of the Wife by the Husband to be begotten, with other Remainders over ; and the Marriage took Effect ; and a Settlement was made to the Husband and Wife for their Lives successively, Remainder to Trustees to preserve contingent Remainders, Remainder to the first Son of that Marriage, and the Heirs of the Body of such first Son ; and so to the second and other Sons of that Marriage, in like Manner, with a Remainder to the Heirs of the Body of the Wife by her said Husband to be begotten. They had Issue one Daughter only, then the Husband died ; and the Wife married a second Husband, and they both joined in a Fine and Recovery, by which the Daughter being barred of her Inheritance, brought her Bill to carry the Articles into Execution ; for that by the Settlement Care was taken of the Daughters (*Les Sons*) pursuant to the Intention of the Articles ; but no Care was taken of the Daughters in Regard the Limitation to the Heirs of the Body of the Mother by the first Husband made her Tenant in Tail general, and consequently at Liberty to defeat her Daughters, as she has now done by this Fine and Recovery, which was contrary to the Intention of the Articles, which were to make an effectual Provision for the Issue of that Marriage. But Lord Chan-

cellor said, if no Settlement had been made, and you had come hither to have enforced the Making of one pursuant to the Articles ; 'tis true, this Court would have taken Care that the Daughters should likewise have been secured of the Provision intended them by the Articles, by limiting a Remainder to the Daughters and the Heirs of their Bodies to be begotten, on Failure of Sons ; but here a Settlement being actually made, and accepted by the Parties, and in the Provision for the Sons, stricter than the Articles themselves imported ; and for the next Remainder, it being limited in the very Terms of the Articles, he could now make no Alteration in it ; and though a Difference was offered, where the Settlement was made before Marriage, and where after : that where it was before, this Court would not interpose, as they might, where it was after Marriage ; yet the Court had no Regard to this Distinction, but dismissed the Bill. *Pasch. 1715. Burton and Hastings. (Gilb. Eq. Rep. 113, S. C. and Decree. 9 Mod. 131, S. C.)* (In *Gilb. Rep. 114*, it is said, but too hastily dismissed the Bill.)

5. But where on a Treaty of Marriage between the Defendant and the Plaintiff *Joanna*, the Defendant entered into a Bond to the Plaintiff *Joseph*, Father of the Plaintiff *Joanna*, with Condition to surrender certain Copyhold Lands to the Use of himself for Life, Remainder [394] to the Plaintiff *Joanna* for Life, Remainder to the Heirs of their two Bodies to be begotten, with Remainder to the Heirs of the Husband ; the Marriage took Effect ; and a Bill was brought against the Husband to compel a Surrender pursuant to the Intent of this Bond ; and the Husband making Default at the Hearing was decreed to surrender to the Use of himself for Life, Remainder to the Use of his Will for Life, Remainder to the Use of their first and other Sons in Tail General successively, with a Remainder to the Daughters of their two Bodies to be begotten in Tail General ; and that in the mean Time, till such surrender was made, the Court declared that the Copyhold Land should be held and enjoyed according to these Uses. *Pasch. 1716. Nandick and Wilkes. (Gilb. Eq. Rep. 114, S. C. under the Name of Nandike and Wilkes, in totidem verbis. Note : This Decree was on a Bond, where, tho' the Penalty seems to have been the only Sanction intended for securing the Performance of the Condition ; yet a specifick Execution was decreed, and in such a Manner too as effectually to secure the Issue from being defeated by making them Purchasers. Gilb. 114.)*

6. *W. B.* devised £300 to her Daughter *M.*, to be laid out by her Executrix in Lands, and settled to the only Use of her Daughter *M.* and her Children ; and if she died without Issue, the Lands to be equally divided between her Brothers and Sisters then living ; the Plaintiff married *M.* the Legatee, and had Issue by her, but she and her Child being both dead, and the Money not laid out in Land, the Bill was, that the Plaintiff might either have the Money laid out in Lands, and settled on him for Life, as being Tenant by Curtesy, or in lieu of the Profits of the Lands might have the Interest of the Money during his Life ; and it was held by the Court, that if it had been an immediate Devise of Land, *M.* the Daughter would have been by the Words in the Will Tenant in Tail, and consequently the Husband would have been Tenant by the Curtesy ; and in case of a voluntary Devise, the Court must take it as they found it ; although upon the like Words in Marriage-Articles it might be otherwise, where it appeared the Estate was intended to be preserved for the Benefit of the Issue ; and therefore decreed the Money to be considered as Lands, and the Plaintiff to have the Interest or Proceed thereof for his Life, as Tenant by the Curtesy. *Hil. 1705. Sweetapple and Bindon, 2 Vern. 536. (S. C. cit. 2 Vern. 585.)*

7. *A.* by Will bequeathed the Surplus of his Personal Estate to be laid out in a Purchase of Lands to be settled on *B.* his Nephew for Life, and after his Decease to the Heirs Males of the Body of the said Nephew, and to the Heirs Males of the Body of every such Heir Male, severally and successively one after another, as they shall be in Seniority of Age and Priority of Birth ; every elder and the Heirs Males of his Body to be preferred before every younger ; and for want of such Issue, to his Brother *C.*, the Plaintiff, for his Life, &c., in the same Manner. *B.* the Nephew, brought a Bill to have an Execution of the Trust (but *C.* the Plaintiff was no Party to the Suit), and had a Decree, that an Account should be taken of the Assets ; that the Estate should be laid out in Land, and that to be settled by the Approbation of a Master, according to the Direction of the Will ; after the Account was taken, *B.* petitioned the Court, suggesting, that if the Money should be laid out in a Purchase, he was to be made Tenant in Tail of the Land by the said Will, and might immediately bar it ; and therefore prayed, that no Purchase might be made, and obtained an Order to that Purpose,

and had the greatest Part of the Money paid him ; but before the Rest was paid died without Issue, having first made his Will, and subjected all his Real and Personal Estate to the Payment of his Debts ; and this Bill was brought by *C.* to have an Account of the Estate, and that it might be laid out in a Purchase for his Benefit ; for that *B.* was not by his Uncle's Will, to have been Tenant in Tail, as he alledged, and that the former Proceedings were collusive, and he no Party to them, and so not bound by them. It was said, it is plain, from the Frame of the Will, that the Testator's Meaning was that his Nephew *B.* should be only Tenant for Life, and not have Power to bar his Issue ; and then a Court of Equity will decree it to be settled according to the Intent of the Testator ; and the Case of *Leonard and Earl of Sussex* was cited, and the common Case of Marriage-Articles, where tho' they were so worded, as that if a Settlement were made in the precise Words of them, the Husband would be Tenant in Tail, yet this Court has decreed it to be settled on the Husband for Life only, and then upon the first and other Sons. On the other Side it was said, if the latter Words in this Will signify any thing, it is no more [395] than what is included in the first, & *expressio eorum quæ tacite insunt nihil operatur* ; that this therefore is an equitable Estate, and may be barred by Deed, &c. Lord Keeper : There having been a Decree already in this Case, it must depend on what it is at Law ; and I am inclined to think the Judges there may take it to be an Estate tail ; if it were *res integra*, I think the Court had better in such Cases decree the Trust to be executed according to the Letter (*a*), and let the other take what legal Advantages he can ; but that has gone too far to be disturbed now ; the Thing is done and not open to me ; and there may be a Parity of Reason between a constructive Tenancy in Tail and an express one ; and Parity of Reason to have an equitable Tail bound by Decree (not by Deed) as a real one by Recovery where Settlements are agreed to be made upon valuable Considerations, this Court will aid in artificial Words, and make an artificial Settlement ; but I never knew it done for a bare Volunteer ; the Doubt in *Shelley's Case*, 1 *Co.*, arose about the Word *Heirs* ; but, as I said before, this must depend on what it is at Law ; therefore let a Case be made, and I will desire the Opinion of the Judges of the *C. B.* upon it. *Pasch.* 1706. *Leggat and Shewell*. Note : Afterwards three of the Judges certified their Opinion, that *B.* the Nephew had but an Estate-tail. (1 *Will. Rep.* 87, *Easter* 1706, *S. C.* by the Name of *Leggate and Sewell*, says, *Trevor, Blencow and Dormer*, three of the Judges of *C. B.* certified their Opinion, that *B.* the Nephew, by virtue of the said Will, had an Estate tail vested in him ; but *Tracy, J.*, was of Opinion, that he had only an Estate for Life. The Court not satisfied with the Opinion of the three Judges, directed that an Ejectment should be brought in *B. R.*, in order to have the Matter settled, but the Parties agreeing, the Question was not determined. *Ibid.* 92, yet in 2 *Ves.* 695, *Ld. Hardwicke* says that *Ld. Cowper* held himself bound to agree with the three Judges and so decreed. *Gilb. Eq. Rep.* 141, *S. C.* but *S. P.* does not appear. 2 *Vern.* 551, *S. C.* But the Opinion of the Judges does not appear though they were to be attended with a Case. *Vide S. C. cit. ante*, 389.)

(*a*) It is now constantly held in Chancery that if Lands are vested in Trustees to the Use of one and the Heirs of his Body, with Remainder over, the Trustees are not to convey a Fee, but an Estate-tail, though he will have Power to bar the Intail, when the Conveyance is made to him, and it would avoid Circuity ; so if a Sum of Money be appointed to be laid out in a Purchase, and the Lands to be settled in Tail, the Purchase and Settlement shall be made accordingly, and not the Money paid the Party (*b*) ; for the Remainder-man has a Chance for the Estate, in case the Tenant in Tail in Possession die without Issue before any Recovery suffered, which he may omit through Ignorance or Forgetfulness, or he may be prevented by Death before he has completed it.

(*b*) Yet in *Coleman's Case*, *Trin.* 11 *Geo.* 2, where *A.* left £1000 to Trustees to purchase Lands, to be settled on *B.* in Tail, Remainder to *C.* upon Petition his Honor decreed the Money to *B.* before Purchase made. *MS. Notes.*

* *S. Henry Collingwood*, the Plaintiff's Brother, having married *Catherine Moreton*, the only Daughter and Heir at Law of *George Morerton*, in order to pay off several Debts which were charged on his own Estate, and likewise several Debts which were charged on his Wife's Estate, both by her Father and her two Brothers, who were dead, and also by herself, by Lease and Release and Fine, in 1709, *Henry* and his Wife conveyed the Wife's Estate to Trustees and their Heirs, in Trust to sell and dispose thereof, and of every or any Part thereof, for Payment of the said Debts, with Interest

and Charges; and if any Money shall remain in the Trustees' Hands, they were to pay it to the said *Henry* and *Catherine* his Wife, as the [396] said *Henry* and *Catherine* should, by any Writing duly executed before three or more Witnesses, direct or appoint; the Trustees sold all the Lands except two Farms, and paid all the Debts; *Catherine* died in the Life time of her Husband, leaving Issue only a Daughter, who was married to the Defendant; *Henry Collingwood*, by his Will 4th of Jan. 1710, devises thus: I give to my dear Brother *George Collingwood* (the Plaintiff) all my Lands and Houses, with the Appurtenances lying and being in A. to the Use of him and his Heirs, and dies, leaving no other Lands in A. but the two Farms above mentioned, which were his Wife's, and remained unsold after his Death: the Defendants entered on these two Farms, claiming them as the Inheritance of the Mother, and that from her they descended to the Defendant her Daughter: and they insisted, that *Henry* had no Power under the Settlement to dispose of the unsold Farms, but that the same, or the Trust thereof, descended to the Defendant: upon which this Bill was brought for a Discovery of the Settlement and Fine, and to have a Conveyance from the Trustees. And it was insisted on for the Plaintiff, that it appeared by the Settlement, that all the Estate was intended to sold: in which Case *Henry* surviving would have been intitled to what was unsold, as he would have been to the Purchase money, if sold, and consequently had a Power of disposing thereof; and that the Trustees, after the Trusts performed, stood seised in Trust for *Henry* and his Heirs, who had by his Will well devised the same to the Plaintiff. The Defendants insisted, that the Reason of subjecting the whole Estate to be sold for the Payment of Debts, was, that there might be a sufficient Fund for that Purpose, not to empower the Trustees to sell the whole for the Sake only of turning it into Money: when it appeared that Part thereof would be sufficient: that they had accordingly done their Duty, in selling as much as was necessary: and for what remained unsold, it was a resulting Trust for the Defendant, the Heir at Law, and that as it was the Wife's Inheritance, it was not subject to the Husband's Debts, but at her Pleasure: and when she has been so kind as to let in them on her own Estate, it would be unreasonable to carry it further, and take away her whole Estate from her, only to enable her Husband to give it away, and even disinherit, as he has done in this Case, both his own and his Wife's only Daughter and Heir at Law; and in this Case there was an Overplus in Money, even of what was actually sold, which the Husband gave away to a Woman he had Children by, and gave his own Daughter but one *Grace*. But my Lord Chancellor was of Opinion for the Plaintiff, and decreed a Conveyance to be made to him by the Trustees of the unsold Estate, and said, that the Trustees having Power to sell the whole, it must be considered in Equity as it actually sold; in which Case the Money would have gone to the Husband, and so must the Land too, else it would be in the Power of the Trustees to make it Land, or make it Money at their Pleasure, and so to give it to whom they should think fit: but the Intention appearing to be, that the Residue should go to the Husband and Wife and the Survivor of them, it must go accordingly, whether Land or Money. *Pasch. 1727, Collingwood and Wallis.*

* 9. So where A. having five Nieces, his Coheirs at Law, who had each of them several Children, devised a very considerable Estate to Trustees and their Heirs, to be sold, and to put the Money arising by such Sale, into five equal Parts and Shares, and out of each 5th [397] Part or Share, to pay £1000 a-piece to the several younger Children of each of his five Nieces, and the Residue of the Money of each 5th Part to be paid to such of his said five Nieces as should be then living; and in case of their Death, then their Shares to be equally divided amongst their younger Children, which should be alive at the Time the Dividends were, or ought to be made; great Part of this Estate was sold many Years since, and the £1000 a piece to the several Children of the five Nieces had been paid; after which the Nieces themselves being intitled to the Remainder of the Trust Estate, chose not to have it sold, but continued to receive the Rents and Profits thereof in five equal Shares for several Years; and they being all now dead, the eldest Son of each of them claimed it as a resulting Trust for their respective Mothers, and that from them, it descended to their eldest Sons as Heirs at Law; and the rather, for that all the Purposes, for which the Trust was created, being satisfied, their Mothers might in their Lifetimes have compelled the Trustees to have executed Conveyances to them respectively of the unsold Estate; and they, as their Heirs at Law, stood in their Place, and had the same Right; and that otherwise it would be in the Trustees' Power, by delaying or hastening the Sale, to give the Surplus

to whom they pleased ; and that it was now two Years ago since the Trust was created, and yet great Part of the Estate remained still unsold. But the Court directed the Rest of the Estate to be sold, and the Money to be divided among the younger Children of each Niece, according to the Will, as it would have been if the Nieces had died before the £1000 a-piece to their younger Children had been paid, or before sufficient of the Estate could have been sold for the raising thereof ; the Testator plainly intending that the younger Children of each Niece, not their eldest Sons, or Heirs at Law, should stand in their Mother's Place ; and greatly blamed the Trustees for having so long delayed the Sale. *Pasch. 1727, Dancers and Folkes. (S. C. 2 Eq. Ca. Abr. 562.)*

(G) TRUSTEES, HOW TO ACCOUNT, AND WHAT ALLOWANCES TO HAVE.

1. The Defendant was Trustee to the Plaintiff an Infant, who received for him £40 in Gold ; the Trustee was robbed by his own Servant, who lived with him in the House, of £200 and this £40, which last Sum was only proved by his own ; yet my Lord Chancellor allowed it on Account, for he was but to keep it as his own. *Hil. 30 Car. 2 [1679], Morley and Morley, 2 Chan. Ca. 2.*

2. A Trustee shall not be charged with imaginary Values, but only as Bailiff, tho' very supine Negligence might indeed, in some Cases, charge a Trustee with more than he had received ; but the Proof thereof must be very strong ; and it is a Hardship on him, that he is allowed nothing for his Pains. *Palmer v. Jones, 1 Vern. 144*, and said, that it was a hard Rule to charge a Trustee with what he had made, or might have made without his wilful Default ; but the Reason was, because the Court could never yet find where else to fix the Measure.

3. If a Trustee sues for the Trust-Estate, and obtains a Decree with Costs of Course, and the Costs taxed him are short of his real Costs ; and the *Cestui que Trust* exhibits a Bill for Account of the Trust-Estate ; the Trustee, in his Disbursements, shall be allowed [398] the full and necessary Costs, and shall not be concluded by the Costs taxed. *Hil. 24 Car. 2 [1673], Amand and Bradbourne, 2 Chan. Ca. 138.*

4. If two Estates are conveyed to a Trustee for Payment of several and distinct Debts, and the Heir at Law brings a Bill for an Account, and afterwards prays that the Bill may be dismissed as to one of the Estates, yet an Account shall be taken of both Estates. *Vide Purefoy v. Purefoy, 1 Vern. 28, 29. (S. C. but not S. P. ante [1 Eq. Ca. Abr.], 138.)*

5. A. devised £100 a-piece to four Children, payable at Twenty-one, or Marriage, with Maintenance not exceeding the Interest in the mean Time ; B. was appointed Trustee of a Trust Estate, to raise and pay the Legacies as aforesaid ; and he paid £20 in placing out one of the Children Apprentice, who died before his Age of Twenty-one Years ; and the Court held that the £20 was laid out and that the Trustee should be allowed it. *Franklin v. Green, 2 Vern. 137.*

6. But if a Trustee for the Payment of Children's Portions pays one of them his full Share, and the Trust-Estate decays, he shall not be allowed such Payment, [Tilsly v. Throckmorton] 2 Chan. Ca. 132, per Lord Keeper ; and it was urged, that though the Appointment was to pay one in the first Place, &c., yet it would not be good, as it did not denote Preference in the Quantity of the Sum to be paid ; but my Lord Keeper was of another Opinion as to this Point ; but it was clearly agreed, that a specifick Legatee may be paid in the first Place ; but for this *vide Title Legacy [1 Eq. Ca. Abr. 294].*

7. Although an Executor or Trustee is not impowered or directed to place out Money at Interest ; yet if he makes Interest, he shall be accountable for it. *Pasch. 1706, Lee and Lee, 2 Vern. 584*, decreed accordingly.

* 8. But afterwards a Difference was taken by my Lord *Mardlesfield. viz.* that, if an Executor or Trustee of Money, places it out in the Funds, or on other Security, whereby he gains considerably, he shall have the whole Benefit thereof to himself, in respect of the Hazard he run of being a considerable Loser thereby, which he must have borne ; but if such Trustee or Executor were an insolvent Person at the Time of placing out such Trust-money, there the *Cestui que Trust* shall have the whole Benefit gained thereby, as he only could have borne the Loss thereof, if any had happened, the Trustee or Executor, by reason of his Insolvency, being incapable thereof, and consequently running no Hazard at all. *Mich. 1719, Bromfield and Wytherly. (S. C. ante [1 Eq. Ca. Abr.], 239 ; Prec. in Chan. 505.)*

(H) HOW FAR TRUSTEES ARE ANSWERABLE FOR EACH OTHER.

1. If two Trustees for the Sale of a Trust-Estate join in a Conveyance of it to a Purchaser, and each of them receives £1000, and they likewise join in Receipts for the Consideration-money, though afterwards one of them becomes insolvent, yet the other is not liable to the Money received by him: for their joining (without which the Estate could not be sold) was absolutely necessary. [*Townley v. Challoner*,] *Cro. Car.* 312. (See the Case of *Churchill and Hobson*, p. 247, pl. 2; 1 *Salk.* 318, S. C. and P.; 2 *Vern.* 504, 515, *Fellowes and Mitchell and Owen*, S. P. and 1 *Will. Rep.* 81, S. C. and P.)

[399] 2. But if two Executors join in the Sale of the Goods, &c., of the Testator, they shall be both chargeable, though one of them only received the Money, for there was no Necessity for their joining. *Murrell v. Cox*, 2 *Vern.* 570. [*Churchill v. Hobson*] 1 *Salk.* 318. (S. C. ante [1 Eq. Ca. Abr.], 247.)

CAP. LIV.

WASTE.

(A) WASTE, IN WHAT CASES RESTRAINED IN EQUITY.

1. If there be Lessee for Life, Remainder for Life, the Reversion or Remainder in Fee, and the Lessee in Possession wastes the Lands, though he is not punishable for Waste by the Common Law; yet he shall be restrained in Chancery, for this is a particular Mischief. 1 *Roll. Abr.* 377; *Moor*, 554, S. P. *Tracy v. Tracy*, 1 *Vern.* 23, S. P.

(That such Lessee is not punishable by the Common Law, during the Continuance of the Remainder, though after its Determination he is. *Vide Co. Lit.* 54; 2 *Inst.* 301; 5 *Rep.* 76.)

2. But if such Lessee has in his Lease an express Clause of *without Impeachment of Waste*, he shall not be enjoined in Equity. *Tracy v. Tracy* 1 *Vern.* 23.

(Although a Court of Equity will not assist a Forfeiture, yet the Tenant in Possession shall be restrained in Equity from committing Waste in all Cases, in which Waste is punishable by Law; and for this Purpose an Injunction will be granted before the Bill is filed; also an Injunction will be granted to stay Waste in Behalf of an Infant *in Ventre sa mere*; Equity will likewise, in some particular Cases, restrain the Tenant from committing Waste, where it is dispunishable by Law, either by the Nature of his Estate, or by express Grant of *without Impeachment of Waste*; but where by the Agreement of the Parties the Lease is made without Impeachment of Waste, Equity will not restrain the Lessee from cutting Timber, Plowing, opening Mines, &c., though such Lessee shall be restrained from pulling down Houses, defacing Seats, &c. *Hard.* 96; 1 *Chan. Rep.* 13, 14, 106, 116; 2 *Vern.* 392, 711; 1 *Salk.* 161; 2 *Chan. Ca.* 32; 2 *Chan. Rep.* 94.)

3. A. on the Marriage of his eldest Son, in consideration of £10,000 Portion, settled (*inter alia*) *Raby Castle* on himself for Life, without Impeachment of Waste, Remainder to his Son for Life, and to his first and other Sons in Tail Male; afterwards, having taken some displeasure against his Son, he got 200 Workmen together, and of a sudden stript the Castle of the Lead, Iron, Glass, Doors, and Boards, &c., to the Value of £3000. And the Court, on the Son's filing his Bill, granted an Injunction to stay committing of Waste in pulling down the Castle, and upon hearing the Cause decreed not only the Injunction to continue, but that the Castle should be repaired, and put in the same Condition it was in; and for that Purpose a Commission was to Issue to ascertain what ought [400] to be repaired, and a Master to see it done at the Charge and Expence of the Father, and the Son to have his Costs. *Hil.* 1716, *Vane and Lord Bernard*, 2 *Vern.* 738; 1 *Salk.* 161, S. C. (S. C. *Gilb. Eq. Rep.* 127; *Prec in Chan.* 454; 2 *Eq. Ca. Abr.* 244.)

* 4. If A. is Tenant for Life, Remainder to B. for Life, Remainder to the first and other Sons of B. in Tail Male, Remainder to B. in Tail, &c., and B. (before the Birth

of any Son) brings a Bill against A. to stay Waste, and A. demurs to this Bill, because the Plaintiff had no Right to the Trees, and none that had the Inheritance was Party : yet the Demurrer will be over ruled, because Waste is to the Damage of the Publick, and B. is to take Care of the Inheritance for his Children, if he has any, and has a particular Interest himself, in case he comes to the Estate. *Trin.* 1700, *Dayrell and Champness*.

* 5. On a Motion for an Injunction to stay a Jointress, Tenant in Tail after Possibility, &c., from committing Waste ; it was urged, that she being a Jointress within the 11th of H. 7, ought in Equity to be restrained from cutting Timber, that being Part of the Inheritance, which by the Statute she is restrained from aliening ; and the Court granted an Injunction against wilful Waste in the Seite of the House, and pulling down Houses. *Hil.* 1701, *Cooke and Whaley*.

* 6. But where a Jointress, who had a Covenant that her Jointure should be of such a yearly Value, which fell short, tho' her Estate was not without Impeachment of Waste ; yet the Court would not prohibit her committing Waste, so far as to make up the Defect of her Jointure. *Mich.* 1698, *Carew and Carew*. (S. C. *ante* [1 Eq. Ca. Abr.] 221.) But if an Action of Waste be brought against her, if Chancery will injoin the Action, Q.

7. A. devised Lands, on which Timber was growing, to his Wife for Life, Remainder to B. in Fee, paying several Legacies within a limited Time, and in default of Payment, the Remainder to C. he paying the Legacies ; and on a Bill brought by B. the Court gave him Leave to cut Timber for the Payment of the Legacies, tho' it was opposed by the Tenant for Life, and the Devisee over, he making Satisfaction to the Widow for breaking the Ground by Carriage, Waste, &c. *Trin.* 1690, *Claxton and Claxton*, 2 *Vern.* 152. (*Proc. in Chan.* 15, S. C. says the Court without difficulty decreed it.)

8. So where a Man created a Term for 500 Years, in trust for himself and his Wife for Life, Remainder to Trustees for Payment of Debts and Annuities ; and by Will devised the Reversion thereof to A. for Life, without Impeachment of Waste, Remainder to his first and other Sons in Tail Male, with Remainder over ; A. being in Want, the Court gave him Leave to cut down Timber to the Value of £500, tho' the Debts and Annuities were not paid ; the Trustees having no Power to sell the Timber, the Debts being like to have a long Continuance, and there being a great Deal of decaying Timber on the Estate. *Hil.* 1690, *Aspinwall and Leigh*, 2 *Vern.* 218. (*Vide Jesus College v. Bloom, ante* [1 Eq. Ca. Abr.] 75.)

[401] CAP. LV.

WILLS AND TESTAMENTS.

- (A) What shall be established in Equity as a good Will of a Real Estate ; and here of the Circumstances requisite by the 32 H. 8, cap. 1, and the 29 Car. 2, cap. 3.
- (B) Of Testaments and Nuncupative Wills.
- (C) Fraud in obtaining a Will, where examinable.
- (D) What will amount to a Republication, and where a Republication will make the Devise good.
- (E) Of Revocations in Equity.

(A) WHAT SHALL BE ESTABLISHED IN EQUITY AS A GOOD WILL OF A REAL ESTATE ; AND HERE OF THE CIRCUMSTANCES REQUISITE BY THE 32 H. 8, CAP. 1, AND THE 29 CAR. 2, CAP. 3.

1. By the Common Law, no Lands or Tenements (except by particular Custom) were devisable by any last Will or Testament, neither could they be transferred from one to another, but by solemn Livery of Seisin, Matter of Record or sufficient Writing. *Co. Lit.* 111 b. Because it was presumed, that the Testator, would do that *in Extremis*, that he would not do in his Health ; that it proceeded from the Distemper of his Mind, by the Anguish of his Disease, or by sinister Persuasion, to which in his Sickness he was more subject. 1 *Roll. Abr.* 608.

(The true Reason seems to be from the Nature of the feudal Tenure, and the Relation that was first established betwixt the Lord and his Tenant. For tho' Donations, after Length of Time, were made to the Tenant and his Heirs, or the Heirs Males or Females of his Body, under certain Duties and Services expressly reserved, or which the Law created; and tho' the Word *Heirs*, &c., be Words of Limitation, and appropriated to measure out the Length or Continuance of the Estate; yet they were always understood the Heirs of the present Tenant, who being liable to the same Services when they came into the Tenancy, the Lord was to have the Tuition and Education of such Heirs, in case they happened, by reason of their Minority, to be incapable of performing the Services, that so he might, by his Care and Discipline, secure to himself Tenants always capable thereof, either in their own Persons, if they happened to be Males, or by proper Marriages with his Tenants, if they proved to be Females; and therefore by no Act of the Tenant's could he dispose of the Feud, so as to defeat the Lord of the Advantages of his Seignior; and hence it was, that a Tenant could not devise it, even to his own Heir, so as to make him a Purchaser thereof; for then he coming in, not by the Donation of the Lord, but by the Disposition of the Tenant, tho' he remained liable to the naked Services; yet the Lord lost the Advantages of Wardship, Marriage, &c., which were annexed only to those who came in upon the Terms of his own Donation by Descent.)

[402] 2. But the Statute 32 H. 8, cap. 1, (a) enacts, That every Person having Manors, Lands, &c. (b), shall have Power to give, dispose, will, and devise (c) by Will in Writing (d), or otherwise, by Act executed in his Life-time, all his said Manors, &c., any Law, Statute, &c., to the contrary notwithstanding, &c.

(a) There have been several Resolutions concerning Wills made pursuant to this Statute, since the making thereof; but as the Statute 29 Car. 2, is now the proper Pattern to follow, having altered the Forms, by requiring more Ceremony, and greater Exactness, it will be sufficient barely to mention some of the Cases on this. (b) That the Lands must be *sua*, and therefore Lands purchased after the Will is made, will not pass, *vide* *Plow.* 344, Title *Devise*, Letter (B). (c) A Devise of an Authority to Executors to sell, is within the Act. *Moor.* 341; *Cro. Jac.* 345. (d) A Man beyond Sea wrote a Letter, in which he declared his Will to be, that his Land should go in such Manner; and adjudged a good Will. *Moor.* 177, *pl.* 314. So if a Man had ordered one to make his Will, and thereby to devise *White-acre* to A. and his Heirs, and *Black-acre* to C. and his Heirs, and he had written the Devise to A., but before the Devise to C. was written, the Devisor had died; yet as to A. this had been a good Devise. 3 Co. 31 b. So a Will was held good, where a Lawyer took only short Notes, with Design to reduce it into Form, which he afterwards did; but the Devisor died before it was read to him. 1 And. 34; *Kelw.* 209; *Dyer*, 72; 1 *Brown*, 44. A Will wrote without the Appointment of the Testator, if read to him, and approved by him, good: Signing and sealing was not necessary. *Vide* *Cro. Eliz.* 100; *N. Dyer*, 712 a; *March.* 206; 2 *Leon.* 35; 1 *Sid.* 315.

3. An Uncle having devised his Estate from his Nephew and Heir at Law, a younger Brother of the Heir at Law, at the Uncle's Funeral, snatched the Will out of the Hands of the Executor, and tore it in many small Pieces; but most of them, and particularly such Part wherein was the Devise of the Land, were picked up and stitched together again; and on a Bill to have the Will established, it was decreed, that the Devisee should hold against the Heir, and he to convey to him, altho' there was no direct Proof made, that the Heir directed the tearing of the Will. *Mich.* 1702, *Haines* and *Haines*, 2 *Vern.* 441.

(A Will tho' gnawn to Pieces by Rats in the Life of the Devisor, if by joining the Pieces together the Contents can be known, will be good; so if a Will continues in Writing at the Death of the Devisor, tho' gnawn, burnt or lost after, it shall stand good. *Allen*, 2, 55. A Writing in Form of an Indenture, and sealed and delivered, if proved to be intended a Will, shall be good as such. 1 *Chan. Ca.* 248; 1 *Mod.* 117.)

4. A. by Will in Writing, attested by three Witnesses, devised a Copyhold Estate to his Wife; afterwards the Testator, on the Day of his Death, directed his Nephew to obliterate some Devises, but nothing as to the Copyhold devised to his Wife, and then caused a *Memorandum* to be written, that he had examined, perused and approved of the Will as so obliterated and altered by his Nephew, in his Presence, but did not republish it in the Presence of three Witnesses, but directed his Nephew to have it written out fair; but before it was brought back, he became delirious; and this was

held a good Will as to the Copyhold. *Pasch.* 1705, *Burkitt and Burkitt*, 2 *Vern.* 498.

(By the 29 *Car.* 2, *cap.* 3, it is enacted, that all Devises of Lands or Tenements devisable by the Statute of Wills, or any Custom, shall be in Writing, and signed by the Party devising, or some other in his Presence, by his Direction, and shall be attested and subscribed in his Presence, by three or more credible Witnesses, or else shall be void.)

5. If a Will is attested by three Witnesses, who severally signed their Names, not being present together: yet each signing being in the Presence of the Testator, makes it a good Will within the Statute. [Anon.] 2 *Chan. Ca.* 109.

6. But if a Man subscribes and publishes his Will in the Presence of two Witnesses, and they subscribe it in his Presence, and after makes [403] a Codicil in Writing, reciting that he had made a former Will, and confirmed the same (except what was excepted by the Codicil) and declares, that the Codicil should be taken as Part of his Will, and publishes it in the Presence of one of the same and another Witness; this is not a good Will, for there were not three subscribing Witnesses in the Presence of the Testator; and one of the Witnesses to the Codicil never saw the Will. *Lea and Lib.* 3 *Mod.* 262. adjudged, though objected, the Will and Codicil made but one Will, and the Circumstance of three Witnesses wanting to complete the Will, was perfected by the Codicil. (S. C. 1 *Show.* 68, 88; 3 *Salk.* 395; *Comb.* 174; *Carth.* 35; *Gillb. Eq. Rep.* 263; *Holt*, 742.)

7. So if a Man makes a Will in several Pieces of Paper, and there are three Witnesses to the last Paper, and none of them ever saw the first; this is not a good Will. 3 *Mod.* 263, *per Curiam*. A Will void for want of Witnesses will not operate as an Appointment to a Charity. *Vide* [Att. Gen. v. Barnes] 2 *Vern.* 597, 598, and Title *Charity*.

8. The Testator desired the Witnesses to go into another Room seven Yards distant to attest his Will, in which there was a Window broken, thro' which the Testator might see them; and it was held, that this Will was according to the Statute of *Frauds*; for tho' the Statute requires attesting in his Presence, to prevent obtruding another Will in the Place of the true one; yet it is enough if the Testator might see; it is not necessary that he should actually see them signing; for at that Rate, if a Man should but turn his Back, or look off, it would vitiate the Will; and here the signing was in the View of the Testator; he might have seen it, and that is enough; so if the Testator, being sick, should be in Bed and the Curtain drawn. *Pasch.* 3 *Jac.* 2 [1687], *Shires and Glascock*, 2 *Salk.* 688, adjudged in *C. B.* on a feigned Issue. (S. C. *Carth.* 81.)

9. If the Testator writes the Will with his own Hand, tho' he does not subscribe his Name, but seals and publishes it, and three Witnesses subscribe their Names in his Presence, it is a good Will; for his Name being written in the Will, it is a sufficient signing; and the Statute does not direct, whether it shall be at the Top, Bottom, &c. *Lemayne and Stanley*, 3 *Lev.* 1, adjudged *per totam Curiam*, and by three Judges against one, the sealing is a signing within the Act. And note: It is not said in the Act, that the signing shall be in the Presence of the three Witnesses at the same Time. 3 *Mod.* 219.

(B) OF TESTAMENTS AND NUNCUPATIVE WILLS.

* 1. A. being very ill, desired B. to make her Will, who wrote down only Names and initial Letters to this Effect, *viz.* To *Tho. West* £200, to *Jo. Iar.* £100, to *Reb. Cro.* £50, to *Sis.* to *Self* £10, and so to several other Persons in like Manner, to above £400, which being more than her Estate, B. made an Alteration in a second Column, by subtracting Part of the Sums from some of the Legatees, as set down in the second Column, and then told A. the Sense of the proposed Devises; there were two Persons in the Room that did not hear any Thing that passed between A. and B., but only heard the Testatrix at last pronounce, that all was well; B. went to a Scrivener to have the Devises drawn out at Length and in Form, and before she returned the Testatrix died; the Judge be-[404]-low pronounced for this Will; but upon an Appeal to the Delegates it was reversed; and in this Case it was agreed, that if the Will had been written in Words at Length, so as they had carried a Sense and Meaning in themselves, it had been a good Will; for that there was one Witness that wrote it, and two that heard the Testatrix pronounce, that it was well; which would have been intended to have amounted to a second Witness, in regard it appeared on all Hands, by several Witnesses, that the Testatrix did then seriously dispose herself to making her Will; and for that

was quoted the Case of one *Pepper*, where a Person disposed herself to make her Will, and dictated it to a Person, who wrote it down ; and another, not called in as a Witness, lay behind the hangings out of Curiosity, and yet such Will was allowed to be good, being proved by these two Witnesses ; but they distinguished this Case, because the Will was not substantive, but was to take its Sense from the Interpretation of the Witness, and so there would be *Innuendo* upon *Innuendo* ; which made it purely a Nuncupative Will ; and as such, not being attested by the Number of Witnesses appointed by the Statute of Frauds and Perjuries, the Will and Legacies were void. 26 Feb. 1710, *Davis and Gloucester*, before the Delegates.

(By the 29 *Car. 2. cap. 5.* it is enacted, that no Nuncupative Will shall be good, when the Estate bequeathed exceeds the Value of £30 that is not proved by the Oath of three Witnesses that were present at the making thereof, nor unless the Testator bid the Persons present, or some of them, bear Witness, that such was his Will, or to that Effect ; nor unless made in the last Sickness of the Deceased, and in his Dwelling-house, or where he had been resident ten Days, or more, before the making of the Will ; except where surprized and taken sick from home, and died before his Return ; and by the same Act, after six Months passed after speaking the pretended testamentary Words, no Testimony shall be admitted to prove any Nuncupative Will, unless the Testimony or Substance thereof was committed to Writing within six Days after the making of the said Will.—And by the same Act, no Probate of any Nuncupative Will shall pass the Seal of any Court, till fourteen Days after the Testator's Death, nor shall be proved till Process have issued to call in the Widow or next of Kin to contest it, if they will ; provided Soldiers in actual Service, and Mariners at Sea, may dispose of their Personal Estate, as they might before the Act.)

2. Dr. *Shallmer*, by Will in Writing, gave £200 to the Parish of *St. Clement's Danes*, and after, *Prew* the Reader, coming to pray with him, his Wife put him in Mind, to give £200 more towards the Charges of building their Church, at which, tho' Dr. *Shallmer* was at first disturbed, yet after said he would give it, and bid *Prew* take Notice of it ; and the next Day bid *Prew* remember of what he had said to him the Day before, and dies that Day ; within three or four Days after, the Doctor's Wife puts down a *Memorandum* in Writing of the said Devise, and so did her Maid : *Prew* died about a Month after, and amongst his Papers was found a *Memorandum* of his own Writing, dated three Weeks after the Doctor's Death, of what the Doctor said to him about the £200, and purporting that he had put in Writing the same Day it was spoken ; but that Writing which was mentioned to be made the same Day it was spoken, did not appear, and these three *Memorandums* did not expressly agree ; about a Year after, on Application by the Parish to the Commissioners of Charitable Uses, and producing these *Memorandums*, and Proof by Mrs. *Shallmer* and her Maid, they decreed the £200. But on Exceptions taken by the Executors, the Decree was discharged of this £200, and my Lord Chancellor held it not good, because it was not proved by the Oath of three Witnesses ; for tho' Mrs. *Shallmer* and her Maid had made Proof, yet *Prew* was dead ; and the Statute in that Branch requires not only three to be present, but that the Proof shall be by the Oath of three Witnesses. *Trin. 1704, Philips and the Parish of St. Clement's Danes.*

[405] 3. A Daughter deposits £180 in the Hands of her Mother (the Defendant), and afterwards makes her Will in Writing, and thereby devises several Legacies, and makes her Mother Executrix, but takes no Manner of Notice of this £180, afterwards, by Word of Mouth, she desires her Mother to give this £180 to the Plaintiff, if she thought fit, and then soon after died ; the Mother proved the Will, and this Bill was brought against her, to have the £180 paid. The Mother, by her Answer, admits she had such a Sum in her Hands ; that her Daughter did make such a Request to her, but that she left it to her Election, whether she would give it to the Plaintiff, or not, by the very Form of the Devise ; and insisted, that she did not think fit to give it to the Plaintiff. And in this Case it was agreed, that this was not good as a Nuncupative Will, being above £30, and not reduced into Writing within six Days after the speaking, as the Statute requires. *2dly*, That if the Defendant had insisted on the Statute of Frauds and Perjuries, the Court could not have relieved the Plaintiff, as upon a Trust ; but in this Case the Defendant having by Answer confessed the Trust, there was no Danger of Perjury, from Variety of Proof, which was the Mischief the Statute intended to provide against ; and therefore the Court took it to be in Nature of a Trust, and decreed for the Plaintiff : for the Defendant expressly swore she did not think fit to give it to the Plaintiff, and

that the Testator had left her at Liberty. *But this Decree was against the Opinion of several of the Jur.* who thought it too hard on the Election left in the Mother; but the Court principally relied on the Case of *Kingsman and Kingsman*, where a Man devised away an Estate of £2000 *per Ann.* and upwards, from his Son and Heir to a Bargeman, and by his Will devised £20 *per Ann.* to his Son, with this Clause, that if he behaved himself well, and gave no Trouble or Disturbance concerning his Will, he might make it up £80 if he thought fit; and the Court decreed the £80 *per Ann.* to the Son. *Pasch.* 1718. *Jones and Nallos*. But *note*: The £80 *per Ann.* in the Case of *Kingsman and Kingsman*, seems to have been decreed purely upon the Circumstances and Hardship of the Case; but in the present Case there were no such Circumstances or Ingredients of Hardship on the Plaintiff. But *quære*: for it seems to be a Trust in the Hands of the Mother. (*Gillb. Eq. Rep.* 146. S. C. *in totidem verb.*)

(C) FRAUD IN OBTAINING A WILL, WHERE EXAMINABLE.

1. A. made his Will, and thereby gave the Plaintiff the greatest Part of his Personal Estate, to the Value of £5000, as was proved in the Case; but one B. his Maid Servant had in his Sickness prevailed on him (as was alledged) to make another Will, and to marry her a Week before his Death, when he lay in his sick Bed, at six of the Clock at Night, though it was really proved by two Ministers, that she was, a Year before, actually married to the Defendant M. and was then his Wife, and that M. procured the Licence for the Marriage of A. to B., and this Will being set up by M. Executor to B. though it appeared there was as gross a Practice as could be in gaining the Will, the Testator being *Non Compos*, both at the Time of making this Will, and also at the Time of this supposed Marriage, and that in his Health he knew that M. and B. were married, and that B. suppressed the first Will; yet that Will so set up, being proved in the Prerogative Court, and the Matter in Question being purely relating to the Personal Estate, the Lord Chan. was of Opinion, that whilst that Probate stood, this Matter was not examinable in Chancery; and though the Fraud was fully proved, and was opened to him, he would not hear any Proofs read, but dismissed the Bill. *Trin.* 1686, *Archer and Mosse*, 2 *Vern.* 8. (S. C. *ante* [1 Eq. Ca. Abr.], 136. *Vide* *Plume v. Beale*, P. Wms. 388; 2 *Eq. Ca. Abr.* 421.)

[406] 2. But though Wills (of *personal Estate only*) gained by Fraud, and proved in the Spiritual Court, are not to be *controverted in Equity*, yet if the Party claiming under such Will comes for any Aid in Equity, he shall not have it. *Trin.* 1688, *Nelson and Oldfield*, 2 *Vern.* 76. (S. C. *ante* [1 Eq. Ca. Abr.], 136.)

3. It being urged, that a Will concerning *Land* is only triable at Common Law, and that the Party there may take Advantage of any Fraud or Imposition on the Testator, and therefore not proper to be examined into, or set aside in Equity upon Pretence of Fraud or Surprize; Lord Chancellor held, that there may be a Fraud in obtaining a Will that may be relievable in Equity, and of which no Advantage can be taken at Law; as if a Man agrees to give the Testator £2000 in Bank-Bills, if he will devise his Estate to him; and on the Delivery of such Bills makes his Will, and devises his Estate to him, and the Bills prove to be forged or counterfeit. *Mich.* 1715. *Gosse and Tracey*, 2 *Vern.* 700. (1 *Will. Rep.* 287, S. C. and P.)

Note: tho' this is a good Will at Law, yet it shall nevertheless be avoided in Equity by the Testator's Heir for the Fraud. *Vide* 1 *Chan. Rep.* (last Edit.), 12, 16. Instances of a Will of *Land* being set aside in Equity for Fraud.

* 4. But it has been decreed in the House of Lords, that a Will of a Real Estate could not be set aside in a Court of Equity for Fraud or Imposition, but must first be tried at Law, on *Decisavit et non*, being Matter proper for a Jury to inquire into. *July* 28th. 1728. *Bransley and Kerriph*. (S. C. *ante* [1 Eq. Ca. Abr.], 133. *Vide* 2 *Eq. Ca. Abr.* 421, 508, 767.)

(D) WHAT WILL AMOUNT TO A REPUBLICATION, AND WHERE A REPUBLICATION WILL MAKE THE DEVISE GOOD.

1. If a Man devises certain Lands, and after aliens the Land to a Stranger, and repurchases; and after shews his Intent, that the said Will shall be his Will, this is a new Publication, and the Land shall pass by the Devise. 44 *E.* 3, 33; 2 *R.* 3, 3. *Vide* [Hall v. Dench] 1 *Vern.* 330.

2. So the Testator's saying, his Will was in a Box in his Study, amounted to a new Publication. *Cotton and Cotton*, 2 Vern. 209, cited to have been tried before North, Ch. Just. (S. C. but not S. P. ante, 63, *Cotton and Cotton* seems S. C. 1 Freeman, 264, states it : A. devised his Lands in D. and all his other Lands, unto his Wife, and after purchases other Lands, and then discoursing with B. B. desired him to let him have those new purchased Lands at the Rate that he bought them : A. answered no, for that he had made his Will, and settled his Estate, and intended that his Wife should have his whole Estate. The Court strongly inclined that this was a new Publication, and applied particularly to the Lands ; and that it was no Matter for alleging *quod dixit animo testandi*, for that must necessarily be intended when the Discourse had particular Reference to the Will. (2 Chan. Rep. 138, 140. S. C. says, a Trial at Law having been had upon this Point, a special Verdict was found by C. J. North's Direction ; and on a solemn Argument, all the Judges of C. B. held it a Republication of the Will, and that the Lands belonged to the Wife, and that the Court of Chancery affirmed the Judges' Opinion.)

3. If a Man seised of Lands devises all his Lands to J. S. and afterwards purchases the Manor of D., and after writes in his Will, that J. D. shall be his Executor : yet this is not any new Publication to make the Lands Pass. 1 Roll. Abr. 618. Note : This Case does not appear to have been resolved, for in the Book it is entered with a *Dubitatur*.

4. But if after the Purchase of the Manor of D. he delivers the first Will as his Will, and says that it shall be his Will, without putting any Words thereto ; yet this is a new Publication, to make the Lands newly purchased pass. 1 Roll. Abr. 618 [*Bridge-water v. Bolton*], 1 Salk. 237.

5. So if a Man seised of Lands in D. devises to another, by his Will in Writing, all his Lands in D., and after purchases other Lands in D., and after one J. S. comes to him, and requests him to give him the buying of the Lands last purchased ; and he answers him, that he will not, but that his Intent was, that those Lands should go to his Executors (for the Devisee was made Executor by [407] the Will as his other Lands should ; and after the Devisor causes a Codicil to be writ, in which there is a Devise of several personal Things, as Corn, and Implements of Household, and annexes it to his first Will ; and after dies without other Publication ; yet this shall be a sufficient Publication to make the Lands newly purchased to pass by the Will, for there needs no other Words in the Will than there were before ; and his Intent appears, that it should be his Will by the annexing the Codicil. 1 Roll. Abr. 618 ; *Moor*, 404. S. C. ; *Cro. El.* 493, S. C. ; *Gouls.* 150.

6. But if a Man has Issue two Daughters, A. and B., and he devises Lands to A., and to the Heirs of her Body, and for want of Issue, to B., and A. dies in the Life-time of the Testator, leaving Issue, though after the Testator annexes a Codicil to his Will, and thereby disposes of some Part of his Personal Estate ; yet this will not amount to a Republication of the Will, nor give any Title to the Issue of A. *Mich.* 1716. *Hutton and Simpson*, 2 Vern. 722. (S. C. ante [1 Eq. Ca. Abr.], 216, pl. 16.) Resolved *per Curiam*, though the Testator had declared in his Will, that B. had married against his Consent, and that what he had given her, was in full of her Portion, and in bar of any further Part of his real Estate.

7. If one devises a Lease to his Daughter, and afterwards renews the Lease, and afterwards adds his Codicil to his Will, without taking any Notice of the Lease, whether the Renewal of the Lease is a Revocation, and whether the adding a Codicil to his Will is a Republication, *Quære* ; & vide 2 Vern. 209, *Alford v. Earle*.

8. If a Man has Issue three Sons, A. B. and C., and devises Lands to B. in Tail, Remainder to C., and B. has Issue two Sons, and dies ; and after the Devisor says, my Will is, that the Sons of B. shall have the Lands devised to their Father, as they should have had if he had lived, and had died after ; and then the Devisor dies ; whether this should amount to a new Publication *dubitatur* ; two Judges against two. *Fuller and Fuller*, *Cro. Eliz.* 422. (S. C. ante [1 Eq. Ca. Abr.], 215 ; *Moor*, 353 ; *Godol.* 57.)

9. If J. S. has Issue two Sons, William and Robert, and Robert has Issue a Son named Robert, and J. S. devises Lands to his Son Robert, and his Heirs, and by the same Will gives his Grandson £50, and Robert the Son dies ; and after J. S. by Parcel republishing his Will says, Robert my Grandson shall take by my Will as Robert my Son should have done ; yet the Grandson shall not have the Lands, for Lands cannot pass but by Will in Writing ; and his Son Robert cannot import his Grandson Robert,

especially when by the same Will he has made a Distinction between Son and Grandson. *Hid.* 30 *Car.* 2 [1679], *Strode* and *Berager*, 2 *Lev.* 243. The Judgment to the contrary given by three Judges against the Opinion of *Scroggs* in the Common Pleas, is said by the Reporter to have been reversed in *B. R.* (as he heard) though it was argued, that the Words of the Will were proper enough to pass the Lands to the Grandson; for that the Addition of Grand. only imported a Distinction between Father and Son while living; but that the Father being dead at the Time of the Republication, the Grandson might properly be described by the Name of Son. 2 *Mod.* 313, *S. C.*; 1 *Vent.* 341; 2 *Jon.* 135; *Raym.* 408.

(E) OF REVOCATIONS IN EQUITY.

1. A Man makes his Will duly executed and attested according to the Statute of Frauds and Perjuries, and at the same Time in like Manner executes a Duplicate thereof; some Time after the Testator having a Mind to change one of his Trustees, orders his Will to be wrote over again, without any Variation whatsoever from the First, save only in the Name of that Trustee; and when it was so wrote over, he executes it in the Presence of three Witnesses, and the three Witnesses subscribed their Names, but not in his Pre[408]sence; after this the Testator cancels the Duplicate, by tearing off the Seal, and then dies; and the Question was, whether this second Will, not being good as a Will to pass Lands, should yet be a Revocation of the First; and if it should not, whether the cancelling the other should be a Revocation thereof within the Statute of Frauds and Perjuries. And it was decreed, that neither the making the Second, nor the cancelling the first was a Revocation thereof; though in the Second there was an express Clause, that he did thereby revoke all former and other Wills; wherein my Lord Chancellor took this Distinction, that the Second was not intended barely a Revocation of the First, so as to signify his Intention of dying Intestate, or without any Will; but it was intended as an effectual Will to pass the Lands to the Persons, and in the Manner thereby devised; and therefore, if it was not good as a Will to that Purpose, it was no Revocation of the First, but as it was supposed to be valid as a Will for passing the Lands by the Second; and if a Man by his Will devises Lands to *A.* and after makes a second Will, and thereby devises the same Lands to *B.* if this second Will be not good as a Will to pass the Lands to *B.* it shall be no Revocation of the Devise in the first to *A.*, for it is plain *A.* was to lose only what *B.* was to gain; and if *B.* gains nothing by the second, *A.* shall lose nothing that was given him by the first; but if a Man executes a second Will, which appears to have no other Intention than to revoke the first, and to die intestate, though this second be not in all Circumstances duly executed as a Will whereby to pass Lands, yet it will operate as a Revocation of the first; and as to the cancelling or tearing of the first Will, that is no Revocation of it in this Case, because that was no self-subsisting independent Act, but done to accompany, or in a Way of Affirmation of the second; it was done from an Opinion, that the second had effectually revoked the first, and therefore he tears the first, as of no Use; but if the first was not effectually revoked by the second, that Act of tearing the first will not destroy it neither; for tho' a Man may by the Statute of Frauds as effectually destroy his Will, by tearing or cancelling it, as by making a Second; yet if he does make a Second, and intends that as a Revocation of the First, if it be insufficient for that Purpose, as in the principal Case, the tearing and cancelling being only in consequence of his Opinion, that he made a good second Will, shall not destroy the first; but it ought to be set up again in Equity. *Hid.* 1716, *Onions* and *Tryers* (called in *Vernon* and *P. Wms.* *Tyrer*), decreed. *Vide* 3 *Mod.* 220, 258; 3 *Lee.* 86, 87. (2 *Vern.* 741; 1 *Will. Rep.* 343; *Prec. in Chan.* 459; *Gilb. Eq. Rep.* 130, *S. C.* that it is no Revocation.)

2. But if a Man cancels or revokes either the Duplicate or original Will, this is an effectual avoiding of both, they being both but one Will, and therefore must stand or fall together. [*Onions v. Tyrer.*] 2 *Vern.* 742, *per Curiam*; and said to have been so resolved in *Sir Edw. Seymour's Case*. *S. P. P. Wms.* 346.)

(By the 29 *Car.* 2, *c.* 3, it is enacted, that no Devise in Writing of Lands, Tenements or Hereditaments, or any Clause thereof, shall be revocable otherways than by some other Will or Codicil in Writing, or other Writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the Testator himself, or in his Presence, and by his Direction and Consent, but shall continue, &c., unless altered by some other

Will or Codicil in Writing, or other Writing of the Devisor, signed in the Presence of three or more credible Witnesses, declaring the same. And by the same Act, no Will in Writing concerning personal Estates shall be repealed, nor any Clause or Bequest therein altered by Words, or Will by Word of Mouth only, except the same be in the Life of the Testator committed to Writing, and read to and allowed by him, and proved to be done by three Witnesses. — But where a Man by Will in Writing devised the Residue of his personal Estate to his Wife, and after, she dying, he by a Nuncupative Codicil bequeathed to *J. S.* all that he had given to his Wife: it was resolved good: for by the Death of the Wife, the Devise of the Residue was totally void: and the Codicil was no Alteration of the former Will, but a new Will for the Residue. *Raym.* 334.)

[409] 3. A Man makes his Will in Writing, and thereby devises all his Real and Personal Estate to his Wife, her Heirs and Executors, in trust to pay his Debts and Legacies, and then devises several Legacies to his Children and other Persons, and concludes, *In Witness whereof I have, to this my last Will and Testament, containing nine Sheets of Paper, and to a Duplicate thereof, to be left in the Hands of such a one, set my Seal to every Sheet thereof, and to the last of the said Sheets my Hand and Seal, in the Presence of three Witnesses*, who all subscribed their Names in due Form of Law; afterwards the Testator being minded to add other Trustees to his Wife, and make some little Alterations in his Will, sends for a Scrivener, and gives Directions to prepare a Draft of Instructions for another Will, which the Scrivener does accordingly, which the Testator read over and approved very well, and sets his Hand to it; and being at a Tavern, thinking he had now made a new Will, he pulls out of his Pocket the first Will, and tears off the Seals from the first eight Sheets, which the Scrivener seeing, asked him what he was doing! *Why (says he) I am cancelling my first Will. Pray (says the Scrivener) hold your Hand, the other Will is not perfected, it will not pass your Real Estate for want of being executed pursuant to the Statute of Frauds and Perjuries.* I am sorry for that (says he) and immediately desisted from tearing off any more of the Seals, and in some short Time after dies, without having done any Thing further to perfect the second Will, or cancelling the first: after his Death, on Application to the Spiritual Court by the Wife, who was made Executrix of this last Will, they sentenced it a good Will as to the Personal Estate, and admitted her to prove it; and on a Bill brought by the Legatees against the Wife and other Trustees, to have a specifick Performance of the Trust in the first Will, and that the Estate might be sold pursuant to the Directions of that Will: it was insisted upon, that the first Will was revoked, either by making of the second, or by the tearing off the Seals from the first. But Lord Chancellor held, that the subsequent Will could be no Revocation as to the Real Estate, not being executed according to the Statute of Frauds and Perjuries: and that as to the tearing off the Seals from the first eight Sheets, that not being done *animo cancellandi*, was no Revocation; and that the Seal remaining whole to the last Sheet was sufficient, and in strictness it was not necessary that all the Sheets should be sealed; but because the Spiritual Court had sentenced the second a good Will of the Personal Estate, his Lordship held it a good Will for the whole Personal Estate: and that such Legatees of Personalities in the first Will, as are left out in the second, must lose their Legacies: but for those that had Legacies by the first Will, chargeable on the Real Estate, if the same Legacies were devised to them by the second Will, that they should still continue chargeable on the Real Estate: provided such Legacies were not increased or enlarged by the second Will: for though the second Will was not sufficient in itself to charge the Real Estate, yet since the Real Estate remained well devised by the first Will, they should be still secured by that Real Estate, for they were not devised out of Land like a Rent, but only secured by Land, which before was well devised: but for other new absolute Personal Legacies devised by the last Will, they should be chargeable only upon the Personal Estate, and should have the Preference to be first paid out of the Personal Estate before the other Legacies in the first Will, charged upon the Real Estate, because they had their several Funds out of which they were to be paid: the Personal Legacies in the last Will, out of the Personal Estate, which was well devised by that Will; and the Legacies [410] charged upon, or secured upon the Real Estate, which was devised by the first Will, out of the Real Estate. *Hil. 6 Ann. Hyde and Hyde.* (3 Chan. Rep. 155, S. C. and Decree: and adds, that all agreed that the second Will, tho' not sealed and subscribed, as the Statute of Frauds directs, yet is good for the Personal Estate, it being *Causa omissus* out of the Statute, and then it was good at Common Law. *Ibid.* 161.)

4. If A. devises Lands to B. and his Heirs, and afterwards mortgages the same Lands to J. S. for Years, or in Fee, tho' a Mortgage in Fee be a total Revocation at Law (*1 Rol. Abr. 616*), yet in Equity it shall be a Revocation *pro tanto* only. *1 Vern. 342, 342, 37, 141, 182, 1 Salk. 158*, S. P. admitted to be a settled Point in Equity.

5. So if a Man seised in Fee devises it to J. S. in Fee, or for Life, and afterwards makes a Lease to J. D. for Years, this, even at Law, shall not be a Revocation, but during the Years; for his Intent does not appear further than during the Term for Years. *Mortgage and Jofferies, 1 Rol. Abr. 616.* (S. C. *Moore*, 429; *Poph.* 108; *Godol.* 57.)

6. So if a Husband possessed of a Term for forty Years devises it to his Wife, and after leases the Land to another for twenty Years, and dies, this Lease is not any Revocation of the whole Estate, but only during the twenty Years, and the Wife shall have the Residue by the Devise. *Wilcox and Kent, 1 Rol. Abr. 616.*

7. But if A. devises Lands to B. and his Heirs, and twelve Years after leases the same Lands to B. for sixty Years, to commence after his Death, and delivers the Deed to a Stranger, to the Use of B., who does not deliver it to B. till after the Death of A., this is a Revocation of the whole Estate: for both Estates are not consistent, nor can vest in B. at the same Time; and it was plainly the Intention of the Devisor, that B. should have the less Estate only. *Hil. 45 Eliz. [1583], Coke and Bullock, Cro. Jac. 49*, adjudged, tho' objected, that it was the Intention of A. that B. should have his Liberty to take by the Lease or Devise, B. not having agreed to the Lease in the Life of A.

8. But if the Lease made to the Devisee had been to begin either *in Prasenti* or *Futuro*, in the Life of the Devisor, it had not been a Revocation: for inasmuch as the Lease might have determined in his Life, it was consistent with his Will. *Cro. Jac. 49, per Curiam.*

9. So where A. by Will devised to his younger Son a certain Messuage for ninety-nine Years, if three Lives lived so long, yielding and paying to his Sister, the Plaintiff £20 *per Ann.* until twelve Years old, and thence £40 *per Ann.* for Life; and afterwards the said A. for £300 Fine demised the said Messuage to J. S. for ninety-nine Years, if three Lives lived so long, yielding and paying £50 *per Ann.* to A. the Testator, his Heirs and Assigns; tho' it was held at the Rolls to be a Revocation, yet on an Appeal to my Lord Keeper, he decreed it to be no Revocation, and that the Daughter should be paid her Annuity; and he said, that the Rule is, *where a subsequent Act shall amount to a Revocation by Implication, it must be a necessary Implication; and the Act must be wholly inconsistent with the Devise.* *Pasch. 1705, Lamb and Parker, 2 Vern. 495.* (2 *Freem.* 284, S. C. says, Lord Keeper seemed to be of Opinion that it was not a Revocation, because the three Lives in the Lease might die before the Testator, and then the Devise would take Place; but referred it to the Judges of B. R. by way of a Case to determine. *1 Bro. P. C. 160*, S. C.)

10. So if A. devises Lands to Trustees to pay his Debts, and then to pay his Wife £200 *per Ann.* for her Life; and the Testator living several Years after, his Debts increased from £2000 to £10,000, for £8000 whereof his said Trustees were bound, and afterward A. the Testator, by Deed and Fine conveys his Lands to his said Trustees, to sell to pay his Debts, and the Surplus to him and his Heirs; and though the Wife joined with him in the Fine and Conveyance, yet this shall be no Revocation of the Wife's £200 *per Ann.* and she shall have the £200 *per Ann.* out of the Surplus of the Money, [411] after the Debts paid. *Mich. 1691, Vernon and Jones, 2 Vern. 241*, decreed; but the Reporter adds a Q. (2 *Freem.* 117, S. C. says, the Lords Commissioners *Trevar, Parkinson and Hutchins* were of Opinion, that the Surplus being to his own right Heirs, that was still in his own Power, and should be subject to his Disposal by the Will; and the Case of *Hall and Dench* was cited, where after a Devise of Lands the Devisor made a Mortgage in Fee; and adjudged that the Devisee should have the Equity of Redemption. (*Proc. in Chan.* 32, S. C. says, the Lords Commissioners held that neither the Mortgage and Fine, nor Deed of Trust, shall be a total Revocation of the Will, being made for particular Purposes; but that after Debts paid the Widow shall have the £200 *per Ann.*)

11. But in a Case where *Edward, Earl of Lincoln*, had mortgaged the Manor of S. to the Defendant *Wren* and his Heirs, for £12,000, and afterwards, by his Will, in default of Issue Male of his own Body, devised it to Sir *Fran. Clinton* (who was to succeed him in the Honour) for his Life, with Remainder to his first and other Sons in Tail Male, with other Remainders over; and appointed that his Household-Goods

at his chief House at *S.* should remain there as *Heir looms* to the next Heir Male, who should be *Earl of Lincoln*, and made *Sir Francis Clinton* Executor; afterwards the Earl (who was very whimsical) took a Fancy to one Mrs. *Calvert*, Daughter to the Lord *Baltimore*, and fancied he would marry her (though it was proved in the Cause, there never was any Intention of such Marriage in her, or in any of her Relations, nor any Treaty about it), and in this Fancy he makes a Lease and Release of these Premises to the Defendants *Davenport* and *Townsend* and their Heirs (in consideration of the said intended Marriage, as it was expressed), to the Use of himself and Heirs, till the said intended Marriage took effect; then as to Part in trust for Mrs. *Calvert* and her Heirs, in lieu of her Dower, and as to the Rest in Trust that the Trustees should sell it, to disencumber that Part limited to Mrs. *Calvert*, and the Surplus of the Money to his Executors and Administrators; there was no farther Progress towards the Marriage; and sometime after the Earl died, without any alteration of his Will, and the Honour descended to *Sir Francis Clinton* (who had but a very small Estate, if any, who died soon after; and the Plaintiff, his eldest Son and Heir, an Infant of about seven Years old, brought his Bill to have the Redemption of the Mortgage, and a Conveyance of the Estate; and the Defendants *A. B.* and *C.* who were Cousins and Co-heirs of *Earl Edward*, brought a Cross Bill, that they might redeem and have the Estate conveyed to them. And the only Question was, whether this Lease and Release were a Revocation of the Will. It was said, for the Plaintiff, that the Earl had but an equitable Interest (the whole Estate being before mortgaged in Fee), and therefore it ought to be considered according to Equity; and that tho' such a Lease and Release would have been a Revocation of a Devise of a legal Estate, yet it will not be so here; for the Reason the Law goes upon in judging it a Revocation is, because the Lease and Release is a Conveyance of the Estate, and so *ex necessitate rei* a Revocation of the Devise; and it is plain the Law goes upon this, and not upon any supposed Alteration in the Person's Will; for if a Man makes a Will, and thereby devises Lands to *J. S.* and his Heirs, and afterwards articles to sell the Lands to *J. D.* and his Heirs, and receives the Purchase-Money, and dies before any Conveyance made, these Articles will be no Revocation of his Will; and yet it is as plain his Mind and Intention, as to those Lands, is altered, as much as if he had actually made a Conveyance to *J. D.* and in case of an equitable Interest, the Lease and Release makes no Alteration of the Estate, so as to induce a Necessity of adjudging it a Revocation, as there is in case of a legal Estate; it is plain as to his Intention, that he did not intend any Revocation or Alteration of his Will, unless or until that Marriage should take effect, for by the Release it is limited, that till that Marriage it should be to him and his Heirs, which is just as it was before; and that [412] Marriage having never taken effect, the Estate continues just as it was; and it cannot be pretended, that this Lease and Release are any express Revocation of his Will; and the Court of Chancery is so far from following the strict Rules of legal Revocations, that it often relieves against them; and therefore if a Man devises *Blackacre* to *J. S.* and his Heirs, and afterwards mortgages to *J. D.* and his Heirs, this in Law is a Revocation of the Devise, and yet in Equity it shall be none farther than to let in the Mortgage; and to this Purpose were cited several Cases; and therefore since the Court of Equity must interpose for one Side or t'other, it was concluded it ought to interpose for the present Earl, and that he ought to have the Redemption of the Estate, as devised by the Will of *Earl Edward*. For the Defendant it was said, that such a Lease and Release would have been a Revocation of a Devise of a legal Estate, and that equitable Estates were governed by the same Rules that legal Estates are; and there is no Fraud or Circumvention, nor other equitable Circumstances, to make the Court vary from that Rule in this Case; and the Will is in Disinheritance of the Heir, who is always favoured in all Courts; and as to the Case's put, where Mortgages have been held to be no Revocation in Equity, it was said the Reason of that is, because Mortgages are not considered as Conveyances of the Estate, but only Charges upon it; and my Lord Keeper was of this Opinion, and decreed the Plaintiff's Bill to be dismissed, and the Co-heirs to have the Redemption of the Mortgage. *Tren.* 1695, the Earl of *Lincoln* and *Bulls &c.*, *Shaw*, P. C. 154, S. C., and the Decree affirmed in the House of Lords. (2 *Froom*, 202, S. C., resolved that it was a Revocation, and upon an Appeal so held in *Dow. Proc.* carried only by two Lords. *Vide Dister v. Dister*, 3 *Ler.* 108; *Shaw*, *Presl. Cas.* 154; 3 *P. Wms.* 163; *Chan. Rep.* 189; 3 *Atk.* 741; 1 *Wils.* 308; *Ambl.* 116; 3 *Atk.* 798; *Ambl.* 224; 3 *Wils.* 6; *Ambl.* 487; *Doughl.* 684, 695.)

12. So where Sir *John Huband*, by Will in Writing dated the 12th of *Feb.* 1708, devised several pecuniary and specifick Legacies, and then gave all the Rest of his Real and Personal Estate, after all his Debts and Legacies paid, to *John Pollen*, on Condition he took the Name of *Huband* upon him and the Heirs Males of his Body, with divers Remainders over; afterwards, by Lease and Release the 30th of *Aug.* 1709, Sir *John Huband*, together with *J. S.* his Trustee, conveyed several Manors and Lands in the County of *Warwick* to Trustees and their Heirs, to the Use of himself for Life, without Impediment of Waste, and that the Trustees and their Heirs should execute such Conveyance and Conveyances thereof, as the said Sir *John* by Writing under his Hand and Seal, or by his last Will and Testament, should direct or appoint; and in 1710, Sir *John* died, without altering or revoking the said Will, or making any other Appointment touching the said Real Estate; and the Question was, whether this Lease and Release were a Revocation of the Will, or not; the original Bill of *Pollen* being to establish the Will, and the Cross-Bill to set aside the Will, and have an Account of the Profits; and it was decreed, that the Lease and Release were a Revocation of the Will. *Mich.* 1712, *Pollen and Huband* [S. C. 4 Bro. P. C. 433].

13. *A.* having Issue four Daughters, and no Male Issue, devises Lands to Trustees, in trust to permit his Daughter *S.* to receive the Rents and Profits until her Marriage or Death; and in case she married with the Consent of two of the Trustees and her Mother, then to convey the Premises to her and her Heirs; but if she died before Marriage, or married without such Consent, then to convey to other Persons; afterwards *S.* marries in the Life time of her Father, and with his Consent, and he settled Part of those Lands on [413] her and her husband, and died; and it was held, that this Settlement was no Revocation of the Will, as to the Devise of the other Lands. *Mich.* 1716, *Clarke and Berkley*, 2 *Vern.* 720. *Vide Where a Devise shall be a Satisfaction* (Q). If this Case was not affirmed in *Dom. Proc.* I think it was. S. C. 2 *Eq. Ca. Abr.* 771, *Title Devise, Letter (L)*.

14. *A.* made his Will, and thereof his brother Executor, and devised unto his Executor all his Estate both Real and Personal, and four Years afterwards he marries, and then by a Codicil makes his Wife his Executrix; and the Question was, whether the Brother should have the Personal Estate; and it was urged, that he should, for he does not take it as Executor only, but by express Words of Gift in the Will; and it appears, that there was not only a Benefit intended him as Executor, for even the Real Estate was devised to him; but it being in Proof, that he had not any the least Real Estate in the World, it was said by my Lord Chancellor, that the Personal Estate was designed him only as Executor; and it was thereupon decreed for the Widow, the Executrix. *Mich.* 1681, *Wilkinson* and ———, 1 *Vern.* 23.

15. *J. S.* being a Bachelor, made his Will, and devised a Legacy of £500 to his Brother, and other Legacies to other Persons, and devised his Real Estate to *Eliz. Close* and her Heirs, and afterwards intermarries with the same *Eliz. Close*, and died, leaving her *Præsent ensient* with a Son, without making any Alteration in his Will; and the main Question in the Case was, whether this Alteration in the Testator's Circumstances did of itself, without more ado, amount to a Revocation of the Will. Those who argued for its being a Revocation, relied on the Case of one *Ayres*, in which it was resolved by the Judges, that where a Man that was unmarried made a Will, and devised away his Estate, and afterwards married and had a Child, and died without making any Revocation of his Will, that this Alteration of Circumstances was in itself a Revocation of the Will; and a Case was cited out of *Cicero*, where one thinking his Son dead, devised his Estate to another, yet the Son returning held he should have it, because it was not to be supposed he would have disinherited him without Reason. On the other Side it was argued, that though Alteration of Circumstances might in some Cases amount to a Revocation of a Will; yet not in this, for here is nothing but what a reasonable Man might do, nothing unjust or unjustifiable; it appeared he had an Intention of marrying *Eliz. Close* when he made the Will, though perhaps he might not know, when he died, that his Wife was *ensient*; or if he did, yet it is not uncommon for many, who are kind to, or fond of their Wives, to leave their Children wholly in their Power, to make them the more dutiful to her, and that he must know the Son would be the Wife's Heir as well as his, and would have the Estate as such, if she did not dispose of it from him. Lord Keeper was clear of Opinion, that Alteration of Circumstances might be a Revocation of a Will of Lands as well as of a Personal Estate; and that notwithstanding the Statute of Frauds and Perjuries, which does not extend to an implied Revocation; but no such

Alteration appears here, for no Injury is done any Person : and these are provided for whom the Testator was most bound to provide for : and so established the Will. *Trin.* 1702, *Brown and Thompson* (1 *Will. Rep.* 204. in a Note this Reporter says that this Case was heard at the Rolls, 8 *Decem.* 1701, where Sir *John Trevor* held that a subsequent Marriage, and having Children, was a Revocation of a Will of Land and dismissed the Bill of the Legatees claiming Legacies charged on the Estate by such Will ; and the Reporter adds, that he finds in the Register's Book that *Wright*, Lord Keeper, in *July* following reversed the Order of Dismission, and decreed the Payment of the Legacies. 1 *Will. Rep.* 304, S. C. cited by Sir *John Trevor*, Master of the Rolls, and appears to have been the Case of *Eyre and Eyre*, said to be reported to Sir *John* by *Treby*, C. J., and some eminent Civilians. *Ibid.* in a Note. *Vid. Cic. de Oratori Cantab. Ed. Page* 69, 102, & *Dig. L. ult. de Hæred. Inst.*)

[414] CAP. LVI.

WRITS.

- (A) Of Writs of Error, and Writs mandatory when to issue.
 (B) Of superseding Writs, for what Causes.

(A) OF WRITS OF ERROR, AND WRITS MANDATORY, WHEN TO ISSUE.

1. A. being indicted for not coming to Church, and found guilty, Application was made to the *Attorney General*, that they might bring a Writ of Error ; but he refused to allow thereof ; and thereupon the Lord Keeper was moved for such a Writ ; but he said, that though he had the Custody of the Great Seal, yet he would make no Use thereof, but according to the Course of the Court, and therefore could not put the Seal to a Writ of Error, till it had been first signed and allowed by the *Attorney General* ; and he took it, that a Writ of Error in a Criminal Matter was *ex gratia Regis* in all Cases, but where Provision is made for the same by the Statute, and is not due *ex debito Justitiæ*, or *de cursu* (*vide infr. pl. 2*) ; but if there were real Error in the Case, and a Writ of Error was not sought for Delay, the Way was to petition the King, and he would give Directions for inspecting the Proceedings, and see if there was real Error, or whether a Writ of Error was sought purely for Delay. *Pasch.* 1683, *Crawle and Crawle*, 1 *Vern.* 170. And the *Attorney General* said, that A. being indicted on the Statute 3 *Jac.* 1, no Error could avail him, and the Indictment could not be quashed, nor the Proceedings avoided, otherwise than by Conformity.

2. A Motion was made, that the Lord Keeper would grant a mandatory Writ to the Chief Justice of the *King's Bench*, to command him to sign a Bill of Exceptions in the Case of the Lord *Gray & al.*, who were convicted for a Riot in *London* ; and they produced a Precedent, where, in a like Case, such Writ had issued out of Chancery to the Judge of the Sheriff's Court in *London* ; but the Lord Keeper denied the Motion, for that the Precedent they produced was to an inferior Court, and he would not presume but the Chief Justice of *England* would do what should be just in the [415] Case : for possibly you may tender a Bill of Exceptions which has false Allegations in it, and the like ; and then he is not bound to sign it : for that might be to draw him into a Snare ; and said, if they had Wrong done them, they might right themselves by an Action on the Case, and if this Court had a Power to grant such a Writ, the same was discretionary only, as Writs of Error are in criminal Cases, which are discretionary, and not *de cursu*. *Trin.* 1683, *The Rioter's Case*, 1 *Vern.* 175.

(Writs of Error in Criminal Cases are not grantable *ex debito Justitiæ*, but *ex gratia Regis* ; and in such Case a Man ought to make Application to the King, and he will then refer it to his Council, and if they certify there is Error, the King will not deny a Writ of Error. 1 *Vern.* 175. S. C. *Vide sup. pl. 1.*)

(B) OF SUPERSEDING WRITS, FOR WHAT CAUSES.

* 1. A. being excommunicated for Contumacy, and a Writ of *Pro excommunicatione capiend'* awarded, it was moved for a *Supersedeas* to the Writ, by Reason that the

Significavit was general and uncertain: but it was said by the Lord Chancellor that a *Superseas* could not be granted on that Ground; but if the Excommunication were not for any of the Offences within the Statute 5 *Eliz.*, and the *Significavit* did not express the same, the Remedy expressly appointed upon that Statute is a *Habeas Corpus*, and upon the Return of it the Parties shall be discharged; but it being then alleged, that an Appeal was brought, and Security given to prosecute it with Effect, a *Superseas* was awarded, the Lord Chancellor saying, that the Appeal was a *Superseas* of itself. *Mich. 1681, The King versus Sneller, Russel & al'*.

2. Upon a Motion made for a *Superseas* to a Writ *De Cautione admittenda*, for that they had taken a Writ to the Sheriff, without any Affidavit filed, that the Bishop refused to admit the Caution, for that Reason a *Superseas* was awarded; and the Lord Keeper declared, that finding this Court often troubled for Writs *De cautione admittenda*, he thought the Right of it was, that if there was a Sentence for a Man to pay Money, or do any other Thing in the Spiritual Court, a Man ought first to perform that, before he is admitted to his Writ *De cautione admittenda*; for it is in vain to take Security *Parere mandatis Ecclesie*, whilst a Man refuses the Sentence; but the Reporter adds a *Quare*; for suppose a Man be excommunicated for not coming to Church, or not receiving the Sacrament; how can he do that till his Caution is admitted, and he absolved? *Hil. 1682, Archbishop of York versus —, 1 Vern. 119.*

* 3. An *Excommunicato capiendo* having been awarded, was on Motion superseded before the Return of it, for the Generality of the *Significavit* whereon it was awarded, which was only that the Party was excommunicated in *Quadam causa Appellationis & Quare*; for the Chancellor held clearly, that till the Return of the Writ, the Court of King's Bench cannot relieve him; and if this Court cannot help him neither till the Return of the Writ, he must in the mean Time lie in Prison; and this he was clear in, without entering into the Question which was made in this Case, whether, after the Writ returned and filed in *B. R.* according to the Statute 5 *Eliz.* that Court had not the sole Power of proceeding on it; for till the Writ returned and filed there, they had nothing to do with it, either by [416] Way of quashing or superseding it on Motion; and two Precedents were cited 10 *Geo. 1.*, where such Writs had been superseded *quia improcedere eman'*, before the return in *B. R.*, and he said the Cases of *King* and *Fowler*, and of the Bishop of *St. David's*, 1 *Salk. 293, 294*, may be good Law, as they were after the Writs returned and filed; and yet this Court could not be ousted of its Jurisdiction in the mean Time, before the returning and filing of the Writ in *B. R.* And Lord Chancellor said, that at Common Law the *Excommunicato Capiendo* was not returnable till the *Pluries*, but went first, and then an *Aliter*; and if that not obeyed, then a *Pluries*; and if not then returned, then an Attachment to the Sheriff. *Hil. 1727, Barlow and Collins.*

* 4. *Thomas Bambridge*, late Deputy Warden of the *Fleet*, was indicted for the Murder of one *Castle*, a Prisoner in the *Fleet*, and acquitted; and the Widow brought an Appeal; the Writ was directed to the Sheriff, and returnable the first Day of next Term in *B. R.* being issued out of the Chancery; the Writ was, *Quia Maria Castle fecerit vos scire per Thome A. and B.* (naming them particularly with their Additions) *de appellatione per quod et de precepimus vobis quod attachietis per Corpus, &c.* And now it was moved in Chancery to supersede this Writ, for that in Truth no Pledges were found or entered, notwithstanding the naming of them in the Writ, as appeared by Affidavit; and it was said that Pledges in an Appeal were grounded on the Statute of *W. 1. c. 2.* which takes Notice of vexatious Appeals brought by Persons who had nothing to answer Damages, in case they did not proceed, or that the Appellee was acquitted; and the bringing of a Man's Life twice in Jeopardy, was of such Consequence, that if the Appeller was not sufficient to answer the Damages, his Pledges or Sureties ought, and therefore were they required to be real, and not fictitious Persons, like *John Doe* and *Richard Roe*; and they ought likewise actually to give Security to prosecute the Appeal. That they could not move in the King's Bench to quash this Writ, because it was not returnable there till the first Day of the Term; and if they could not move to supersede it here, a Man must lie in Prison without Bail or Mainprise for a whole long Vacation, as *Bambridge* has done in this Case, upon an erroneous Writ, without Redress. It was also argued, that the Writ was absurd, and neither Grammar nor Sense; for it should have been *Si Maria Castle fecerit vos scire*, and not *Quia* *Castle fecerit*, the Word *Quia* relating to the Time past, and the Word *Fecerit* to a Time future; and that the Precedents are, *Si A. B. fecerit vos*

secur', in the Nature of a Condition precedent ; so that till the Appellor has made the Sheriff secure, by finding of Sureties, he is not to attach him ; or it should have been *Quia A. B. nos fecerit secur'* ; so that the Sureties are either to be given to the King before the issuing of the Writ, and then it is *Quia nos*, or to the Sheriff after the issuing thereof, and then it is *Si A. B. fecerit vos* ; and so are the Precedents in *Rastal*, 44, 46, *Co. Ent.* and others ; and the Sheriff may return to the Writ, *Non invenit Plegios* ; and though it is said in 2 *Jon.* 154, and other Books, that the Appellor may find Sureties at any Time before Judgment, that cannot be ; for then, if the Appellor finds that the Appellee is likely to be acquitted, he will never demand Judgment at all, and then the Party's Life may be brought [417] twice into Danger, and yet he have no Recompence in Damages against an unjust Appeal ; and it was resembled to an *Excommunicato capiendo*, which is returnable in *B. R.* they cannot move there to quash the Writ till it is returned and filed, because till then the Writ is not in Court, but in the Sheriff's Hands ; but if the Writ issued *erronice* or *improride*, this Court from whence it issued, may call it in or supersede it ; and the Great Seal ought not to be affixed to an erroneous or irregular Writ ; but it was argued on the other side, and agreed by my Lord Chancellor, that this Writ did not issue *erronice* or *improride*, that that must be something extrinsick to the Writ itself, that if there be any Defect in the Writ, they may move to quash it when it comes into the King's Bench, if they think fit ; that by the Precedents in *Rastal*, and 2 *Jon.* 154, it appears, that the Appellor may find Sureties in Court, if the Sheriff return *Non invenit Plegios*, or even at any Time before Judgment ; that the Statute of *Westminster* the Second, was not made for the finding of Pledges, but for the Punishment of the Abettors ; and that there were very many Precedents, where no Sureties were actually found ; that the Sheriff may, if he will, attach the Party without finding Pledges, because they may be found afterwards, or he may refuse to attach him, and return *quia non invenit Plegios* ; that *quia A. B. fecerit vos secur'*, because the Party will find Pledges, is as good as *Si fecerit*, and that the Party may either find Sureties to the King, and then it is *Quia nos*, or to the Sheriff, and then it is, *Si vos*, &c., so the Motion was disallowed. *October* the 14th, 1729, *Bambridge's Case* (9 St. Tr. 152, S. C.).

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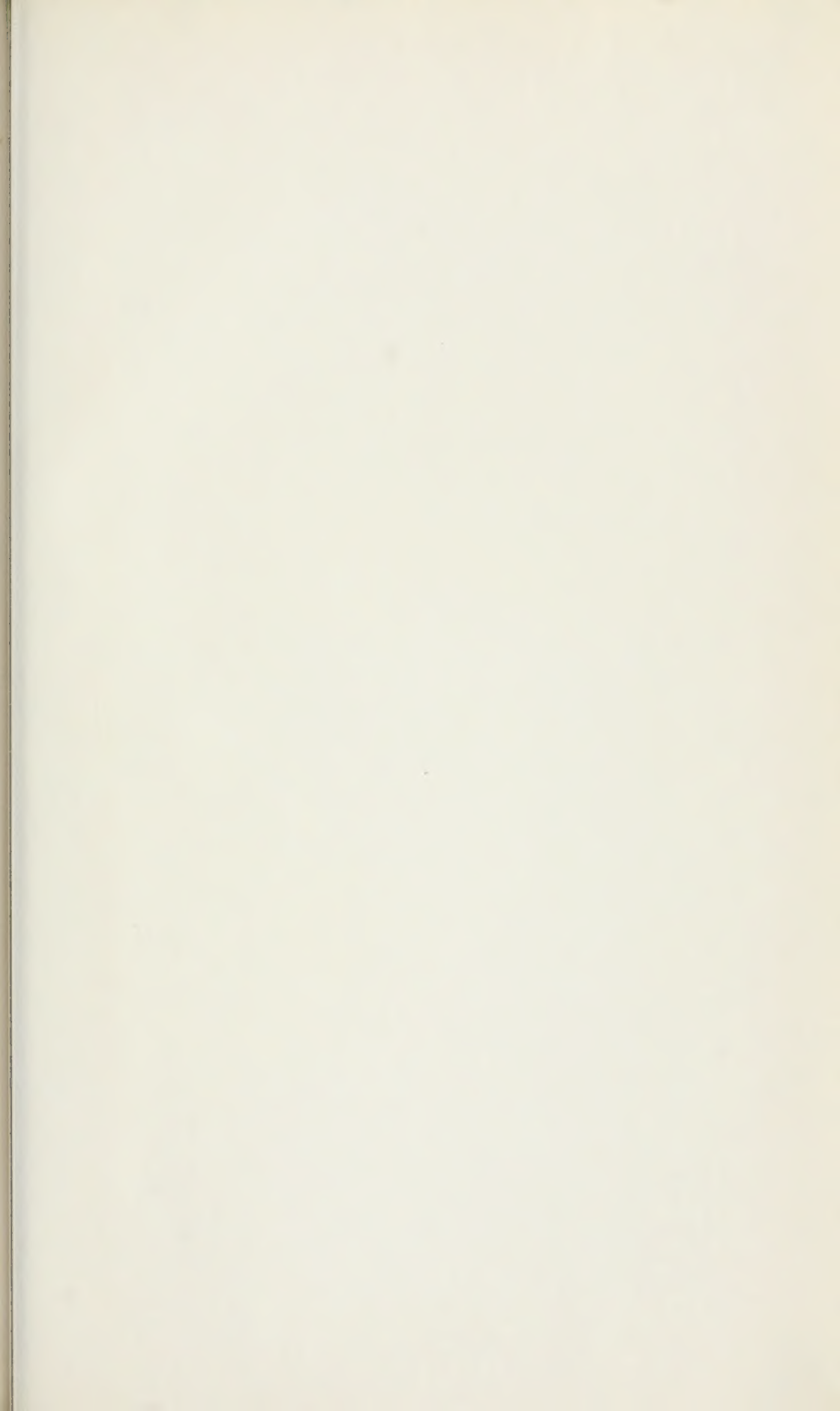
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